

# AMICUS CORNER

*By Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy*

**IMLA's amicus activity continues at a rapid pace. Below are some of the cases where IMLA is involved:**

***Comptroller of Maryland v. Wynne, Case No. 14-485*** (petition-stage *amicus* brief filed on November 18, 2013, certiorari granted on May 27, 2014). A Maryland resident is challenging the state's tax scheme which allows a full credit against Maryland state income taxes for taxes paid out of state but does not allow such a credit against Maryland county taxes. The Maryland Court of Appeals found for the taxpayer, in essence construing the dormant Commerce Clause to require that each state give a full income tax credit to local residents for income taxes paid out of state. IMLA, in an amicus brief joined by the United States Conference of Mayors, the National Association of Counties and others, promotes the fundamental right of a state to tax its residents on all income, wherever received, and argues that the dormant Commerce Clause does not require dismantling every taxing scheme—whether state or local—which does not grant a full credit for all income taxes paid elsewhere. The United States Solicitor General requested that the Court review the Wynne case.

The IMLA amicus brief was written by IMLA Assistant General Counsel Erich Eiselt as Counsel of Record; Chuck Thompson, Amanda Kellar and Tagg Hutchinson of IMLA all contributed significantly to the brief.

The date for oral argument has not been set.

***City and County of San Francisco v. Sheehan, Case No. 13-1412*** (petition-stage *amicus* brief filed on June 26, 2014). This case presents two substantial questions of federal law that bear on police officers' authority and discretion in responding to dangerous individuals who are mentally ill: specifically, the extent to which the mental illness of a dangerous person constrains police officers' (1) discretion regarding the tactics or methods they may use to bring the person into custody, by making those tactics or methods subject to "reasonable accommodations" analysis under the Americans with Disabilities Act (ADA); and (2) authority to make a Fourth Amendment search. For purposes of qualified immunity, the collateral question is whether those limitations were "clearly established" at the time of the arrest.

Two San Francisco police officers were called to take the Respondent into custody for an involuntary mental evaluation after she had menaced a social worker with a knife. When the officers opened the door to the Respondent's residence she threatened to kill them, brandishing a knife. They closed her door and called for backup. However, they then re-entered her residence before reinforcements arrived to effectuate the arrest and prevent her from harming herself or others. Respondent rushed them with the knife. The officers tried to use pepper spray to stop her; when that didn't work, they shot her several times. She survived and sued under 42 U.S.C. § 1983 and the ADA.

The Ninth Circuit held that the first entry was lawful (under the warrantless search exemption to render emergency assistance or respond to exigent circumstances), as was the officers' ultimate use of deadly force under the circumstances. However, the Circuit Court reversed the district court and held that the officers' second entry into the Respondent's residence was unlawful under both the Fourth Amendment and ADA. The court held that under the Fourth Amendment, it was unreasonable to make an otherwise lawful second entry when the officers could have desisted from their efforts to arrest Sheehan in light of her resistance and mental illness, and could have used different tactics that might have resulted in a different outcome.

Regarding her claim under the ADA, the Ninth Circuit held that the "reasonable accommodation" requirement of Title II of the ADA applies to officers' conduct in the course of an arrest – including the arrest of a violent individual like the Respondent. The court further held that the issue of the reasonableness of the accommodations proposed after this incident by the Respondent's litigation expert (i.e., that the officers should have allowed her to remain in her "comfort zone" until they were able to calm her down), was one for the jury.

These issues have significant implications for local governments. Not only would the Ninth Circuit's holding create added liability for municipalities, but it would also invalidate many state laws that specifically do not require police officers to retreat in their efforts to arrest an individual by reason of resistance or threatened resistance of the arrestee. Additionally, the decision undercuts police officers' ability to make split-second decisions under dangerous circumstances.

Sarah Shalf and the Emory Law School Supreme Court Advocacy Program wrote the petition-stage brief supporting the position of the City and County of San Francisco. IMLA's brief was joined by the National Sheriff's Association and the Major County Sheriff's Association.

***Koopman v. Myers, Case No. 13-1143*** (petition-stage *amicus* brief filed on April 21, 2014). This case implicates important questions for law enforcement and municipalities regarding whether a claim for malicious prosecution may be brought as a Fourth Amendment violation under 42 U.S.C. § 1983.

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The Respondent asserts that Detective Koopman obtained an arrest warrant by falsifying an affidavit to create the illusion of probable cause. Pursuant to that warrant, law enforcement searched the Respondent's property and discovered a jar containing a white substance, which was initially incorrectly identified as methamphetamine. The Respondent was then arrested and he spent three days in custody. Additional tests on the substance revealed that it was not a controlled substance and all charges were subsequently dropped against the Respondent.

The Respondent brought suit under § 1983, alleging violations of the Fourteenth and Fourth Amendments. The Tenth Circuit held that a claim for malicious prosecution exists under § 1983 and that the statute of limitations began from the date the charges were dropped against the Respondent, not the date that he was arrested. Other circuits have held that the statute is tolled as the date of the arrest.

IMLA's petition-stage brief, authored by John Wilkerson of the Arkansas Municipal League, highlights the existing circuit split on this unanswered question.

*Lane v. Franks, Case No. 13-483* (merits-stage *amicus* brief filed on April 9, 2014). This is the first public employment First Amendment case the Supreme Court has taken since *Garcetti v. Ceballos.* The Court will determine whether a public employee may bring a First Amendment claim for alleged retaliation against truthful sworn testimony that the employee was compelled to provide pursuant to subpoena. IMLA's brief argues that an employee who is acting as an employee and in the scope and context of employment is protected by all of the rights and benefits accorded to any employee under state and federal law, but the Constitution should not convert an employment action or dispute into a federal claim simply because the employer is a government.

IMLA's brief was authored by Matthew Delude of Primmer Piper Eggleston & Cramer, PC and was joined by the International Public Management Association for Human Resources. Oral argument was held on April 28, 2014.

***City of Anaheim v. Gonzalez, Case No. ___*** (petition-stage *amicus* brief to be filed on June 27). IMLA is supporting the City of Anaheim's petition in this Fourth Amendment deadly force case.

Two Anaheim police officers made a traffic stop at 2 am after observing a van driving erratically. During the course of the confrontation with the driver, a series of escalating events occurred, ultimately leading one of the officers to enter the van through the passenger door in an attempt to get the driver to comply with the commands while the other officer continued to attempt to restrain him from the driver side window. The driver then began driving away with one of the officers trapped inside the van. It was undisputed that the driver "stomped" on the accelerator to drive away. The officer trapped in the van ordered the driver to stop the vehicle and attempted to put the vehicle in neutral and to turn off the ignition, all with the driver continuing to fight him off. The officer then drew his firearm and shot the driver in the head. The officer was trapped in the van as it drove away for between 5-10 seconds.

The Ninth Circuit held because the parties disputed how fast the van was traveling at the time the officer shot and killed the driver, summary judgment was inappropriate as a reasonable jury could conclude that the use of deadly force violated the Fourth Amendment.

In a scathing dissent, Judge Trott explained that the majority's focus on the speed of the van is entirely misplaced for the purposes of the Fourth Amendment and that under well-established Supreme Court precedent, the officers' actions were objectively reasonable under the circumstances. Specifically, Judge Trott notes that the "factual dispute" relied upon by the majority - i.e., the speed of the van at the time the officer shot Gonzalez – is not a "material" fact and therefore should not have been considered in the Fourth Amendment reasonableness analysis. The dissent explains: "The law does not require an officer who immediately faces physical harm to wait before defending himself until the indication of impending harm ripens into the onslaught of actual physical injury."

***T-Mobile South, LLC v. City of Roswell, Case No. 13-975*** (merits-stage amicus brief to be filed August 25). IMLA is supporting the City of Roswell in this case involving the interpretation of the Telecommunications Act of 1996 (TCA). In this case, T-Mobile applied to construct a cell tower in the City of Roswell, Georgia in an area zoned as single-family residential. T-Mobile proposed constructing an "alternative tower structure" in the shape of a man-made tree that would be approximately 25-feet taller than the pine trees surrounding it. The City Council ultimately voted unanimously to deny the application. The City sent T-Mobile a brief letter saying that it denied T-Mobile's application and that T-Mobile could obtain the hearing transcript and meeting minutes, which set forth its reasons for the denial. T-Mobile claims that by failing to include the reasons for the denial in the letter, the City violated the TCA.

The TCA requires that a municipality's denial for a cell tower be "in writing." The district court and other circuit courts have held that the TCA requires a written decision and a written record that explain why the city council's majority rejected the application. The Eleventh Circuit disagreed, reasoning that the statute does not say that "the decision [must] be 'in a separate writing' or in a 'writing separate from the transcript of the hearing and the minutes of the meeting in which the hearing was held' or 'in a single writing that itself contains all of the grounds and explanations for the decision.'"

While this case hinges on a technicality, the local government is faced with the possibility that if a violation of the "in writing" requirement is found, the telecommunications company would automatically be allowed to build its cell tower without further recourse by the local government. IMLA joined a State and Local Legal Center amicus brief authored by Tim Lay of Spiegel & McDiarmid. **ML**

**Ordinances** *Cont'd from page 26*

"Tobacco Product" shall include, but shall not be limited to, any cigar, little cigar, chewing tobacco, pipe tobacco, roll-your-own tobacco, snus, bidi, snuff, tobacco-containing shisha, or dissolvable tobacco product. Tobacco product shall also include electronic cigarettes, which are battery-operated device that contain cartridges filled with a combination of nicotine and liquid that are turned into vapor and inhaled by the user.[4]

This was only part of the council's revitalized attack on smoking generally. The Act raises the minimum age for purchase of cigarettes, electronic or tobacco, to twenty-one:

§ 17-706. Sale of cigarettes, tobacco products, or electronic cigarettes to minors and young adults prohibited.[5]