INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



2005 Annual Report
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SUPREME COURT 2004 TERM DECISIONS/CASES
CHEAT SHEET

Case Name and Citation	Topic	Holding or Summary of Question Presented
American Trucking Associations v. Michigan Public Service Commission, No. 03-1230, 2005 WL 1421164 (U.S. June 20, 2005)	Michigan Motor Carrier Act, fees, interstate/intrastate commerce, federal preemption, Commerce Clause	Does the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the U.S. Constitution and whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. sec. 14504? May affect a variety of local government interests, perhaps most significantly flow control ordinances.
Brosseau v. Haugen, 125 S.Ct. 596 (2004)	Police, excessive force, qualified immunity	Decision in favor of police officer. Qualified immunity/excessive force case, officer's conduct was not clearly in violation of the Fourth Amendment, several justices call for a re-examination of *Saucier v. Katz*, 533 U.S. 194 (2001).
Castle Rock, Colo. v. Gonzales, No. 04-278, 2005 WL 1499788 (U.S. June 27, 2005)	Property rights, due process, 14th Amendment, domestic restraining order	The Colorado statute at issue did not create a property interest, for federal constitutional due process purposes, in the enforcement of a restraining order.
Cooper Industries, Inc. v. Aviall Services, Inc., 125 S.Ct. 577 (2004)	Environmental cleanup, joint liability, Comprehensive Environmental Response, Compensation, and Liability Act	Decided in favor of Cooper on December 13, 2004 Local governments may not seek contribution nor can they be forced to contribute funds for cleaning up brownfields unless there is a clean up order.

Cutter v. Wilkinson, No. 03-9877, 2005 WL 1262549 (U.S. May 31, 2005)	Congressional power, Spending and Commerce clauses, 1st Amendment, establishment clause, 10th Amendment, inmates, Religious Land Use and Institutionalized Persons Act (RLUIPA)	Congress did not violate the Establishment Clause by enacting the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 through § 2000cc-5, which requires state officials to lift unnecessary governmental burdens imposed on the religious exercise of institutionalized persons under their control. Only the Establishment Clause was addressed. Land use issues were specifically reserved.
Devenpeck v. Alford, 125 S.Ct. 588 (2004)	4th Amendment, arrests, probable cause, "closely related offense"	Decided in favor of the officer. Subjective reason for making arrest need not be same as the criminal offense for which probable cause exists.
Graham County Soil & Water Conservation Dist. v. U.S., ex rel. Wilson, No. 04-169, 2005 WL 1421216 (U.S. June 20, 2005)	Federal False Claims Act, wrongful discharge, statute of limitations	Courts should apply the most closely analogous state statute of limitations in cases alleging retaliation.
Illinois v. Caballes, 125 S.Ct. 834 (2004)	4th Amendment, search & seizure, drug-detection dogs	Decided in favor of the State. No legitimate privacy interest exists in possessing contraband, therefore the dog drug sniff was constitutional.
Jackson v. Birmingham Board of Education, No. 02-1672, 2005 WL 701076 (U.S. March 29, 2005)	Title IX, private cause of action, gender discrimination, retaliation	The private right of action for violations of Title IX of the Education Amendments of1972, 20 U.S.C. §§ 1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination. (This case was only about a right of action, not about the merits of the allegations.)

Kelo. v. New London, Conn., No. 04-108 2005 WL 1469529 (U.S. June 23, 2005)	Eminent domain, public use, economic development	"Economic development" qualifies as a "public purpose" under the federal constitutions, though states may have stricter qualifications for taking private property.
Lingle v. Chevron U.S.A. Inc., 125 S Ct. 2074 (2005)	5th Amendment, takings clause, just compensation, standard of review	The "substantially advances" test for government regulation is not a valid Takings test.
McCreary County, Kentucky. v. ACLU of Kentucky, No. 03-1693, 2005 WL 1498988 (U.S. June 27, 2005)	Ten Commandments, 1st Amendment, establishment clause, displays	Using the *Lemon* test, it is proper to review a local government's purpose in creating a display that includes religious components.
Muehler v. *Mena*, No. 03-1423, 2005 WL 645221 (U.S. March 22, 2005)	Unlawful detention, search warrant, qualified immunity	In the circumstances of this case, law enforcement officers validly detained the plaintiff in handcuffs for several hours. The officers did not violate her rights by inquiring about her immigration status.
National Cable & Telecommunications Assn. v. Brand X Internet Services / FCC v. Brand X Internet Services, Nos. 04-277 & 04-281, 2005 WL 1498840 (U.S. June 27, 2005)	Communications Act of 1934, cable modems, information services, *Chevron* analysis	The FCC was entitled to decide that cable operators offering "cable modem service" provide only an "information service" and not a "telecommunications service."
Rancho Palos Verdes v. Abrams, No. 03-1601, 2005 WL 645209 (U.S. March 22, 2005)	Telecommunications Act of 1996, civil rights, remedies, radio permits	Section 332(c)(7)(B) of the Communications Act is not enforceable through an action for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988.
San Diego v. Roe, 125 S.Ct. 521 (U.S. 2004)	Employee speech, public concern	Decided for San Diego. Officer's speech was not of "public concern."

San Remo Hotel v. City & County of San Francisco, No. 04-340, 2005 WL 1421451 (U.S. June 20, 2005)	Takings clause, 5th Amendment, property rights, issue preclusion	A Fifth Amendment Takings claim is barred under the Full Faith and Credit Clause when the arguments in state court and the state court decision look to federal law for analysis.
Sherrill, NY v. Oneida Indian Nation of New York, No. 03-1160, 2005 WL 701058 (U.S. March 29, 2005)	Reservation land/Indian Country	Land purchased by the tribe did not qualify as "reservation" land and was subject to local government property taxes.
Smith v. City of Jackson, Miss., No. 03-1160, 2005 WL 711605 (U.S. March 30, 2005)	Age discrimination, disparate impact, Age Discrimination in Employment Act of 1967	Disparate impact claims are cognizable under the Age Discrimination in Employment Act.
Van Orden v. Perry, No. 03-1500, 2005 WL 1500276 (U.S. June 27, 2005).	Ten Commandments, 1st Amendment, separation of church and state, schools	A 6 foot by 3 foot monument of the Ten Commandments located on government property between the Texas State Capitol and the Texas Supreme Court does not violate the First Amendment.

This Annual Report summarizes United States Supreme Court cases on the Court's 2004 Docket.

American Trucking Associations v. Michigan Public Service Commission, No. 03-1230, No. 03-1230, 2005 WL 1421164 (U.S. June 20, 2005). Under Michigan's Motor Carrier Act (MCA), which is enforced by the Michigan Public Service Commission, "motor carriers must pay a fee of $100 for each application filed with the commission for a certificate of authority or for a permit to operate intrastate. *See* Mich. Comp. Law § 478.2(1). The fee must be paid whether the motor carrier is engaged solely in intrastate transportation within Michigan, or engages in both intrastate and interstate transportation. This case asks whether the fee, as applied to interstate truckers that engage in both interstate and intrastate shipping, violates the dormant Commerce Clause.

The American Trucking Association and USF Holland Motor Express, Inc., (collectively "ATA") challenged the fee in Michigan state court under the dormant Commerce Clause, claiming that it is an unconstitutional tax because it is not fairly apportioned and because it discriminates against interstate commerce. ATA based its challenge on the four-part test first articulated by the Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). There, the Supreme Court unanimously upheld a Mississippi tax on transportation services provided within Mississippi, "reject[ing] the proposition that interstate commerce is immune from state taxation." The Court articulated the test relied upon by ATA in this case: "no claim is made

> that the activity is not sufficiently connected to the State to justify a tax, or
> that the tax is not fairly related to benefits provided the taxpayer, or
> that the tax discriminates against interstate commerce, or
> that the tax is not fairly apportioned." *Complete Auto*, 430 U.S. at 287.

In the Michigan courts, ATA argued the $100 fee failed both the "fair apportionment" and "anti-discrimination" components of the *Complete Auto* test. ATA based its argument on *American Trucking Ass'n v. Scheiner*, 483 U.S. 266 (1987), in which the Court applied *Complete Auto* to invalidate two flat taxes imposed by Pennsylvania on interstate trucking companies whose trucks crossed Pennsylvania but did not engage in intrastate transportation of goods within Pennsylvania.

The Michigan trial court upheld the fee, reasoning that the fee did not discriminate against or burden interstate commerce. The Michigan Court of Appeals affirmed, holding that the proceeds of the fee are used to enforce Michigan's regulation of motor carriers and that the aggregate fee revenues collected by the State "are proportional to the cost of the services to which they relate." The court of appeals, having held that the $100 fee did not discriminate against or unduly burden interstate commerce, then analyzed the fee under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under *Pike*, "where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to

the putative local benefits." Applying this standard, the Michigan Court of Appeals held that the burden on interstate commerce imposed by the $100 fee was not "clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." ATA sought review in the Michigan Supreme Court, but was unsuccessful in obtaining review and filed a petition for certiorari in the U.S. Supreme Court, which was granted.

The question presented by ATA's petition asked "whether the fair apportionment and antidiscrimination requirements of the Commerce Clause invalidate flat state taxes on participants in interstate commerce." ATA asserts the Michigan flat tax is inconsistent with the Court's precedents regarding the necessity of apportioning state taxes that fall on participants in interstate commerce. ATA further argues that satisfaction of the apportionment requirement is determined by application of the "internal consistency" test.

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. . . . [The internal consistency test] looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction.

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995).

According to ATA, the Michigan flat tax violated this internal consistency test. The reason for this failure, according to ATA, "is obvious: unapportioned levies necessarily impose cumulative burdens on interstate commerce that are not borne by equivalent intrastate activity – and that is so whether the flat tax is imposed on the privilege of entering the state" as in *Scheiner*, "or on the privilege of engaging in business within the state," as in this case. It is, ATA contends, "inevitable that flat levies like the Michigan tax are malapportioned because they 'bear much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical that sells in only one place.'"

ATA also argued that the Michigan fee discriminates against interstate commerce, contending that the Supreme Court has made clear that flat taxes *necessarily* discriminate against interstate interests and that empirical evidence of the discriminatory effect of such a tax is not necessary. In support of its argument ATA relies on *Nippert v. City of Richmond*, 327 U.S. 416 (1946), which struck down a flat municipal license fee on door-to-door salesmen, which was the same for local salesmen as for those from out-of-state. In striking down the flat license fee, the Court reasoned that "the very difference between interstate and local trade . . . makes equality of application between those two classes of commerce, generally speaking, impossible." *Id.* at 432.

In its brief in opposition, the Michigan Public Service Commission (PSC) argued that the Michigan Court of Appeals properly upheld the $ 100 fee because of ATA's failure to offer any evidence to support its claim that the fee unduly burdens interstate commerce. The Michigan PSC argued the $ 100 fee satisfies the four-part test of *Complete Auto Transit*, including the requirement that the fee be fairly apportioned and "internally consistent." The PSC contended that the state statute at issue "is internally consistent because no more than 100% of a carrier's intrastate activity is being taxed. If every State in the Union were to impose an identical fee . . . no multiple taxation . . . would result [because] each separate state would only be charging for intrastate operations in that same state." The Michigan PSC disputed ATA's contention that *Scheiner* mandates invalidation of the $100 flat fee as applied to out-of-state truckers who carry goods point-to-point in Michigan. The PSC argued that the flat tax invalidated in *Scheiner* is distinguishable from Michigan's fee: "While the flat marker fee and flat axle tax in *Scheiner* applied to all trucks traveling through Pennsylvania, Michigan's fee . . . relates to only those vehicles assigned by the carrier to haul intrastate loads. Vehicles handling only interstate loads do not pay [the] fee." Michigan "in no way levies a charge on motor carriers to engage in interstate commerce on the highways in Michigan."

The unanimous Court held that a $100 fee charged by Michigan on intrastate trucking did not violate the dormant Commerce Clause. The Court found that the fee applied even handedly to all carriers, in-state or out-of-state, who engaged in domestic journeys. The Michigan statute was not an effort to tax activity taking place outside the state. The State and Local Legal Center filed a brief on IMLA's behalf in that case.

In a companion case, *Mid-Con Freight Systems, Inc. v. Michigan Public Service Commission*, No. 03-1234, 2005 WL 1421291 (U.S. June 20, 2005), a 6-3 Court upheld another $100 fee as not being preempted by the statute governing federal trucking permits. The federal Intermodal Surface Transportation Efficiency Act created the Single State Registration System (SSRS), which allows a trucking company to fill our one set of forms in one state and thereby register its federal trucking permit in every participating state through which a truck travels. The SSRS statute prohibits states from imposing additional "registration requirements." The Court found that the $100 fee on "each Michigan license-plated truck operating entirely in interstate commerce" did not violate the prohibition on additional registration requirements.
IMLA filed a brief in this case in support of the State, to be authored by the State and Local Legal Center.

Brosseau v. Haugen, 125 S.Ct. 596 (U.S. 2004) (*per curiam*). Noting that in qualified immunity cases the first question which must be answered is whether the facts show an officer's conduct violated a constitutional right, the Court nonetheless did not answer that question in this case. Instead, the Court moved directly to the second question, holding that regardless, the officer in this case was entitled to qualified immunity. "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." The Court noted that in an "obvious" case of excessive force, the right to be free of the constitutional violation of the use of excessive force is clearly established. However, the Court did not find the facts in this case to be one of "obvious"

excessive force. The Court framed the issue as whether there is a Fourth Amendment violation when an officer shoots "a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." The Court characterized the officer's actions at the time fell in the "hazy border between excessive and acceptable force" and held that by "no means" was it clearly established that the officer's conduct violated the Fourth Amendment.

Justice Breyer was joined in a concurring opinion by Justices Ginsburg and Scalia to note that the holding of *Saucier v. Katz*, 533 U.S. 194 (2001) should be reconsidered because it requires lower courts to engage in difficult constitutional analysis before answer the qualified immunity question.

Justice Stevens dissented, arguing that whether a reasonable officer would have known that using deadly force to prevent the escape violated the constitution was a question for the jury.

City of Castle Rock v. Gonzales, No. 04-278, 2005 WL 1499788 (U.S. June 27, 2005). Ms. Gonzales obtained a temporary restraining order, restricting the contact her estranged husband could have with her and their three pre-teen daughters. The order was issued by a Colorado state court, in accordance with Colorado state law, and required Mr. Gonzales to stay more than 100 yards away from Ms. Gonzales's property at all times. It also contained language instructing law enforcement officers to enforce the conditions of the order. The order was then made permanent and modified slightly to allow for limited contact between Mr. Gonzales and his daughters.

Shortly thereafter, Mr. Gonzales went to his wife's home and took away their three daughters. Ms. Gonzales soon realized that her daughters were missing and concluded that her husband was likely responsible. She called the Castle Rock police department, requesting that they enforce the restraining order against her husband. Ms. Gonzales alleges the police persistently refused to pursue Mr. Gonzales under the restraining order. Mr. Gonzales eventually appeared at the Castle Rock police station, and was killed in a shoot-out with police there. The bodies of the three Gonzales children, who had been slain by their father, were found in his truck.

Ms. Gonzales subsequently sued the City of Castle Rock and three individual police officers under 42 U.S.C. 1983, claiming the officers' failure to enforce the restraining order violated her right to due process. The federal district court granted the defense's motion to dismiss for failure to state a claim. On appeal, the 10th Circuit's panel affirmed the motion to dismiss with respect to Ms. Gonzales's substantive due process claim, but reversed with respect to her procedural due process claim. The 10th Circuit agreed to rehear the case en banc, reviewing the panel's conclusion that Ms. Gonzales had stated a cognizable procedural due process claim. The en banc court agreed with the 10th Circuit panel. It found that Ms. Gonzales had a legitimate property right in the entitlement to police enforcement of the restraining order. This entitlement was created by the state's statutory scheme for restraining orders and the mandatory language contained in the restraining order issued by the Colorado court. The court also held that Ms. Gonzales had been denied appropriate process by the Castle Rock police when they declined to give appropriate consideration to her pleas to enforce the restraining order, thereby depriving her

of her property interest in enforcement of that order.

In a 7-2 decision, the Court held that Mrs. Gonzales, had no property interest in police enforcement of a restraining order she had obtained against her husband. The Court noted that the Due Process Clause of the Fourteenth Amendment did not protect everything that might be described as a government benefit, but rather that a person must have a "legitimate claim of entitlement' to the benefit created by something such as state law. The Court stated a benefit is not a protected entitlement if officials have the discretion to grant or deny the benefit. In this particular case, the Court refused to defer to the Tenth Circuit's conclusion that the Colorado statute at issue created a property interest and ultimately held no personal entitlement was created. The Court also held that even if an entitlement was created, it was not clear that this individual entitlement would qualify as a property interest for the purposes of the due process clause.

IMLA supported the City at the certiorari stage and on the merits brief. The briefs were authored by Brad Bailey of Littleton, Colorado.

Cooper Industries, Inc. v. Aviall Services, Inc., 125 S.Ct. 577(U.S. 2004). The question before the Court was whether parties that voluntarily clean up contaminated properties can seek contribution from other polluting parties if they have not been ordered to conduct the cleanup under the CERCLA or Superfund law. The held parties could not seek contributions under CERCLA.

The enabling clause of §113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as added by the Superfund Amendments and Reauthorization Act of 1986 (SARA), provides that any person "may" seek contribution from any other person liable or potentially liable under CERCLA §107(a), "during or following any civil action" under CERCLA §106 or 107(a). CERCLA § 106 authorizes the Federal Government to compel responsible parties to clean up contaminated areas, see *Key Tronic Corp.* v. *United States,* 511 U.S. 809, 814. CERCLA §107(a) empowers the federal government to recover its response costs from potentially responsible persons (PRPs). Section 113(f)(1)'s saving clause provides: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under" §106 or §107. SARA also created a separate express right of contribution, §113(f)(3)(B), for "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement."

The Court held that a party may not seek contributions under CERCLA §113(f)(1) if they are not the subject of an action under CERCLA 106 or 107(a). The Court stated that its decision flowed from the "clear meaning" of the text. The Court also refused to determine whether CERCLA 107 provided a basis for Aviall to seek contribution, citing the fact that this premise for contribution was not addressed below.

Cutter v. Wilkinson*,* No. 03-9877, 2005 WL 1262549 (U.S. May 31, 2005). The Supreme Court

decided that Congress did not violate the establishment Clause when it enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. Sec. 2000cc-1 through Sec. 2000cc-5 (2000), State prisoners sued prison officials in three separate actions, alleging that each prisoner was denied the right to practice his religion due to unwarranted concerns about security in violation of Religious Land Use and Institutionalized Persons Act (RLUIPA). The actions were consolidated and the federal government intervened. The district court denied the officials' motion to dismiss. The officials filed an interlocutory appeal. The court of appeals held that the provision of Religious Land Use and Institutionalized Persons Act (RLUIPA) applicable to institutionalized persons violate Establishment Clause. (The provisions prohibit governments from imposing a substantial burden on prisoners' exercise of religion unless the burden is in furtherance of compelling governmental interest and is the least restrictive means.) The Court noted that prisons have compelling interests in the operation and safety of prisons and directed lower courts to be deferential in reviewing prison officials' decisions regarding religious exercise by prisoners. The Court also specifically reserved ruling on RLUIPA's application to land use decisions, as well as to challenges brought against the Act as a whole on Spending Clause, Commerce Clause, and Fourteenth Amendment grounds.

IMLA filed a brief in support of the State. The brief was authored by Prof. Marci Hamilton and urged the Court to recognize a distinction between prison regulation and land use regulation, as well as to find the Act unconstitutional.

Devenpeck v. Alford, 125 S.Ct. 588 (U.S. 2004)**.** This case asked whether an arrest is valid when probable cause supports multiple charges, but not the one which officers cite in making the arrest. The case also examined whether a nexus is required between the possible bases for arrest and the offense charged, and how close that nexus must be if it is required.

A number of states and judicial circuits had upheld the validity of arrests if objectively reasonable probable cause existed to support any violation. Other states and judicial circuits, including the Ninth Circuit, had ruled arrests to be validly supported by probable cause only if observed violations were "closely related to and arising out of the same conduct" as the crime or crimes that the arresting officer may have articulated at the time of the arrest.

The Court stated an arresting officer's "subjective reason for making an arrest need not be the criminal offense as to which the known facts provide probable cause." Therefore, "the rule that the offense establishing probable cause must be 'closely related' to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent" with the Fourth Amendment and the Court's precedent. The Court reasoned that to rule otherwise would make the validity of arrests dependent on the arresting officer's ability to correctly identify a general class of offense for which probable cause exists. The Court noted that, if the Ninth Circuit was correct, arrests by seasoned officers who are able to properly articulate the correct class of offense would be valid, while arrests by rookies, in precisely the same circumstances but articulating the wrong basis, might not be valid.

The Court also stated that while it is "assuredly" a good police practice to inform a person as to

the reason for his or her arrest, the Court has never held that this is constitutionally required. The Court's opinion was unanimous, though the Chief Justice did not participate in the case. IMLA was asked by the State of Washington to file an amicus brief. IMLA's brief was prepared by the State and Local Legal Center and included as additional signatories the National League of Cities, the U.S. Conference of Mayors, and the National Association of Counties, among others.

Illinois v. Caballes, 125 S.Ct. 834 (U.S. 2005). The Court held a police dog sniff conducted during a lawful traffic stop that reveals "no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." An Illinois state trooper stopped Caballes for speeding on an interstate highway. A second trooper, who was part of the state's drug interdiction team, heard the report of the stop and immediately headed for the scene with his narcotics-detection dog. While the first trooper wrote a warning ticket, the second trooper walked his dog around Caballes' car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested Caballes. The entire incident lasted less than 10 minutes.

Caballes was convicted of a narcotics offense, sentenced to imprisonment and ordered to pay a fine. The trial judge denied his motion to suppress the seized evidence and to quash his arrest. The trial judge held that the officers had not unnecessarily prolonged the stop and that the dog alert was sufficiently reliable to provide probable cause to conduct the search. The Illinois Supreme Court ultimately reversed, concluding the canine sniff was performed without any "specific and articulable facts" to suggest drug activity, and the use of the dog "unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug investigation." 802 N. E. 2d 202, 205 (2003).

The Court granted certiorari to decide whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop. The Court proceeded on the assumption that "the officer conducting the dog sniff had no information about respondent except that he had been stopped for speeding. . . ."

The Court noted that while the initial seizure of Caballes was based on probable cause, it is also clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. *United States v. Jacobsen,* 466 U. S. 109, 124 (1984). "For instance, a seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."

The Supreme Court relied heavily on the record as it was developed below. The Illinois Supreme Court carefully reviewed the details of the first trooper's conversations with Caballes and the precise timing of his radio transmissions to the dispatcher to determine whether he had improperly extended the duration of the stop to enable the dog sniff to occur. The state court concluded the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop.

"Despite this conclusion, the Illinois Supreme Court held that the initially lawful traffic stop became an unlawful seizure solely as a result of the canine sniff that occurred outside respondent's stopped car. That is, the court characterized the dog sniff as the cause rather than the consequence of a constitutional violation." In the Illinois court's view, the use of the dog converted the citizen-police encounter from a lawful traffic stop into a drug investigation. Because the shift in purpose was not supported by any reasonable suspicion that Caballes possessed narcotics, the Illinois court deemed the drug sniff unlawful.

The United States Supreme Court disagreed holding that conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. That did not occur in this case.

The Court noted that any interest in possessing contraband cannot be deemed 'legitimate,' and governmental conduct that *only* reveals the possession of contraband does not compromise any legitimate privacy interest. "The use of a well-trained narcotics-detection dog--one that 'does not expose noncontraband items that otherwise would remain hidden from public view,' --during a lawful traffic stop, generally does not implicate legitimate privacy interests." The Court concluded that any possible intrusion into Caballes' privacy expectations did not rise to the level of a constitutional violation.

The Court also expounded on *Kyllo v. United States,* 533 U. S. 27 (2001), which held the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. The search was unconstitutional because the device was capable of detecting lawful activity. The Court found there to be a categorical difference between the legitimate privacy expectations and Caballes' hopes or expectations concerning the non-detection of contraband in the trunk of his car. "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."

Graham County Soil & Water Conservation Dist., et al. v. U.S., ex rel. Wilson,No. 04-169, 2005 WL 1421216 (U.S. June 20, 2005). The question before the Supreme Court is whether the six year limitation period set out in 31 U.S.C. § 3731(b) should be applied to retaliatory discharge actions under the False Claims Act or whether courts should apply the most closely analogous state limitation period.

On March 7, 1997, Karen T. Wilson ("Wilson") resigned as a secretary at the Graham County Soil & Water Conservation District. Over three years and ten months later, Wilson sued alleging that she was harassed by supervisors and co-workers for exposing various false claims for reimbursement made to several federally funded programs. Specifically, she claims that she was retaliated against in violation of 31 U.S.C. § 3730(h) of the False Claims Act.

The Petitioners moved to dismiss Wilson's retaliatory discharge claim in that it was barred by the applicable limitation period (three years under North Carolina law). The district court agreed

that Wilson's retaliatory discharge claim was time barred and dismissed this claim. On April 29, 2004, a divided panel of the Fourth Circuit reversed the District Court. The panel concluded that claims under 31 U.S.C. § 3730(h) are governed by the six year limitation period set out in 31 U.S.C. § 3731(b)(1):

> A civil action under section 3730 may not be brought - -
>
> (1) more than 6 years after the date on which the violation of 3729 is committed.

As the Fourth Circuit noted, Section 3729 "creates and defines the parameters of liability for presenting a false claim to the Government." 367 F.3d at 248. Section 3730 then creates three separate causes of action for violations of 3729. Section 3730(a) creates a cause of action that may be brought by the Attorney General when the Government has been damaged by a false claim. Section 3730(b) provides for the filing of a qui tam action by an individual. Section 3730(h) creates a cause of action for retaliatory discharge when an employee has been discriminated against for pursuing a false claim action.

The Fourth Circuit concluded that Congress intended to bar any retaliatory discharge claim that is not brought within six years from the date the false claim was submitted to the Government: "[T]he effect of the language as written is to provide that an action under § 3730, which necessarily includes an action for retaliation under § 3730(h), may be brought no more than six years after the date on which the underlying violation was committed." 367 F.3d at 248. Recognizing that this issue has "divided both our sister circuits and courts within this circuit," the Fourth Circuit rejected the rationale of the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998). 367 F.3d at 249. The Fourth Circuit instead joined with the Third and Seventh Circuits which held that the six year statute of limitations period applies to retaliatory discharge cases. See, *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed. Appx. 270 (3d Cir. 2003), *cert. denied*, 158 L. Ed. 2d 469 (2004) and *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994).

One of the Fourth Circuit panel members dissented. He reasoned that the Fourth Circuit's opinion cannot be squared with the literal language of the False Claims Act and is not consistent with Congressional intent. He opined that the majority's decision "introduces an unprecedented oddity into state and federal law by disconnecting the statute of limitations for anti-retaliation claims from the actual retaliatory acts themselves," a result contrary to the usual application of statutes of limitations in wrongful discharge cases. 367 F.3d at 257, 260 (Wilkinson, J., dissenting).

In *Lujan*, the plaintiff argued that because the retaliatory discharge provision is set out in 31 U.S.C. § 3730, a six year period must be applied to retaliation claims. The Ninth Circuit rejected this reading, concluding that the language and legislative history of the False Claims Act demonstrates that Congress did not intend for a six year limitation period to apply to retaliation

claims. The Ninth Circuit noted that prior to 1986, when Congress first added a retaliatory discharge provision to the False Claims Act, Section 3731(b) provided that a "'civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed.'" 162 F.3d at 1034 (quoting 31 U.S.C.A. § 3731(b) (West 1983)). When the retaliatory discharge provision was added in 1986, Section 3731(b) was changed so as to tie the six years to the date "'the violation of section 3729 is committed.'" Id. (quoting 31 U.S.C.A. § 3731(b)(1) (West Supp. 1998)). Because Section 3729 relates solely to substantive violations of the False Claims Act and does not address retaliation, the Ninth Circuit concluded that Congress did not intend to apply a six year period to retaliation claims:

> If Congress had wanted to retain a six-year statute for all actions under section 3730, including retaliation claims, it would have left the pre-1986 amendments to the [False Claims Act]. Instead, Congress, while adding a provision for retaliation claims under 3730(h), narrowed the application of the six-year statute of limitations to violations of section 3729.

Lujan, 162 F.3d at 1034.

On the other hand, the Seventh Circuit in *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994), concluded:

> Section 3731(b)(1) allows six years to file suit under § 3730 from "the date on which the violation of § 3729 is committed." Section 3729 deals with making false claims. Neal filed this suit under § 3730 within six years of Honeywell's false claims. It is therefore timely.

Id. at 865. The Seventh Circuit dismissed the employer's argument that such a statutory construction is illogical because it could lead, in certain circumstances, to retaliatory discharge claims being time barred before they accrue. The Seventh Circuit reasoned that this six year period was akin to a statute of repose and therefore concluded that there was "no absurdity in the statute." *Id.* While, the Third Circuit has held that a six year limitation period applies to retaliatory discharge claims under the False Claims Act, it has not discussed the reasoning for its decision. *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed. Appx. 270 (3d Cir. 2003).

Under the Fourth Circuit's opinion, an employee who is discharged in violation of 31 U.S.C. § 3730(h) may sit on his or her rights and wait to file a complaint until six years from the underlying False Claims Act violation. Given the fact that 31 U.S.C. § 3730(h) provides for double recovery of back pay, the effect of the Fourth Circuit's decision is to allow claimants to recover over twelve year's worth of salary by manipulating when a complaint is filed.

The Court held that the appropriate statute of limitations in cases brought under the federal False Claims Act (FCA) and alleging retaliation claims is that of the most closely analogous state statute of limitations The Court found the statute of limitations language, found in section 3731(b)(1), to be ambiguous as to whether a claim of retaliation was a "claim brought under

section 3730" of the statute. The Court determined that if the statute was interpreted as the plaintiff urged, it was possible that the time for filing an action could run out before any retaliatory act actually occurred. **Judge John Charles Thomas, Carolyn Dubay and Christine Klein,** of **Hunton &Williams'** Richmond, Virginia office, prepared a brief on behalf of IMLA and NLC in support of the water district.

Jackson v. Birmingham Board of Education, No. 02-1672, 2005 WL 701076 (U.S. March 29, 2005). The Court, in a 5-4 decision, held Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, encompassed a private right of redress for retaliation for complaints about unlawful sex discrimination.

The former coach of a girls' high school basketball team sued the board of education, alleging that it retaliated against him in violation of Title IX because of his complaints of discrimination against girls' sports teams. The district court dismissed the complaint. The court of appeals held neither Title IX nor promulgated regulations imply a private right of action for claims of retaliation brought by individuals who have complained about gender discrimination suffered by others.

A bare majority of the Supreme Court disagreed. The majority found the plain text of Title IX provides protection from retaliation for individuals who complain of sex discrimination, even if they are not the individuals experiencing the "discrimination on the basis of sex." According to the majority, had Congress meant to protect only those who were retaliated against because of discrimination based on their individual sex, the statute would read "no person shall be subjected to discrimination on the basis of *such individual's* sex."

The majority also found the school board was on notice that they could be subject to a suit for private damages because of a long line of Supreme Court cases allowing private suits for intentional sex discrimination. The one silver lining in the Court's decision was that it made no comment on the merits of Jackson's claim, but was solely ruling on his ability to state a claim.

The 4 member dissent disagreed with the majority on all points. The dissent's reading of the "plain language" of the statute would not allow a party to state a claim for retaliation based on complaints that someone else is being discriminated against. The dissent contends that Jackson's retaliation claim lacks any connection to sex discrimination. The dissent also argues that Congress did not make clear in enacting Title IX that recipients of federal funds could be liable for claims of retaliation.

Kelo v. City of New London, Connecticut, No. 04-108, 2005 WL 1469529 (U.S. June 23, 2005). In *Kelo,* the owners of homes and property in a development area adjacent to the site of a major drug corporation's new global research facility sued the city to prevent the taking of their homes through eminent domain. The development plan that is projected to create in excess of 1,000 jobs, to increase tax and other revenues, to revitalize an economically distressed city, including its downtown and waterfront areas, and make the city more attractive. After approving an integrated development plan, the City of New London, through its development agency,

purchased most of the property earmarked for the project from willing sellers, but initiated condemnation proceedings when the petitioners, the owners of the rest of the property, refused to sell. The petitioners brought a state-court action claiming, among other things, that the city's taking of their properties would violate the "public use" restriction in the Fifth Amendment's Takings Clause. The trial court granted a permanent restraining order prohibiting the taking of the some of the properties, but denying relief as to others. The Supreme Court of Connecticut held that economic development can be valid public use.

The U.S. Supreme Court, in a 5-4 decision, ruled the city's proposed development plan and disposition of the petitioners' property qualified as a "public use" within the meaning of the Takings Clause. Justice Stevens, authored the opinion of the Court, in which Justices Kennedy, Souter, Ginsburg, and Breyer joined. Justice Kennedy, J., filed a concurring opinion. Justice O'Connor, filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Scalia and Thomas. Justice Thomas also filed a separate a dissenting opinion.

The majority held that (a) although the city could not take the petitioners' land simply to confer a private benefit on a particular private party, the takings at issue would be executed pursuant to a carefully considered development plan, which was not adopted "to benefit a particular class of identifiable individuals," and noting that the Court had "long ago rejected any literal requirement that condemned property be put into use for the general public;" (b) The city's determination – that the area at issue was sufficiently distressed to justify a program of economic rejuvenation – was entitled to deference; and © The petitioners' proposal that the Court adopt a new bright-line rule that economic development did not qualify as a public use was rejected. "Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized." The court concluded that nothing in the opinion precludes any State from placing further restrictions on the exercise of the takings power by jurisdictions within that state.

IMLA filed a brief on behalf of the City, authored by the State and Local Legal Center and Tim Dowling of Community Rights Counsel. Numerous State Leagues also filed a brief in support of the City.

Lingle v. Chevron USA, Inc., 04-163, 2005 WL 1200710 (U.S. May 23, 2005). The Court held that the "substantially advances" test enunciated in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) was not a valid test under the Takings Clause. Chevron sued Hawaii, challenging a law proscribing the maximum rent that oil companies could collect from dealers who leased company-owned service stations. In the most recent trip to the Ninth Circuit, the court held that the law of the case doctrine barred the state's argument that oil company's challenge was controlled by Due Process Clause rather than Takings Clause, and the Hawaii law did not substantially advance legitimate state interest in lowering consumer gasoline prices, and therefore the law constituted a regulatory taking.

The Court noted the "substantially advances" formula suggests a means-ends test – whether a regulation of private property is effective in achieving some legitimate public purpose – but reveals nothing about the magnitude or distribution of the burden that the regulation imposes upon property rights. This approach is "doctrinally untenable" as it ignores both the basis of the Takings Clause and the justification for allowing regulatory actions to be challenged under the Clause. The Court also noted the *Agins* formula undermines deference to legislative judgments and presents the courts with the practical difficulty of second-guessing state and federal legislation.

IMLA's brief in support of the petition for certiorari was authored by Tim Dowling and argued that within the Takings context, the "substantially advances" test is an improper theory of liability because current takings law calls for a basic inquiry of whether the government is pursuing legitimate ends and has adopted reasonable means to achieve its ends. IMLA filed a brief in support of the State at the merits stage also. That brief was authored by the State and Local Legal Center and Tim Dowling of the Community Rights Counsel.

McCreary County, Kentucky v. ACLU of Kentucky, No. 03-1693, 2005 WL 1498988 (U.S. June 27, 2005). The ACLU sued several counties and a school district, alleging that courthouse and classroom posting of the Ten Commandments, even with documents from American history, violated First Amendment. The district court granted preliminary injunction requiring the removal of the displays. The Court of Appeals held that the plaintiffs were likely to prevail on claim that the defendants lacked a secular purpose for the displays.

In November 1999, individuals in McCreary, Harlan, and Pulaski Counties along with the American Civil Liberties Union ("ACLU") filed three lawsuits in the United States district court alleging that the counties had erected displays consisting of framed copies of the Ten Commandments in violation of the Establishment Clause of the First Amendment. The displays were in the county courthouses of McCreary and Pulaski Counties, as well as in the schools of the Harlan County School District. The three lawsuits were considered as one by the district court, and eventually consolidated.

The display of the Ten Commandments in the McCreary and Pulaski County Courthouses consisted of a framed copy of one version of the Ten Commandments and was not part of any larger educational, historical, or retrospective exhibit. The displays were erected pursuant to an order signed by each county's Judge Executive. The courthouse displays, both in their initial and later in their modified forms, were "readily visible to the plaintiffs and the other county citizens who use the courthouse to conduct civic business, to obtain or renew drivers' licenses and permits, to register cars, to pay local taxes, and to register to vote."

The schools in Harlan County School District displayed copies of a version of the Ten Commandments in their classrooms which, like the courthouse displays, initially consisted of "framed copies of one version of the Ten Commandments which were not part of larger educational, historical or retrospective exhibits."

After suit was filed, the Defendants amended the respective displays. Specifically, the Courthouse displays were modified to consist of:
(1) an excerpt from the Declaration of Independence;
(2) the Preamble to the Constitution of Kentucky;
(3) the national motto of "In God We Trust";
(4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation;
(6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading, "The Bible is the best gift God has ever given to man.";
(7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact.

The School Board display was modified to include those documents included in the modified courthouse displays, along with the addition of "a recently enacted Kentucky statute, K.R.S. 158.195, which the defendants allege permits the posting of the Ten Commandments; and ...a Harlan County School Board resolution permitting the posting of the Ten Commandments."

Common to all three modified displays was the fact that while some of the added documents were displayed in their entirety, the defendants excerpted a small portion of others to include only a document's reference to God or the Bible with little or no surrounding text.

The Plaintiffs sought a declaration that the displays were unconstitutional, as well as preliminary and permanent injunctive relief enjoining the counties from continuing their display of the Ten Commandments. Shortly after the complaint was filed, the Defendants modified the displays to include secular historical and legal documents and then filed motions to dismiss. Following a hearing held on April 20, 2000, the district court issued an order denying motions to dismiss and granting the Plaintiffs' motions for preliminary injunctive relief. The court ordered that the displays be removed and that no similar displays be erected. The district court found even the amended displays failed the "purpose" and "effect" prongs of the three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in that they lacked a secular purpose and had the effect of endorsing religion. The court ordered that the displays be removed "immediately" and further ordered that "similar displays" could not be erected in the future. The Defendants filed a notice of appeal, and a motion to stay the injunction pending appeal. The district court denied the motion to stay, as did the appellate court.

The Defendants allegedly obtained new counsel and then filed a motion to clarify the district court's preliminary injunction as to all Defendants regarding the court's prohibition against erecting "similar displays." The district court denied the motion for clarification stating "the injunction speaks for itself."

The Defendants, allegedly acting on the belief that a display containing the Ten Commandments could be erected within the parameters of the Constitution, voluntarily dismissed their appeal and

erected new displays containing several additional secular historical and legal documents in their entirety, along with the Ten Commandments. The courthouse displays contained an explanation entitled the "Foundations of American Law and Government Display" which explained that the displays included various documents that played a significant role in the founding of the American system of law and government. The new courthouse displays also consisted of the **entire** Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, the Ten Commandments, and Lady. The prefatory description stated that the "display contains documents that played a significant role in the foundation of our system of law and government."

With regard to the Ten Commandments, a prefatory description states:

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

There is no other discussion of the Ten Commandments and how it purportedly relates to any of the other documents in the display.

The school district displays contained similar documents to the courthouse displays, except instead of the "Foundations of American Law and Government Display" explanation, the School Board displays contained a School Board Resolution. The Resolution addressed the historical context of the displays and opened a forum for the community to post an unlimited number of additional historical documents.

The new School Board displays consisted of the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, an excerpt of the Congressional Record containing the Ten Commandments, Kentucky Statute 4 § 158.195 regarding the posting of historical displays and a School Board Resolution. The Congressional Record entry is a statement of Representative Philip M. Crane of Illinois in which he discusses a Joint Resolution authorizing then-President Reagan to declare 1983 to be the "Year of the Bible." The School Board Resolution stated, in part:

We believe these ... documents positively contribute to the educational foundations and moral character of students in our schools.... [I]t is our opinion that these ... documents, taken as a whole, are valuable examples of documents that may instill qualities desirable of the students in our schools, and have had particular historical significance in the development of this country.

The Resolution also contained a procedure that would permit any person to request the posting of other historical documents with the permission of the Harlan County Board of Education.

As a result of these new displays, the Plaintiffs filed a motion to hold the Defendants in contempt for violating the district court's preliminary injunction or, in the alternative, to enter a supplemental preliminary injunction order. The Defendants responded to the Plaintiffs' motion by arguing that the new displays were not similar to the previous displays, and contended that the "purpose for the display is to educate citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government."

A hearing was held and the district court denied the Plaintiffs' motion for contempt. The court also urged the parties to settle the matter. The court noted if the parties could not reach a settlement within 30 days, it would rule upon the motion for a supplemental preliminary injunction. The parties failed to reach a settlement, and the district court issued an order granting the motion for a supplemental preliminary injunction. The district court, citing *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) and *Stone v. Graham*, 449 U.S. 39 (1980), found that the new displays were "clearly outside the bounds of these permissible uses and [were] violative of the Establishment Clause," and enjoined the displays.

The Defendants appealed to the Sixth Circuit, which held that the

> very text in which the Ten Commandments are contained in the schoolhouse displays manifests a patently religious purpose. Defendants' courthouse displays also manifest a religious purpose because they utterly fail to integrate the Ten Commandments with a secular subject matter. When distilled to their essence, the courthouse displays demonstrate that Defendants intend to convey the bald assertion that the Ten Commandments formed the foundation of American legal tradition. The Supreme Court has held, however, that "such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment" when no effort has been made to integrate the Ten Commandments with a discussion or display of a secular subject matter. *Stone*, 449 U.S. at 41, 101 S.Ct. 192. Since Defendants' displays make no such effort, the district court correctly concluded that Defendants' primary purpose was religious.

Before the Supreme Court were the following questions:
1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.
2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.
3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

A 5-4 Court held that courts could look to the purposes behind local government actions in reviewing Establishment Clause challenges to those actions. The Court also declined to abandon the *Lemon* test. *See, Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court stated that while a legislature's stated reasons will generally be entitled to deference, the stated purposes must not be a sham. The Court majority also disagreed with the argument that the latest pronouncement of legislative intent was the only one which courts should consider, but rather stated that the evolution of the government actions could be considered. The dissenters argued that the history of the United States was closely influenced by monotheistic religions and that the display of the Ten Commandments in courthouses was in line with that tradition. The Court's opinion did not address the displays in the Harlan County Schools, which the district court and appellate courts also had held unconstitutional. Those displays were the subject of a separate petition for certiorari, filed at the same time as the petition in this case. On June 28, 2005, one day after this decision, the Court denied that petition for certiorari and the Sixth Circuit's decision with respect to the school display stands.

Muehler* v. *Mena, No. 03-1423, 2005 WL 645221 (U.S. March 22, 2005).
The case presented two important questions regarding the application of the Fourth Amendment to police conduct in executing a search warrant. The first question is whether asking questions of a person lawfully detained during the execution of warrant, without having probable cause to believe that person committed a crime constitutes, an additional seizure under the Fourth Amendment. The second is whether the police, in executing a search warrant of a residence, are authorized to keep an occupant handcuffed during the duration of the search or whether the occupant must be released once it becomes clear that she does not pose an "immediate threat."

This case arises out of an investigation into a gang related drive-by shooting in the City of Simi Valley, California. During the course of the investigation, the Simi Valley police developed probable cause to search a residence where one of the suspects lived and obtained a warrant to execute a search of the premises. The house was reported to be a "poor house" – that is, a single family home that housed a large number of persons in the residence, its garage and in vehicles parked on the property. Based on their investigation, the police also concluded that the house may have been used by other gang members.

Because of the evidence that gang members used the house, the police decided to deploy their Special Weapons and Tactics ("SWAT") team in executing the warrant. During the execution of the warrant, the police found four people on the premises. Each person was handcuffed and taken to the garage including respondent, Iris Mena. Because the police did not know whether Mena was connected to the gang and believed that she might interfere with the search, she was kept handcuffed during the duration of the search.

Because many of the gang were illegal aliens, the police had previously notified the INS of the

impending search. During the course of the search, an INS agent arrived and questioned the four detainees, including Mena. Upon completion of the search, in which the police seized a handgun, several baseball bats with gang writing on them, other gang paraphernalia, and marijuana, Mena was released.

Mena filed a Section 1983 action in federal district court against the police alleging the violation of her Fourth Amendment right to be free from unreasonable searches and seizures. The officers moved for summary judgment on the ground of qualified immunity. The court denied the motion and the Ninth Circuit denied the officers' interlocutory appeal. The case then went to trial where a jury found the officers liable for violating Mena's constitutional rights.

Petitioners appealed to the Ninth Circuit, which affirmed. The court of appeals registered no objection to the initial handcuffing of Mena. However, the court ruled that because "Mena was not a suspect in the crime, the officers should have released her from the handcuffs when it became clear that she posed no immediate threat and did not resist arrest-much less resist arrest actively." The court further held that "because Mena was not a suspect, the police should not have subjected her to any of the heightened security measures police officers employ while detaining persons suspected of being violent criminals—such as physical roughness, threatening deadly force, and using handcuffs for an extended period." While recognizing that the police must make "split second judgments," the court held that the police violated the Fourth Amendment because they "point[ed] a machine gun at Mena's face, roughly jerk[ed] her off of her bed, march[ed] her barefoot through the rain into a cold garage, and [kept] her in handcuffs for several hours."

The court of appeals further "note[d] with particular emphasis that the officers unduly invaded Mena's privacy by inquiring unnecessarily into her citizenship status." According to the court, the officers had no reason "to be suspicious of her citizenship status." The court concluded that "these facts alone . . . allege[] a violation of a constitutional right." According to the court, the police "must have *a particularized reasonable suspicion* that an individual is not a citizen to interrogate that individual regarding his citizenship."

In *Michigan v. Summers*, 452 U.S. 692, 705 (1981), the Supreme Court held that a search warrant "founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Although the Court acknowledged that "a prolonged detention, might lead to a different conclusion in an unusual case," the "routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant is not such a case." *Id*. at 705.

In *Summers*, the Court explained that the detention of the occupants is justified by a variety of interests including "minimizing the risk of harm to the officers," and preventing the destruction of evidence. *Id*. at 702. The Court further explained that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id*. at 702-03.

The U.S. Supreme Court held in light of the circumstances the force used to detain Mena was reasonable. According to the Court, the inherent risk in executing a search for weapons justified the used of handcuffs to effect the detention.

With respect to questioning Mena regarding her citizenship, the Court noted it has repeatedly held that mere questioning does not constitute a seizure. Because there was no finding that the questioning in this case prolonged the detention, there was no Fourth Amendment violation.

National Cable & Telecommunications Assn. v. Brand X Internet Services / FCC v. Brand X Internet Services, Nos. 04-277 & 04-281, 2005 WL 1498840 (U.S. June 27, 2005). The case involved the regulatory classification of cable modem service. The Court, in a 6-3 opinion, held that the FCC properly classified cable modem service as an information service without a telecommunications component. The Court applied *Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to the case, finding that the Ninth Circuit should also have applied *Chevron* and that the FCC interpretation of the Communications Act of 1943, as amended, was permissible. (Thanks to Tim Lay of Spiegel & McDiarmid for his tireless support of local government in filing briefs on behalf of IMLA and other local government groups in this case.)

On December 6, 2004, the Court denied the petition for certiorari filed by NATOA, NLC and other government organizations asking the Court to review whether the Ninth Circuit incorrectly determined that cable modem service is not a cable service.

Rancho Palos Verdes v. Abrams, No. 03-1601, 2005 WL 645209 (U.S. March 22, 2005). This case involved a Federal Communications Commission licensed amateur radio operator who also provided commercial mobile radio services from his home. The City of Rancho Palos Verdes, California, allowed him to construct a 52-ft. antenna on his property for his amateur operations. When the city learned of Abrams' unauthorized commercial use, it obtained an injunction barring him from using his antenna for commercial purposes until he obtained a conditional use permit. The city subsequently rejected his request for that permit.

Abrams sued, saying the city had violated his rights under the Section 332 of the Act. Citing Section 1983, Abrams sought damages, attorney fees, and other relief as a result of the rejection. Section 1983 of the Civil Rights Act allows parties that prevail in establishing certain civil rights violations to recover attorney fees. The U.S. District Court of Los Angeles, ordered the city to grant Abrams a permit but said that the Act "subsumed" all of his remedies, turning down his request for damages, attorney fees and costs.

The case was appealed to the Ninth Circuit, which reversed the district court and held that Section 1983 remedies are available for violations of Section 332 of the Act on two separate bases: 1) Section 332's remedial scheme was not sufficiently comprehensive to imply congressional intent to preclude Section 1983 relief, and 2) the savings clause in the Section 601 of the Act demonstrated Congress' affirmative intent to preserve Section 1983 remedies.

The U.S. Supreme Court found that §332's remedial scheme was comprehensive enough to foreclose a § 1983 remedy. The Court also disagreed with the Ninth Circuit's application of the savings clause in the Telecommunications Act and noted that nothing in § 1983 is affected by finding that § 332 contains the sole remedies for violations of this portion of the Telecommunications Act. IMLA filed a brief at both the petition and the merits stage. The merits brief was authored by the State and Local Legal Center.

San Diego v. Roe, No. 03-1669, 2004 WL 2775950 (U.S. 2004) (*per curiam).* The United States Supreme Court released a *per curiam* decision today in the above- referenced case. The Court reversed the Ninth Circuit's judgment in *Roe v. San Diego*, 356 F.3d 1108 (9th Cir. 2004), finding that the City did not violated Roe's First or Fourteenth Amendment rights when it terminated his employment as a police officer for selling videotapes of himself engaged in sexually explicit conduct.

Roe, a San Diego police officer, made a video showing himself stripping off a police uniform and masturbating. He sold the video on the adults-only section of eBay. The uniform was not the specific uniform worn by the San Diego police, but was identifiable as a police uniform. Roe also sold customized videos, as well as police equipment, including official uniforms of the San Diego Police Department (SDPD), and various other items. Roe's eBay user profile identified him as employed in the field of law enforcement.

Roe's supervisor discovered his activities when he came across an official SDPD police uniform for sale offered by an individual with the username "Codestud3@aol.com." He searched for other items Codestud3 offered and discovered the videos. The supervisor recognized Roe's picture, and subsequently shared what he had discovered with others in Roe's chain of command. An investigation followed and revealed that Roe's conduct violated specific personnel policies, including those governing conduct unbecoming an officer, outside employment, and immoral conduct. The Department ordered Roe to "cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the internet, U.S. Mail, commercial vendors or distributors, or any other medium available to the public."

Roe removed some of the items he had offered for sale, but did not change his seller's profile, which described the first two videos he had produced and listed their prices, as well as the prices for custom-made videos. The Department began termination proceedings, citing Roe for the added violation of disobedience of lawful orders. The proceedings resulted in Roe's dismissal from the police force.

The district court, in granting summary judgment to the City, ruled that Roe had not demonstrated that selling official police uniforms and producing, marketing, and selling sexually explicit videos for profit qualified as expression relating to a matter of "public concern" under *Connick v. Myers*, 461 U.S. 138 (1983).

The Ninth Circuit reversed, holding Roe's conduct fell within the protected category of "citizen commentary on matters of public concern." The court of appeals, applying *United States v.*

National Treasury Employees Union, 513 U.S. 454 (1995) *(NTEU),* concluded Roe's expression was not an internal workplace grievance, took place while he was off-duty and away from his employer's premises, and was unrelated to his employment. Therefore, according to the court of appeals, his "speech" was a matter of public concern entitled to First Amendment protection.

The Supreme Court stated that the Ninth Circuit's reliance on *NTEU* was "seriously misplaced." Instead, *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968), and *Connick* were the controlling precedents in this case. The Court noted that, while Roe's speech took place outside the workplace and was purportedly unrelated to his employment, the police department demonstrated "legitimate and substantial interests" that were compromised by his speech. The Court noted Roe's activities deliberately linked him to his law enforcement employment and that this link was injurious to the Department.

The Court explained that while Roe's speech was "unrelated" to his employment, the proper question was whether his speech was contrary to the department's regulations and harmful to the functioning of the police force. This, according to the Court, required utilizing the balancing test from *Pickering*, as further explained in *Connick*, to wit: To merit *Pickering* balancing, a public employee's speech must touch on a matter of "public concern."

The Court concluded that in this case, "there is no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test."

San Remo Hotel, et al. v. City & County of San Francisco, No. 04-340, 2005 WL 1421451 (U.S. June 20, 2005). The Court limited the question in this case to whether a Fifth Amendment Takings claim is barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim. The State and Local Legal Center authored IMLA's brief on the merits. IMLA had been involved previously in the case at the Ninth Circuit and at the California Supreme court. Tim Dowling and Community Rights Counsel authored those briefs.

In its most recent opinion, the Ninth Circuit held issue preclusion could apply to bar relitigation of takings issues necessarily decided in state court, and that issue preclusion applied to bar litigation of plaintiffs' federal takings claims. *San Remo Hotel L.P. v. San Francisco City & County*, 364 F.3d 1088 (9th Cir. 2004). The case arose when the San Remo Hotel and its owners brought a § 1983 action in federal court challenging the constitutionality of the city's hotel conversion ordinance and alleging that the ordinance effected facial and as-applied takings in violation of Fifth Amendment. The United States district court granted summary judgment for city on the ground that the claim was not ripe, forcing the plaintiffs to litigate their claim in state court. This was affirmed by the Ninth Circuit. *See* 145 F.3d 1095 (9th Cir. 1998). The plaintiff proceeded to state court and ultimately the California Supreme Court rejected the plaintiffs' state-law takings claims. *See* 41 P.3d 87 (Cal. 2002). The plaintiffs again sought to adjudicate their federal takings claims in federal court. Both the district court and the court of appeals ruled were the federal takings claims were barred by doctrine of issue preclusion.

IMLA's previous briefs have argued that the plaintiffs attempts at further federal court litigation are in direct contravention of the Full Faith and Credit Act and Ninth Circuit precedent in *Dodd v. Hood River County (Dodd I)*, 59 F.3d 852 (9th Cir. 1995) and *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (*Dodd II*). The *Dodd* cases and other Ninth Circuit precedent are contrary to San Remo's argument that a takings claimant, in federal court after reserving a federal claim in state court, may relitigate the precise issues decided by the state court. Although takings claimants may successfully avoid claim preclusion by invoking the protection of *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), that case provides no safe harbor from the doctrine of issue preclusion.

The specific issues sought to be re-litigated are whether the City's ordinance is subject to the heightened scrutiny usually reserved for land dedication cases under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The state supreme court discredited this argument. IMLA's position in briefing was that *Nolan*, *Dolan*, and subsequent Supreme Court cases strongly counsel against applying heightened means-end scrutiny to impact fees and other legislative exactions that do not physically invade a landowner's property.

The Court held that, on the facts of the case, the plaintiffs were not entitled to litigate their federal takings claims in federal court after the claims had been adjudicated in state court. The Court refused to create an exception to the Full Faith and Credit statute, 28 U.S.C. § 1738, for Takings cases. As noted above, the case had several trips to and between the Ninth Circuit Court of Appeals and the California state courts before arriving at the Supreme Court. At one point in the earlier litigation, the plaintiffs had succeeded in convincing the Ninth Circuit to abstain from ruling on federal issues in favor of the state court resolving certain state law issues. The plaintiffs also asked the state court to reserve their federal claims. But, as the Supreme Court noted, the plaintiffs phrased their state law claims in language that "sounded in the rules and standards established and refined by this Court's takings jurisprudence." The plaintiffs "effectively asked the state court to resolve the same federal issues they asked the [state court] to reserve. The California state supreme court ultimately decided the case under both its and the United States Supreme Court's precedents. Based on these facts, the U.S. Supreme Court refused to create an exception to the full faith and credit statute to provide a federal forum for litigants. The Court noted that "it is entirely *unclear* why [the petitioners] preference for a federal forum should matter for constitutional or statutory purposes." Justice Rehnquist, joined by Justices O'Connor, Kennedy, and Thomas, joined in affirming the Ninth Circuit, but expressed concern that *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), may have been wrongly decided.

Sherrill, New York v. Oneida Indian Nation of New York, No. 03-1160, 2005 WL 701058 (U.S. March 29, 2005). The United States Supreme Court, in an 8-1 opinion, held the Oneida Indian Nation of New York could not revive its sovereign authority, through open-market purchases, on lands over which New York and its political subdivisions had exercised constant regulatory authority for some 200 years.

The case arose when the Oneida Indian Nation of New York ("OIN") tribe brought a federal suit against the City of Sherrill, alleging that property, which was located within the historic boundaries of the OIN reservation and was again in present day possession of the tribe, was exempt from property taxes. Concurrently, the City initiated state court eviction proceedings. After cases were consolidated, the district court determined that the properties were not taxable, and the city appealed. The court of appeals ruled against the city.

The Court reversed, rejecting the theory that the OIN had "unified" its fee and aboriginal titles and could assert sovereign authority over the property. The Court based its ruling largely on the "long passage of time" between the original loss of the OIN property and its attempts to regain possession of the land and assert authority over it. Ultimately, laches, acquiescence, and impossibility rendered "inequitable the piecemeal shift in governance" the OIN sought in this suit.

The Court noted that a checkerboard of alternating state and tribal jurisdiction would seriously burden the administration of state and local governments and would adversely affect landowners neighboring tribal patches. The Court noted that Congress has provided a mechanism for the acquisition of lands for tribal communities which takes into account outside interests and provides for the exemption of property from state and local taxes. *See*, 25 U.S.C. § 465.

Smith v. City of Jackson, Mississippi, No. 03-1160, 2005 WL 711605 (U.S. March 30, 2005). The United States Supreme Court held disparate impact claims can be brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A § 623 (a)(1), (2) (1967). ("Disparate impact" discrimination does not require any evidence of a discriminatory intent by the employer and is ordinarily proved solely by statistics.) The opinion was rather splintered with five justices determining disparate impact claims can be brought, but disagreeing somewhat as to why. Three justices disagreed that the ADEA allows disparate impact claims at all. In spite of the ruling on availability of a disparate impact claim, the Court unanimously held the plaintiffs in this case did not meet their burden for stating a valid disparate impact claim.

The City of Jackson offers pay incentives to newly recruited police officers that it does not offer to officers with 5 or more years of service. In addition, officers with less time on the job received proportionally bigger percentage raises then officers with longer tenure. In particular, the City adopted its pay policy based on its perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market.

The Court began its analysis by noting textual similarity between the ADEA and Title VII. Justice Steven writing for three other justices then noted the "compelling precedents" of the Court's unanimous decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which held disparate impact claims were cognizable under Title VII. Justice Stevens noted the *Griggs* opinion relied on the purposes of Title VII and the EEOC's view that disparate impact claims were available under Title VII. He also noted that allowing disparate impact claims under Title VII was a "better reading of the statutory text." He then distinguished *Hazen Paper Co. v.*

Biggins, 507 U.S. 604 (1993), stating the case held disparate treatment captures "the essence of" the ADEA, but did not rule out the possibility of a disparate impact claim.

However, Justice Steven also wrote that, in contrast to the kinds of disparate impact claims that can be brought under Title VII, "the scope of disparate-impact liability under ADEA is narrower than under Title VII." Under the ADEA, an employer can defend against disparate impact claims if an employment decision is "based on reasonable factors other than age discrimination." Justice Stevens opinion also holds that disparate impact claims should be evaluated under *Wards Cove Packing co. v. Atonio*, 490 U.S. 642 (1989), a case which narrowly construed disparate impact liability under Title VII and which led Congress to amend Title VII but not the ADEA.

Relying on *Wards Cove*, the Court then determined the Petitioners had not met their burden in stating a claim for relief based on disparate impact. The Court noted it is not enough to simply allege there is a disparate impact or to point to a generalized policy leading to an impact. Rather the employee is responsible for isolating and identifying specific employment practices responsible for the disparities. In this case, the Petitioners failed to identify a relevant practice responsible for a disparate impact, but even if they had succeeded on this point, the Court stated the City's pay plan was "based on reasonable factors other than age."

Justice Scalia wrote a concurring opinion, agreeing with much of Justice Steven's opinion, but noting that the basis of that opinion did not provide sufficient basis for ruling on the question of whether disparate impact theory was available under the ADEA. Justice Scalia instead believes that *Chevron* deference is appropriate and would have deferred to the EEOC's view that disparate impact claims are viable under the ADEA.

Justice O'Connor wrote an opinion on behalf of herself and Justices Kennedy and Thomas in which she expressed the view that "disparate impact claims are not cognizable under the ADEA." She disagrees with the textual and legislative history readings put forth by Justice Stevens and disagrees with Justice Scalia's assessment that *Chevron* deference is appropriate in this case. Because of her view that disparate impact claims can never be brought under the ADEA, she joined the Court's judgment in favor of the City of Jackson in this case.

Van Orden v. Perry, No. 03-1500, 2005 WL 1500276 (U.S. June 27, 2005). A resident sued the state and state officials, alleging that a Ten Commandments monument donated by the Eagles in 1961 and placed on grounds of state capitol violated First Amendment. Following a bench trial, the United States district court entered judgment for State. Fifth Circuit held that: (1) state legislature had valid secular purpose for authorizing installation of monument, and (2) monument did not have primary effect of advancing or inhibiting religion as seen from eyes of reasonable observer.

The Fifth Circuit, using the *Lemon* test (and its modifications by the Supreme Court) reviewed the factual record of the placement of the monument. The court was persuaded that Texas did not "violate the First Amendment by retaining a forty-two-year-old display of the decalogue. The Ten Commandments monument is part of a display of seventeen monuments, all located on

grounds registered as a historical landmark, and it is carefully located between the Supreme Court Building and the Capitol Building housing the legislative and executive branches of government." The court was not persuaded that "a reasonable viewer touring the Capitol and its grounds, informed of its history and its placement, would conclude that the State is endorsing the religious rather than the secular message of the decalogue."

The question before the Supreme Court was "whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment." Chief Justice Rehnquist authored a plurality opinion, which was joined by Justices Scalia, Thomas and Kennedy, and which held the monument was part of a larger display which called to attention important people, events and principals in Texas' history. The Chief Justice also noted that no other complaint had been lodged regarding the monument in the 40 years it had stood on the state capitol grounds. The plurality did not apply the *Lemon* test to the facts of this case, finding that test not to be useful in dealing "with the sort of passive monument that Texas has erected on its Capitol grounds." The plurality instead looked to the history of the United States to find statements and letters from the Founding Fathers and early political thinkers which included references to God. The plurality placed significance on the fact that the United States has a "rich" tradition of religious acknowledgments. The plurality also noted, however, that there are differences between this case and cases where the Ten Commandments have been posted in schools and school prayer cases.

Justices Scalia and Thomas wrote concurring opinions which expressed a desire to return the Court's Establishment Clause jurisprudence to the "original" meaning of the Clause. Justice Scalia noted that the United States has always been a religious Nation, that it continues to be so, and that interpretation of the Clause does not prevent the State's favoring of religion generally, honoring God through prayer, or "venerating the Ten Commandments" in a non-proselytizing manner. Justice Thomas opined that the Establishment Clause has not been incorporated through the Fourteenth Amendment to apply to the States, but even if it had been incorporated, the display involved no coercive aspects and therefore did not violate the Constitution.

Justice Breyer, noting this was a close case when it came to deciding whether the display violated the Establishment Clause. Ultimately, he reviewed the setting in which the monument was placed, determining it did not suggest anything of a sacred nature, but rather simply reflected a message about the ethics and legal principles of the citizens of Texas. He also noted that in 40 years no one had challenged the presence of the monument, leading him to conclude that few individuals had understood the monument to be an effort by the government to favor religion over non-religion, or a particular sect over any other sect.

The dissenters , on the other hand, reciting the text on the monuments, noted there was no relation between that text and the history of Texas or the Nation. The dissenters also disagreed with the assertion that the monument provided reasonable observers with a basis by which to guess that the monument honored any person from Texas history. The dissenters also countered the plurality opinion with their own quotes from the Founding Fathers supporting their position

that the monument would have been considered to violate the Establishment Clause. The dissenters also discounted the reliance on the fact that 40 years had passed without another challenge.