International Municipal Lawyers Association
www.imla.org

IMLA NEWS
Issue 4 – February 25, 2016

Commerce Clause: Colorado Use Tax Law Requiring Out of State Retailers to Track and Report Coloradans' Purchases Does Not Violate Commerce Clause

Direct Mktg. Ass'n v. Brohl, No. 12-1175 (10th Cir. Feb. 22, 2016)

In the latest chapter in Colorado's attempt to collect use taxes on purchases from vendors with no presence in the state, the Tenth Circuit has upheld a Colorado law requiring those vendors to track and report purchases by Colorado residents. The Circuit Court found that, although the Supreme Court's precedents prohibit requiring out of state vendors to collect sales or use taxes, it says nothing about laws requiring mere record-keeping and reporting by out of state vendors.

Under the Supreme Court's long-standing *Quill* opinion and its progeny, states may not require entities with no physical presence inside state lines to collect sales or use taxes. States themselves, however, are entitled to collect use taxes on items purchased from out of state vendors. Unfortunately for state tax authorities, purchasers from out of state vendors generally ignore the requirement to report their transactions and pay use taxes.

To add muscle to its use tax statute, Colorado passed provisions in 2010 requiring out of state vendors who were not paying sales tax in Colorado to keep track of their Colorado sales, to send Colorado purchasers a record of amount, date and item purchased and reminding them of their responsibility to pay use taxes, and to provide records of Coloradans' purchases to the state's tax authorities.

The Direct Marketing Association, a group of internet and print-based sellers (DMA) sued, alleging that the Colorado law unduly burdened and unfairly discriminated against

interstate commerce. They succeeded at the district court, which found both facial and as-applied violations of the Commerce Clause—and secured a permanent injunction against enforcement of the Colorado law. However, the Tenth Circuit thereafter determined that the district court lacked jurisdiction to hear DMA's case, based on the Tax Injunction Act (TIA). DMA challenged that determination at the Supreme Court, which reversed, finding that the TIA did not prevent the federal courts from considering DMA's complaint. Thus, the Tenth Circuit again found itself considering an appeal of the lower court's decision in favor of the DMA.

The Circuit Court reversed. It disagreed with the district court's analysis that *Quill* not only prohibited tax collection by out of state vendors but had also been extended to prohibit more innocuous requirements such as licensing and registration by out of state entities. It also disagreed that the Colorado law imposed unequal duties on out of state vendors and required the application of strict scrutiny: the Colorado law applied to any entity which did not collect sales or use tax, and was not specifically aimed at non-Colorado entities. And the burden imposed on out of state vendors—to report information to Colorado tax authorities—was no greater than the duty in-state entities already had.

LINK

Employment: City Does Not Become "Employer" Merely By Granting Permit to Operate Taxi

Callahan v. City of Chicago, No. 15-1318 (7th Cir. Feb. 17, 2016)

The Seventh Circuit has rebuffed a Chicago cab driver who claimed that, because the City granted her a chauffeur's license and extensively regulated taxicab operations within its boundaries, it was her "employer" under the FLSA and was liable for paying her a minimum wage. The plaintiff obtained a Chicago chauffeur's license and rented a cab. Her net taxi proceeds between 2009 and 2011 averaged less than minimum wage. She argued that the City had to make up the difference between her proceeds and the minimum wage, on two theories: 1) its taxi regulations were confiscatory (a takings theory) and 2) its taxi regulations were so extensive that the city, which obtained significant benefit from having taxis for its residents, must be considered her employer (the FLSA theory).

Affirming the lower court's dismissal, the Seventh Circuit found that no property interest had been "taken" by the state. None of the plaintiff's property was subject the regulations – she leased the cab and taxi medallion (and medallions had dramatically climbed in value, from $64,000 in 2007 to $348,000 by 2013).

The Circuit Court also disagreed with the plaintiff's novel FLSA minimum wage argument. The theory that by "suffering or permitting" drivers to work (in FLSA

parlance), Chicago became their employer was an "extravagant" claim, and would make everyone who contributed to city life—including restaurateurs and hoteliers--potential public employees. This would only have cataclysmic fiscal implications, it would also raise huge First Amendment issues. As the Court put it:

> [t]he contention that the government permits to work, and thus employs, everyone it does not forbid to work has nothing to recommend it . . . . The core question is whether extensive regulation makes the government an employer of the regulated parties. Our answer to that question is "no."

LINK

Employment: Hiring of Cuban-American Over Better Qualified Italian-American Constitutes Racial Discrimination; "Race" Includes Ethnicity

Village of Freeport v. Barrella, No. 14-2270-cv (2d Cir. Feb. 16, 2016)

In 2009 the new mayor of Freeport, New York sought to replace the all-white command staff of the police department, seeking to keep a campaign promise to make the department "achieve his vision of community unity." He sought to appoint a Cuban-born American who self-identified as a member of the "white" race over a "white Italian-American born in the United States" with a master's degree, more supervisory experience, and a higher score than the Cuban-American on the civil service exam.

A jury held that the City and the mayor had discriminated against the losing candidate, prompting the City to appeal, arguing that "Hispanics" do not constitute a distinct "race" as a matter of law--both candidates were "white" for purposes of federal anti-discrimination statutes. Thus, the mayor's decision to hire one white candidate over another could not have been racial discrimination.

The Second Circuit disagreed, holding that "race" includes ethnicity for purposes of § 1981, so that discrimination based on Hispanic ancestry or lack thereof constitutes racial discrimination under that statute and that "race" is defined identically for purposes of Title VII.

LINK

Police: Excessive Force Claim Not Barred Under Heck Principles Where Plaintiff Pleads No Contest to Resisting Arrest

Nelson v. Green Oak Twp., No. 14-10502 (E.D. Mich. Jan. 20, 2016)

A Michigan District Court has denied in part defendants' motion for summary judgment in an excessive force action, finding that plaintiff was not barred from bringing her case merely because she had pled no contest to a charge for resisting arrest.

The case arose out of a scenario where officers were called to a home by a suicidal person. While police prepared to take the caller to a hospital, another occupant of the home collected articles of clothing for her. At some point, the bag of clothing was thrown at or near an officer, instigating an arrest. Efforts to subdue the second person resulting in pulling her arms high up behind her back, despite her protestations that she was being treated for nerve damage in her shoulders. Subsequent examination revealed that she had suffered contusions and aggravated her pre-existing condition.

Sixth Circuit precedent supported her Fourth Amendment claim that such rough treatment for a non-threatening subject, which included the officer's pulling her hair, violated Constitutional standards in effect at the time. However, the officers cited *Heck v. Humphrey*, 512 U.S. 477 (1994) for the proposition that, because the complainant had pled guilty to resisting arrest, she could not also bring a § 1983 claim based on the same underlying facts. However, as the court noted, she had only pled no contest to the resisting arrest charges—which invalidated the application of *Heck* and preserved her right to pursue a claim.

LINK

Religion: Affordable Care Act Contraceptive Mandate Does Not Violate RFRA or Free Exercise / Establishment Clauses

Eternal Word TV Network, Inc. v. Sec'y of the United States HHS, No. 14-12696 (11th Cir. Feb. 18, 2016)

A Catholic broadcast network, the Catholic Archdiocese of Atlanta and other Catholic groups challenged the contraceptive mandate in the Affordable Care Act ("ACA"). They contended that, despite opt-out provisions added to the ACA which allow religious organizations to decline to provide contraceptive coverage in their own health plans, the requirement that they facilitate, through "third party administrators," the provision of contraceptive healthcare to their employees violated the Religious Freedom Restoration Act ("RFRA") and the First Amendment's Free Exercise and Establishment clauses.

The Eleventh Circuit disagreed in an extensive 148-page opinion, finding that the accommodative provisions of the ACA do not violate RFRA, because they do not

"substantially burden" the religious group's exercise and because the government's approach is the "least restrictive means" of advancing a "compelling interest." Furthermore, because the ACA scheme did not discriminate based on any religious sect or denomination, it was a neutral law which did not violate the First Amendment's Establishment or Free Exercise clauses. Finally, the impact on Free Speech, if any, was justified by the government's compelling interest in ensuring that women have access to contraceptive care.

LINK

Religion: Prison's Denial of Rastafarian Feast May Constitute Substantial Burden on Religion Under RLUIPA

Wright v. Lassiter, No. 15-6958 (4th Cir. Feb. 17, 2016)

The Fourth Circuit has reversed a district court grant of summary judgment to North Carolina prison officials in a case brought by an inmate, acting *pro se*, who alleged that they officials violated his RLUIPA rights by refusing to allow him and fellow Rastafarians to hold a feast during certain holy days.

The Eastern District of North Carolina had determined that, because the prisoners were allowed to participate in various other Rastafarian rituals and celebrations, the denial of the request for a feast did not substantially burden their religious exercise. The Circuit Court disagreed, holding that merely allowing other religious exercise did not necessarily justify denying the feast under RLUIPA. It reversed and remanded, requiring the lower court to further assess the significance of the feast within Rastafarian practice.

LINK

Speech: Use of Public Funds to Promote Measure Modifying Police Bargaining Provisions is Legitimate "Government Speech"

Fraternal Order of Police v. Montgomery County, No. 45 (Md. Feb. 23, 2016)

The Maryland Court of Appeals has determined that Montgomery County "is authorized to use its human and fiscal resources to encourage the electorate of the county to support, or oppose, a ballot measure that may have a significant impact on the operations of the county government."

The case arose in the context of a unique provision of the County's collective bargaining law with its Police Department. The provision, not included in the bargaining provisions for firefighters and other county employees, required that, even if certain enumerated

actions by the County were not subject to collective bargaining, the *effect* of those actions nevertheless required collective bargaining.

In 2011, the Montgomery County Council passed a bill effectively eliminating much of the anomalous provision, so that police collective bargaining rules mirrored those of other county employees. The police promptly put the measure before the voters via a referendum slated for 2012, and both sides began efforts to win the hearts and minds of County voters. The County Executive authorized expending $123,000 in public funds to campaign in favor of the measure, which passed with a 58% to 42% plurality.

The police sued, alleging a spectrum of violations of Maryland election laws, of the County charter, of ethical provisions and so on, and demanded injunctive relief and reimbursement of the public funds. They were successful, initially. The trial court found that the actions of the County Executive were *ultra vires*, and that the doctrine of "government speech," which permits governments to promote (or oppose) issues affecting them, did not apply.

That decision was overturned on appeal, and again appealed, to Maryland's highest court. In a comprehensive review of the government speech doctrine, Maryland's Court of Appeals drew upon a relatively recent line of cases beginning with the Supreme Court's 2005 decision in *Johanns v. Livestock Marketing Association* to confirm that, so long as Establishment Clause and other constitutional precepts are not trampled, governments are permitted to endorse and promote causes which further their legitimate objectives—including advocacy on non-partisan ballot measures.

The Court of Appeals then looked at the laws of Maryland and Montgomery County to determine if they prohibited the County Executive's referendum expenditures. Neither the Maryland Constitution nor any other law clearly conferred--or withheld--such authority. However, the Court of Appeals identified xpansive language in numerous cases construing the intent and spirit of Maryland's home rule architecture, and codification authorizing the county council "to pass any ordinance not inconsistent with state law . . . that may 'may aid in maintaining the peace, good government, health, and welfare of the county.' "

The court found that modification of the anomalous police bargaining provision was a legitimate exercise of governmental power and that spending public funds in a non-partisan context to promote that modification was protected government speech.

LINK

Trials: "Intra-corporate Conspiracy Doctrine" Requires Showing Complicity of Multiple Parties: City Cannot Conspire With Itself

Kelly v. City of Omaha, No. 14-3446 (8th Cir. Feb. 18, 2016)

A rental property owner in Omaha was cited by a code inspector for a variety of violations over the course of years and was ultimately denied occupancy permits by other employees of the Omaha city government. She alleged the initial citations resulted from her refusing to engage the code inspector's sexual advances and that the latter violations and permit denials were issued by other city employees in conspiracy with him. She sued under 42 U.S.C. §1985, alleging there was a conspiracy to obstruct justice by a cohort of code officials. The district court rejected the claim, holding that she had only pled bare legal conclusions and not facts.

The Eighth Circuit affirmed, noting that it agreed with the district court, but also, even assuming Kelly had pleaded sufficient facts, the "intra-corporate conspiracy doctrine" precluded her claim because it requires multiple parties – meaning a local government cannot, by definition, conspire with itself.

LINK

Trials: Unionized Group Lacks Standing to Assert Individual Compensatory Damages Claims

Higgins Electric, Inc. v. O'Fallon Fire Protection District, No. 15-1222 (8th Cir. Feb. 22, 2016)

The O'Fallon Fire Protection District sought to construct a new fire house in 2014 and bid out the project. Ultimately, the District did not choose the lowest bidder – Higgins Electric Inc. – but instead chose a different provider. Higgins, a unionized outfit, sued, alleging that the District violated § 1983 by violating the members' Equal Protection and Due Process rights. The district court concluded Higgins lacked standing to sue.

The Eighth Circuit affirmed the lower court, holding Higgins' requested relief – compensatory damages – was peculiar to the individual members, meaning it failed the third prong of the Supreme Court's *Hunt* test for group standing under Article III of the Constitution.

LINK

Water: Circuit Courts Have Direct Jurisdiction Over Arguments Regarding EPA's "Clean Water Rule"

United States Environmental Protection Agency v. Murray Energy Corporation, No. 15-3751 (6th Cir. Feb. 22, 2016)

In a multi-jurisdictional case consolidating actions from West Virginia, Texas, North Dakota, Georgia, Arizona, Washington, Ohio and elsewhere, the Sixth Circuit has rebuffed arguments that it lacks jurisdiction to hear petitions challenging the EPA's adoption of a new "Clean Water Rule" relating to its "waters of the United States" regulatory scheme. The actions arose after the EPA promulgated a "bright line rule" intended to better clarify which waters are encompassed within WOTUS. The effect of the bright line rule, in the eyes of many state authorities, was to expand EPA's domain over many tributaries and peripheral waterways which had previously not been subject to federal oversight. They challenged the EPA's authority and process in take such steps, citing the APA and other standards.

The issue raised here was much more fundamental--whether the Sixth Circuit even had the jurisdiction to hear such a case. If the case involves "effluent limitation," then applicable law provides for review directly at the Circuit Court level; if not, then the direct jurisdiction of the Courts of Appeal is more questionable. The majority found that Congressional intent favored direct review by the Circuit Courts of the United States.

The somewhat unique arguments in this case came from petitioners, who argued that the court lacked jurisdiction to hear their own petitions. The decision was split three ways, with one dissent and one concurrence that noted the Sixth Circuit's 2009 precedent in *National Cotton v. U.S. E.P.A.* required concurrence in the result. Below is the language from the conclusion of the opinion that seemed to have little support from the other two panel members:

> Instead, recognition of our authority and our duty to directly review the Clean Water Rule in this multi-circuit case is in all respects consonant with the governing case law and in furtherance of Congress's purposes. Conversely, to rule that we lack jurisdiction would be to contravene prevailing case law and frustrate congressional purposes without substantial justification. We hold that jurisdiction is properly laid in this court. All pending motions to dismiss are DENIED.

LINK

THIS JUST IN: STATE LEGISLATURES BLOCK CITIES' EFFORTS TO RAISE MINIMUM WAGES

Birmingham, Alabama has moved to establish a city-wide minimum wage of $10.10 per hour. Alabama's state lawmakers are reining in that effort, seeking to preempt the local revolution.

This is but one example of conflicts nationwide between municipalities and state capitals over minimum wages as well as land use, fracking, e-cigarettes and a host of other issues. Two recent articles in the *New York Times* review the controversies.

Times writer Alan Blinder covers the minimum wage fight in "When a State Balks at a City's Minimum Wage"

LINK

and *Times* writer Shaila Dewan surveys a wider range of preemption controversies in "States are Blocking Local Regulations, Often at Industry's Behest"

LINK