Recent U.S. Supreme Court Decisions and Other Current Issues for Local Governments

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1. BEFORE THE COURT

Practice before the Supreme Court has become specialized over the past twenty or so years. A party seeking review by the Court, opposing its review, or participating in a case where the Court has granted certiorari should recognize that the Court is not a court of error. The Court receives almost 10,000 petitions each year. Of these, it grants certiorari in about 80 cases and schedules oral argument for about 70 cases. Because prisoners (and other *in forma pauperis* petitioners) file the largest number of petitions with the Court, statistics suggest that only about 1% of the petitions filed are granted. If only paid cases filed with the Court are considered, the number increases to about 4%. In other words, the chances of getting the Court to take your case are slim.

While rudimentary, counsel should review Rule 10 of the Supreme Court Rules as part of any consideration as to whether to seek certiorari. The Rule provides a guide to how counsel might structure a petition and ought to provide insight into whether to file a petition at all. The Rule provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
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> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
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> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Justice Alito recently pointed this out in his concurrence in the denial of certiorari in *Salazar-Limon v. City of Houston.*

Framing the issue in a petition for certiorari ought to be the second step after reviewing the Rule. As noted, the Court must weed through several thousand requests to find the very few cases it wants to decide. Four Justices must vote to grant certiorari and each of their votes is precious and well considered. A Justice may believe that an issue ought to be decided, but will withhold

the vote to grant certiorari for many reasons. These can include fear that the issue will be decided adversely to the Justice's views for a variety of reasons including that the arguments advancing the issue in the petition seem leaden and unlikely to attract a majority; or a belief that another case frames the issue better.

The petitions in *Lane v. Franks* and *Integrity Staffing Solutions v. Busk* offer two different approaches to framing an issue. The Court granted both petitions. In *Lane*, the issue was framed succinctly and without prelude; counsel couched the issue in viscerally and intellectually compelling language. In *Integrity Staffing Solutions* counsel offered a prelude to the similarly succinct issue offering a bit of important background to what might have otherwise appeared a very dull question. Each of these attorneys is a respected Supreme Court counsel who is a sought-after advocate for a reason.

While the Court denies certiorari to many similarly succinct and well phrased issues, many of the petitions it denies are garbled and include far too many issues for the Court's consideration. A case generally has one compelling reason that can attract the Court's attention and as with *Lane* a corollary issue attendant to it. Petitions that offer the Court an opportunity to decide more than two issues are rarely granted and framing the petition to include myriad issues may enjoy client approval, but will rarely find success.

Because the Court receives so many petitions, finding amicus support can often help get the Court's attention and show that the case has a broader impact. Hearing the Petitioner make that argument can certainly be persuasive, but proof that the issue affects more than just the litigants says much more. Finding an amicus can often be difficult as where there is a circuit split, there will be many potential amici who don't want to see the law changed in their circuit, or their state court has adopted a rule with which they are happy. The more diverse the group the amicus represents the more likely the Court will recognize the need for deciding the issue.

An amicus can sometimes change the proposed issue as the amicus may have a different view of what the Court should decide. Indeed, an amicus may articulate the issue differently and offer better reasons as to why the Court ought to decide the issue. A recent example of a case in which the Court granted certiorari where IMLA framed the issue differently than the petitioner was in *District of Columbia v. Wesby*. In *Wesby*, the petition focused the issues on the specific facts, which involved a trespassing suspect's claim of an innocent mental state and whether police officers are required to credit that mental state in making probable cause determinations for the purposes of effectuating an arrest. IMLA's amicus brief presented the issues more broadly and framed the issue outside of the trespassing context.

Additionally, the Court's rules do not limit the amici to arguing the record and in large measure the Court's practice encourages the amici to bring to the Court's attention relevant facts, treatises and studies both at the petition and merits stage. In *Comptroller v. Wynne*, IMLA filed an amicus brief at the petition stage in support of the State of Maryland and several Maryland counties and the Court sought the views of the Solicitor General. The Solicitor General filed his views in early April 2014, suggesting that the Court grant certiorari and reverse the Maryland

court; he cited to facts offered by IMLA in its amicus brief that were not part of the record. The Court granted certiorari and decided the case as a part of its 2014 Term. Similarly, in *Murr v. Wisconsin*, which was decided last term, Justice Kennedy cited to the IMLA amicus brief, which listed over 100 examples of merger provisions from around the country in rejecting the petitioner's argument. And in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), Justice Alito in deciding an important government speech case referred several times to the IMLA amicus brief and to a survey IMLA conducted of its members to support his decision.

As a Respondent, when the Petitioner files with the Supreme Court, counsel first must consider whether to file a response or waive doing so. Advice on this topic varies, with some counseling to file a response and others counseling against filing. Filing a response draws attention to the issue and for that reason alone, many counsel against it. On the other hand, the Court will ask for a response in cases it considers might merit certiorari. Just one Justice can ask for a response, so the request may not indicate that certiorari will be granted, but certiorari will not be granted where there is not a response and the request draws attention to the issue. So, in cases where counsel believes a response will be requested, it is best to be proactive and file and not waive the response. The response needs to recognize that the question for the Court at this stage is whether to grant certiorari, not whether the lower court was wrong in its decision. Going back to Rule 10, counsel for the Respondent should describe why the case does not fit. In *Plumhoff v Rickard*, the Court asked the Respondent to file a response. That response provided little help to the Court and may be a model of how not to write a Respondent's brief at the petition stage. In contrast, the City of Chicago's outside counsel, Ruth Masters, and its appellate team lead by Benna Ruth Solomon filed a model response in *Hillman v. City of Chicago* and the Court denied certiorari in May 2017.

Unlike a Petitioner seeking certiorari and trying to draw attention to the issue, the Respondent tries to cover itself in anonymity. So, in addition to the reasons for filing or not filing a response already discussed, because the goal of the Respondent is to have the Court deny certiorari, it is an extremely rare case that a Respondent should consider obtaining amicus support at the certiorari stage as doing so only draws attention to the case and increases the chances that the Justices will take a closer look at the case. Additionally, the Respondent may want to look at the Court's schedule. Timing a response can reap some rewards. For example, timing a response or waiver to get into the "long conference" could make a difference in the quest for anonymity.

During its term, the Court holds private conferences to discuss whether to grant certiorari. The long conference is the first conference of the term and is usually held the Friday before the Court's first oral arguments in the term. At the long conference, the Court reviews thousands of petitions that have stacked up during the summer recess. At other conferences during the year the numbers are about a hundred or so, which makes anonymity at the long conference statistically more likely. When the Court conferences, the Chief Justice circulates a list of cases for discussion and each Justice may add to that list. If a case scheduled for that conference is not on the discussion list, certiorari will be denied.

If the Court grants certiorari, the first thing counsel should do is contact the Georgetown Supreme Court Institute and ask for a moot court. The Institute provides this service free of charge and to the first party to contact it; although, its new policy is to toss a coin in those cases where each party contacts it within 24 hours, so contacting them quickly cannot be over emphasized. (If you would like to schedule a moot in your case, call or email the Director, Debbie Shrager (202-662-9350 or des113@georgetown.edu). Merits briefs can be due in very short order. This means that counsel should be prepared by having lined up amici and possibly engaging Supreme Court counsel. Getting Supreme Court counsel for the merits and getting amici at this stage will be much easier than at the petition stage. Attorneys practicing before the Court often want to increase the number of arguments on their resume and may be willing to handle a case pro bono. Amici will often line up unbidden to file either for or against an issue. Coordinating the amicus effort for the client should be an important part of the advocacy. Rather than each amicus writing on the same subpart of an argument, each can take an argument, support it and expand it, avoiding repetition. Counsel for a party cannot write an amicus brief in the case, so while discussion and coordination are important, those discussions and that coordination cannot direct the amicus brief in detail.

In the last several years, the Ninth Circuit generated the most merits cases of any circuit and its reversal rate has been high. In the October 2013 term, the Ninth and Sixth Circuits tied for the most cases, but in the October term of 2011, the Ninth Circuit generated almost one third of the cases decided. It was reversed in roughly 71% of those cases. In the 2014-2016 terms, the Ninth Circuit still generated the most merits cases, though not as many in prior years (21%, 13% and 11% of the merits cases), but the Supreme Court continued to reverse it at a high rate (63%, 80% and 88% of the time). Only state supreme courts combined for generating more merits cases than the Ninth Circuit for the 2015 term and 2016 term. In the 2016 term, the Sixth Circuit and the Federal Circuit were close behind the Ninth Circuit, generating 10% of the merits cases respectively and both were reversed 86% of the time. The Ninth Circuit's trend continued in the 2018 term, generating both the highest number of cases on the Court's docket (19%) and reversed at the highest rate of reversal (86%). In fairness, most cases the Court accepts are reversed. The 2018 term saw a 63.5% reversal rate overall, but that is low compared to prior years (74% in the 2017 term and nearly 80% of in the 2016 term). So, the odds are, if you were victorious below and the Court accepts certiorari, you may be in for a reversal. Scotusblog.com (from which these statistics are derived) provides a great resource on the Court and provides statistical reports for much of its activity that can be vital to understanding the Court.

The Scotusblog.com statistics shows who has argued cases before the Court and their experience. Many of the premier practitioners before the Court have experience in the Office of Solicitor General, some having been Solicitor General at one time. As noted, practice before the Court has become more specialized, and in the 2018 term, nearly 70% of the oral advocates were considered "experts" (defined as having argued at least 5 cases before the Court).

2. OCTOER TERM 2019

Department of Homeland Security v. Regents of the University of California / Trump v. NAACP - Immigration

In 2012, then President Obama adopted the Deferred Action for Childhood Arrivals program or DACA to postpone deportation of undocumented immigrants brought to America as children and, if they met certain conditions. DACA also allowed them to obtain work permits, social security numbers, pay taxes, and become part of the mainstream economy. In 2017, the Trump administration rescinded DACA, arguing that it was illegal from its inception, and therefore could no longer continue in effect. The decision to rescind DACA was based on a 2015 Fifth Circuit decision concluding that the Deferred Action for Parents of Americans or DAPA, a similar program to DACA, exceeded DHS' statutory authority.

Challengers including state and local governments brought suit, arguing that rescinding DACA was arbitrary and capricious under the Administrative Procedure Act. The federal government argued that the decision to rescind DACA is not reviewable and even if it is, it did not violate the APA.

Three lower courts have concluded ending the policy is both reviewable and likely unlawful. The Ninth Circuit concluded that the decision to rescind DACA is not committed to agency discretion and is therefore reviewable by courts. The Ninth Circuit also concluded that the plaintiffs were likely to show that the decision to rescind the policy was arbitrary and capricious under the APA because it was based on a flawed legal premise. The Ninth Circuit emphasized:

> To be clear: we do not hold that DACA could not be rescinded as an exercise of Executive Branch discretion. We hold only that here, where the Executive did not make a discretionary choice to end DACA—but rather acted based on an erroneous view of what the law required—the rescission was arbitrary and capricious under settled law. The government is, as always, free to reexamine its policy choices, so long as doing so does not violate an injunction or any freestanding statutory or constitutional protection.

The issues in this case are whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.

IMLA joined an amicus brief filed by over 100 cities and counties and other national local government organizations in support of the challengers. Oral argument is scheduled for November 12, 2019.

New York State Rifle & Pistol Association, Inc. v. City of New York – Second Amendment

A New York City administrative rule allows residents to obtain a "carry" or "premises" handgun license. The "premises" license allows a licensee to "have and possess in his dwelling" a pistol or revolver. A licensee may only take his or her gun to specific shooting ranges located in the

city. Challengers want to bring their handgun to their second home and to target practice outside the city and claim the premises license violates their Second Amendment rights (they also bring challenges under the First Amendment, the Commerce Clause, and the constitutional right to travel). The Second Circuit held the law is constitutional on all accounts.

The issue before the Supreme Court is whether New York City's ban on transporting a handgun to a home or shooting range outside city limits violates the Second Amendment, the Commerce Clause, or the constitutional right to travel.

Since the Supreme Court accepted certiorari, the City has amended the challenged regulation and now allows premise license holders to transport their firearms to additional locations including to shooting ranges outside of the City and to second homes. In addition, since the Court accepted certiorari, New York state also amended its handgun licensing statute to require localities to allow holders of premise licenses to engage in such transport. Thus, the City now argues that the case is moot based on these changes to the law.

IMLA joined an amicus brief filed by the State and Local Legal Center in support of New York City in this case.

In a two page per curiam decision and a victory for New York City, the Supreme Court concluded the issue in the case is now moot given that both the State and the City amended their laws to provide "the precise relief that the petitioners requested…" The Court remanded the case to the Second Circuit to address any residual disputes, including whether the new rule would still infringe on any of the petitioners' rights given that they argue that they may not be allowed to stop for gas, coffee, or food when transporting their firearms from their homes in New York City to shooting ranges or homes outside the city. The lower court was also instructed to consider whether it was too late for the petitioners to add a claim for damages when damages were not sought in the petitioners' complaint and not raised until well into litigation with the Supreme Court.

Six Justices agreed that the case is now moot given these developments. Justice Kavanaugh concurred, but wrote separately to indicate that he is concerned about how lower courts are applying *Heller* and *McDonald* and that he believes the Supreme Court should address that issue soon. Justice Alito dissented, joined by Justices Gorsuch and Thomas. In the dissent, which is comparatively quite lengthy, Justice Alito complains that "[b]y incorrectly dismissing this case as moot, the Court permits our docket to be manipulated in a way that should not be countenanced." The dissent goes on to argue that New York City had failed to meet its heavy burden to demonstrate mootness. According to the dissent, the Court still had a live case before it because it was not "impossible for [the] court to grant any effectual relief whatever to the prevailing party."

Altitude Express Inc. v. Zarda / Bostock v. Clayton County, Georgia / R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission – Employment Discrimination / Title VII

The issue in *Zarda* and *Bostock*, which are consolidated, is whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.

The issues in *R.G. & G.R. Harris Funeral Homes* is whether Title VII prohibits discrimination against transgender people based on: (1) their status as transgender; or (2) sex stereotyping under *Price Waterhouse v. Hopkins.*

As defined by Title VII, an employer has engaged in "impermissible consideration of ... sex ... in employment practices" when "sex ... **was a motivating factor** for any employment practice," irrespective of whether the employer was also motivated by "other factors." 42 U.S.C. § 2000e-2(m).

By way of background, in *Price Waterhouse,* the Supreme Court concluded that an adverse employment action taken based on gender stereotypes constitutes impermissible sex discrimination. 490 U.S. 228 (1989). In *Price Waterhouse,* the female accountant was denied a promotion because she was "too aggressive," need to walk, talk, and dress more femininely, wear more makeup and jewelry, and take a lesson in charm school.

Another important case by way of background for these Title VII cases is *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75 (1998). In *Oncale,* the Supreme Court held male on male sexual harassment was actionable under Title VII. As relevant for the transgender and sexual orientation cases, the Supreme Court noted:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Id. at 79.

Both Zarda and Bostock were allegedly fired because they are gay. The Second Circuit en banc court held in *Zarda* that "sex is necessarily a factor in sexual orientation" and sexual orientation discrimination is therefore at least motivated in part by sex. The Eleventh Circuit in *Bostock* came to the opposite conclusion relying solely on its prior precedent.

In the transgender case, Aimee Stephens who assigned the male gender at birth told her boss, the owner of a small funeral home, that she planned to transition from male to female. She claims she was terminated from the funeral home by its owner shortly after informing him of her transgender status. The owner of the funeral home indicates he objects to her continuing in the position due to religious reasons.

The Sixth Circuit held that discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex. The court concluded that "[i]t is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." The court went on to explain, "[h]ere, Rost's decision to fire Stephens because Stephens was 'no longer going to represent himself as a man' and 'wanted to dress as a woman,' falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith* forbid."

The Supreme Court heard oral argument in all these cases on October 8, 2019 and a decision is expected before the end of June 2020.

Hawaii Wildlife Fund et al. v. County of Maui – Clean Water Act

The County of Maui operates a wastewater treatment facility that filters and disinfects the sewage it receives then releases the wastewater into four onsite injection wells. The injection wells are long pipes into which the wastewater is pumped. The wastewater then travels approximately 200 feet underground into a shallow groundwater aquifer beneath the facility. It is undisputed that wastewater from these wells eventually makes its way into the Pacific Ocean and that the County was aware of that fact for some time. Specifically, a 2013 tracer study, conducted on behalf of the EPA, the Army Corps of Engineers and the Hawaii Department of Health, confirmed that treated wastewater from the County's UIC wells reached the ocean roughly half a mile south of the treatment plant. On average, it took approximately 10 months for groundwater containing County wastewater to enter the ocean along approximately 2 miles of coastline.

The Clean Water Act prohibits the "discharge of any pollutant" unless certain provisions of the Clean Water Act are complied with. See 33 U.S.C. § 1311(a). The Clean Water Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The Clean Water Act defines "point source" as any "discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). The Clean Water Act allows discharges of pollutants when an NPDES permit is obtained and complied with. See 33 U.S.C. § 1342.

Citizen groups sued, claiming the County needed a NPDES permit for its injection of treated wastewater into the underground injection control wells. The district court held that the County violated the Clean Water Act based on a novel "conduit" theory of liability – i.e., the treated wastewater reached navigable waters without a NPDES permit. Under the conduit theory the court held that the unconfined groundwater acted as a "conduit," conveying pollutants from the point source – the permitted UIC wells – to the ocean. The Ninth Circuit upheld the ruling.

The issue before the Supreme Court was whether a violation of the CWA occurs only when a pollutant is released directly into navigable waters, or whether it is enough that the pollutant is released indirectly.

On April 15, 2019 (after the Court granted certiorari), the EPA issued interpretive guidance, concluding that releases of pollutants to groundwater are categorically excluded from the Act's permitting requirements because Congress explicitly left regulation of discharges to groundwater to the states and to EPA under other statutory authorities.

Before the Court issued its decision, but after after certiorari was granted, the Maui County Council voted to settle the case with the Respondent. However, corporation counsel for Maui has taken the position that under the County's charter, only the Mayor has the authority to settle the case. The case therefore remained on the Supreme Court's docket as the Mayor did not wish to settle the case.

In a compromise 6-3 opinion authored by Justice Breyer, the Supreme Court concluded that the Act requires a permit when "the addition of the pollutants through groundwater is the *functional equivalent* of a direct discharge from the point source into navigable waters." (emphasis added). In reversing the Ninth Circuit, Justice Breyer pointed out that the issue in the case centers on the definition of the word "from" in the statute, and that while the word is "broad in scope, … context often imposes limitations." Specifically, the majority concluded that the Act "requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge." In the majority's view, its holding reflected a "middle ground" between the two extremes posed by the parties.

According to the Court, the County and the federal government's view - which advocated for a "bright line rule" that a permit would not be required if at least "one nonpoint source lies between the point source and the navigable water" - was too narrow and "would risk serious interference with EPA's ability to regulate ordinary point source discharges." To illustrate its point, the Court provided a hypothetical of a pipe which sends pollution directly into the ocean, which could then simply be moved back a few yards so that the pollution would need to travel the last several feet through groundwater to the ocean. The Court noted that it did not believe Congress "could have intended to create such a large and obvious loophole…"

On the other hand, the Court explained that the environmental groups' arguments, which advocated for the Ninth Circuit's "fairly traceable" standard, would lead to "surprising" and "bizarre" results that Congress could not have intended. For example, the Court explained that under the environmental groups' test, a permit would be required "for pollutants carried to navigable waters on a bird's feathers," or, as a result of "the 100-year migration of pollutants through 250 miles of groundwater to a river." Furthermore, the Court explained that based on the statute's structure, Congress intended to leave "substantial responsibility and autonomy to the States" and the environmental groups' rule would seriously interfere with the "States' traditional regulatory authority," which is authority the Act "preserves and promotes." The Court pointed out that under the Act's framework, Congress left it to the States to regulate nonpoint sources.

After coming to its middle ground approach, which the Court noted did not "clearly explain how to deal with the middle instances," the Court set forth seven non-exhaustive factors that may prove relevant in determining if a discharge is the "functional equivalent" of a direct discharge into navigable waters. Explaining that "[t]ime and distance will be the most important factors in most cases," the other five factors are: "the nature of the material through which the pollutant travels"; "the extent to which the pollutant is diluted or chemically changed as it travels"; "the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source"; "the manner by or area in which the pollutant enters the navigable waters"; and "the degree to which the pollution (at that point) has maintained its specific identity." The Court remanded to the lower court to apply the factors to this case.

Justice Thomas, joined by Justice Gorsuch filed a dissent and Justice Alito also wrote a separate dissent.

IMLA filed an amicus brief in support of the County with the Ninth Circuit, at the Supreme Court petition stage and at the Supreme Court merits stage. And while not adopting a bright-line rule that would have been easier to administer, we were very pleased that the Court rejected the Ninth Circuit's "fairly traceable test," which would have meant significantly increased liability for local governments.

Comcast Corp. v. National Association of African American-Owned Media – Race Discrimination

The question presented in this case is whether a claim of race discrimination under Section 1981 fails in the absence of but-for causation. In a 9-0 opinion issued by Justice Gorsuch, the Court concluded that a plaintiff who sues for racial discrimination in contracting under 42 U.S.C. § 1981 bears the burden of showing that race was a but-for cause of the plaintiff's injury, and that burden remains constant over the life of the lawsuit.

Georgia v. Public.Resource.Org Inc. **- Copyrights**

The issue in this case is whether the government edicts doctrine extends to—and thus renders uncopyrightable—works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated. In a 5-4 opinion authored by Chief Justice Roberts, the Court held that under the government edicts doctrine, the annotations beneath the statutory provisions in the Official Code of Georgia Annotated are ineligible for copyright protection.

Atlantic Richfield Co. v. Christian - CERCLA

The issues in this care are: (1) Whether a common-law claim for restoration seeking cleanup remedies that conflict with remedies the Environmental Protection Agency ordered is a jurisdictionally barred "challenge" to the EPA's cleanup under 42 U.S.C. § 9613 of the Comprehensive Environmental Response, Compensation and Liability Act; (2) whether a

landowner at a Superfund site is a "potentially responsible party" that must seek EPA approval under 42 U.S.C. § 9622(e)(6) of CERCLA before engaging in remedial action, even if the EPA has never ordered the landowner to pay for a cleanup; and (3) whether CERCLA pre-empts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.

Kelly v. U.S. **– Public Corruption**

The question presented in this case is whether a public official "defraud[s]" the government of its property by advancing a "public policy reason" for an official decision that is not her subjective "real reason" for making the decision. In an unanimous opinion, authored by Justice Kagan, the Court held that because the scheme to reduce the number of George Washington Bridge toll lanes dedicated to Fort Lee, New Jersey, morning commuters as political retribution against Fort Lee's mayor did not aim to obtain money or property from the federal Port Authority, the defendants could not have violated the federal-program fraud or wire fraud laws.

Espinoza v. Montana Department of Revenue – First Amendment / Establishment Clause

The question presented in this case is whether it violates the religion clauses or the equal protection clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools.

Kansas v. Glover – Fourth Amendment

The question presented is whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary. In a 8-1 opinion authored by Justice Thomas, the Supreme Court held that when a police officer lacks information negating an inference that a person driving is the vehicle's owner, an investigative traffic stop made after running the vehicle's license plate and learning that the registered owner's driver's license has been revoked is reasonable under the Fourth Amendment.

June Medical Services LLC v. Gee – Abortion / Stare Decisis

The question presented is whether the U.S. Court of Appeals for the 5th Circuit's decision upholding Louisiana's law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with the Supreme Court's binding precedent in *Whole Woman's Health v. Hellerstedt*.

McGirt v. Oklahoma – State Sovereignty / Tribal Law

The issue in this case is whether the 1866 territorial boundaries of the Creek Nation within the

former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

This case presents a hugely important question for the entire state of Oklahoma and its local governments as to whether the Creek Nation's reservation was disestablished. In a significant ruling, the Tenth Circuit held that it was not, thereby effectively stripping a huge swath of Oklahoma (and the majority of Tulsa) of jurisdiction over crimes committed by Native Americans. If not corrected, the decision below could result in the largest abrogation of state sovereignty by a federal court in American history. More concerning, the case has implications for the state and local governments' taxing, land use regulations, code enforcement, law enforcement, and other authority.

The case was argued in the 2018 term but in an unusual move, the Court ordered the case held over to be reargued in the 2019 term. Justice Gorsuch is recused from the case (he was on the Tenth Circuit when it was decided) and the Justices are likely deadlocked 4-4 but want to try to build a majority.

IMLA filed an amicus brief in this case.

***Lomax v. Ortiz-Marquez* – Supreme Court Merits / Prison Litigation Reform Act**

Arthur Lomax had previously filed three lawsuits alleging a variety of constitutional violations stemming from his expulsion from the Sex Offender Treatment and Monitoring Program at Centennial Correctional Facility. The federal district court dismissed the first and second lawsuits as barred by *Heck v. Humphrey*, holding that a litigant cannot bring a § 1983 claim challenging a conviction's legitimacy until that conviction has been dismissed. The third lawsuit was dismissed for a failure to state a claim. The first two cases were dismissed without prejudice.

28 U.S.C. § 1915(g) of the PLRA states:

> In no event shall a prisoner bring a civil action or appeal a judgment in civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

This provision is known as the "three strikes rule." Once a prisoner has three strikes, he can no longer proceed *in forma pauperis* and must pay any applicable court fees if he wishes to bring further lawsuits against prison officials.

Lomax filed suit in federal district court a fourth lawsuit against prison officials alleging various constitutional violations. Lomax argues he should be able to bring this lawsuit *in forma pauperis*

regardless of the three-strikes rule in the PLRA because two of his previous lawsuits were dismissed without prejudice.

The trial court rejected his argument that two of his previous lawsuits did not count as strikes under the PLRA and held that if he wanted to proceed with the lawsuit, he must pay the $400 filing fee or show he was in imminent danger of serious physical injury (a requirement under the statute to proceed *in forma pauperis* despite 3 strikes). The Tenth Circuit affirmed, concluding that the fact that two of the previous dismissals were without prejudice was "immaterial."

The issue in this case is whether a dismissal without prejudice for failure to state a claim counts as a strike under 28 U.S.C. 1915(g).

***Trump v. Pennsylvania* – Universal (Nationwide) Injunctions**

The issues in this case are: (1) Whether the Departments of Health and Human Services, Labor and the Treasury had statutory authority under the Patient Protection and Affordable Care Act and the Religious Freedom Restoration Act of 1993 to expand the conscience exemption to the contraceptive-coverage mandate; (2) whether the agencies' decision to forgo notice and opportunity for public comment before issuing the interim final rules rendered the final rules – which were issued after notice and comment – invalid under the Administrative Procedure Act; and (3) whether the U.S. Court of Appeals for the 3rd Circuit erred in affirming a nationwide preliminary injunction barring implementation of the final rules.

IMLA joined an amicus brief by the SLLC focused solely on the nationwide injunction issue in this case. In the brief, we argued that if the federal government seeks to enforce a uniform policy that is deemed unlawful, it is unfair if only the cities / counties with the resources to litigate against the federal government will be afforded the benefits of that ruling. Smaller jurisdictions with less resources would suffer under such a rule.

Barr v. American Association of Political Consultants*- First Amendment / *Reed

The Telephone Consumer Protection Act prohibits automatic dialing or prerecorded calls to cell phones with three exceptions—emergency, consent, and debt collection owed to or guaranteed by the United States. The American Association of Political Consultants claims the third exception violates the First Amendment.

The Fourth Circuit held that the debt-collection exemption violates the First Amendment. Applying *Reed v. Town of Gilbert*, the Fourth Circuit concluded that this exception was content-based because "the exception facially distinguishes between phone calls on the basis of their content." Specifically, the court noted that "automated calls made to cell phones that deal with other subjects — such as efforts to collect a debt neither owed to nor guaranteed by the United States — do not qualify for the debt-collection exemption and are prohibited by the automated call ban." The court then held that the debt-collection exemption fails to survive strict scrutiny.

The issue in this case is whether the government-debt exception to the Telephone Consumer Protection Act of 1991's automated-call restriction violates the First Amendment, and whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute.

This case involves an interpretation of *Reed v. Gilbert*, where the Supreme Court held that strict-scrutiny applies to content-based restrictions on speech, in that case, the Town's sign ordinance. Significantly, the Court defined content-based broadly, which is unfavorable to local governments. Since the Court's holding, *Reed* has been applied in a host of areas including solicitation ordinances, regulations of robocalls, buffer zones, and many others. IMLA joined an amicus brief filed by the SLLC arguing that the Supreme Court should limit its decision in *Reed v. Town of Gilbert.*

3. OCTOBER TERM 2020

Due to the outbreak of COVID-19, the Supreme Court postponed arguments in its March and April sitting in 2020. A handful of the cases that were originally scheduled for those months were rescheduled for May 2020 and oral argument was held via teleconference. A number of others, including several that are relevant to local governments, were postponed until the 2020 term and will be argued sometime after October 2020.

***Carney v. Adams* - First Amendment**

The issues in this case are: (1) Whether the First Amendment invalidates a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a "bare majority" on the state's three highest courts, with the other seats reserved for judges affiliated with the "other major political party"; (2) whether the U.S. Court of Appeals for the 3rd Circuit erred in holding that a provision of the Delaware Constitution requiring that no more than a "bare majority" of three of the state courts may be made up of judges affiliated with any one political party is not severable from a provision that judges who are not members of the majority party on those courts must be members of the other "major political party," when the former requirement existed for more than 50 years without the latter, and the former requirement, without the latter, continues to govern appointments to two other courts; and (3) whether the respondent, James Adams, has demonstrated Article III standing.

IMLA joined an amicus brief filed by the SLLC in this case.

City of Chicago v. Fulton – **Bankruptcy / Police Powers**
In these consolidated cases, the City of Chicago impounded the debtor's respective vehicles based on significant accumulated unpaid fines and penalties for parking tickets, moving violations, and driving with suspended licenses. The City has an ordinance which provides that the City may impound vehicles of individuals with three or more unpaid violations for the "purpose of enforcing" its traffic regulations until the owner of the vehicle pays the outstanding

fines and penalties. The Chicago Municipal Code further provides that "[a]ny vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle."

In each of the 4 cases at issue here, after the City had impounded the owner's vehicles, each owner filed for bankruptcy. The Bankruptcy Code's automatic stay provision provides that a petition for bankruptcy operates as a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The City did not release the debtor's vehicles back to the trustee of the bankruptcy estate and each bankruptcy court held that the City violated the stay by "exercising control" over property of the bankruptcy estate and ordered the City to turn over the vehicles immediately.

The City of Chicago argued that holding a vehicle that was impounded *before* the debtors filed their bankruptcy petitions did not violate the Bankruptcy Code's automatic stay provision. Further, the City argues that the Bankruptcy Code provides a mechanism for a debtor to seek the turnover of property being held by a creditor through a possessory lien through an adversary proceeding and the court should therefore find an exception for the City's retention of the vehicles from the automatic stay under 11 U.S.C. § 362(b)(3). The City also argued that subsection (b)(4) which provides that the stay authorized by the Act does not extend to:

> . . . the commencement or continuation of an action or proceeding by a governmental unit . . ., to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

This police power exception often arises in bankruptcy proceedings where a debtor seeks to avoid local regulations affecting its business.

IMLA filed an amicus brief at the petition stage, urging the Court to grant certiorari and then joined an amicus brief filed at the merits stage filed by the SLLC. In the brief, IMLA argued that local governments have a strong interest in enforcing their traffic laws pursuant to their police powers and for the general health, safety, and welfare of their residents.

***Torres v. Madrid* – Supreme Court Merits / Fourth Amendment**

Two police officers were going to arrest a woman at her apartment. They noticed two people standing in front of her apartment next to a Toyota Cruiser and decided to talk to them as one of them may have been the person the officers were seeking to arrest. The officers were wearing tactical vests with police markings. One of the people, Roxanne Torres, got into the car. She claims she was "tripping out" from meth. One of the officers told Torres several times to show her hands. The officers couldn't see Torres clearly because of tinted windows.

When Torres heard the flicker of the car door she started to drive thinking she was being carjacked. Torres drove at one of the officers who fired at Torres through the wind shield. The other officer shot at Torres as well to avoid being crushed between two cars and to stop Torres from hitting the other officer.

Torres was shot twice. She hit another car, got out of the Cruiser, and tried to "surrender" to the "car jackers." She asked a bystander to call the police but left the scene as she had an outstanding warrant. She then stole a car, drove 75 miles, and checked into a hospital. She claims the officers used excessive force.

The Tenth Circuit held that Torres wasn't seized under the Fourth Amendment because they "failed to 'control her ability to evade capture or control.'" There was therefore no excessive force in this case. The Tenth Circuit relied on its own precedent stating:

> … Torres failed to show she was seized by the officers' use of force. Specifically, the officers fired their guns in response to Torres's movement of her vehicle. Despite being shot, Torres did not stop or otherwise submit to the officers' authority. … She was not taken into custody until after she was airlifted back to a hospital in Albuquerque and identified by police.
>
> These circumstances are governed by *Brooks v. Gaenzle*, 614 F.3d 1213, 1223-24 (10th Cir. 2010), where this court held that a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim. This is so, because "a seizure requires restraint of one's freedom of movement." Thus, an officer's intentional shooting of a suspect does not effect a seizure unless the "gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him."

The issue in this case is whether an unsuccessful attempt to detain a suspect by use of physical force is a "seizure" within the meaning of the Fourth Amendment, as the U.S. Courts of Appeals for the 8th, 9th and 11th Circuits and the New Mexico Supreme Court hold, or whether physical force must be successful in detaining a suspect to constitute a "seizure," as the U.S. Court of Appeals for the 10th Circuit and the District of Columbia Court of Appeals hold.

IMLA joined an amicus brief filed by the SLLC.

***Fulton v. City of Philadelphia* – First Amendment / Free Exercise Clause**

When a child in need of foster care comes into the City of Philadelphia's custody, Human Services refers that child to one of the foster care agencies with which the City has a contractual relationship. Once the City refers a child to an agency, that agency selects an appropriate foster parent for the child.

The City of Philadelphia learned that two of its agencies would not work with same sex couples as foster parents, which it considered a violation of the City's anti-discrimination laws. When the

agencies confirmed that, because of their religious views on marriage, they would not work with gay couples, the City ceased referring foster children to them (though still continued to work with them in other capacities).

One of those agencies, Catholic Social Services ("CSS"), brought this action claiming that the City has violated its rights under the First Amendment's Free Exercise, Establishment, and Free Speech Clauses. It seeks an order requiring the City to renew their contractual relationship while permitting it to turn away same-sex couples who wish to be foster parents.

The Third Circuit concluded that, at least at the preliminary injunction stage, CSS had failed to show that the City violated the Free Exercise or Free Speech Clauses by requiring that an agency that provides foster care services for the City comply with its anti-discrimination laws protecting same-sex couples. The Third Circuit noted that there was no evidence of religious bias or hostility (as was present in *Masterpiece Cakeshop* where the Supreme Court found evidence of hostility toward religion), nor was there any evidence that the City had treated CSS differently because of its religion.

The Third Circuit relied on *Employment Division v. Smith*, in coming to its conclusion that the agency must comply with the City's valid and neutral law of general applicability. On this point, the Third Circuit explained:

> CSS's theme devolves to this: the City is targeting CSS because it discriminates against same-sex couples; CSS is discriminating against same-sex couples because of its religious beliefs; therefore the City is targeting CSS for its religious beliefs. But this syllogism is as flawed as it is dangerous. It runs directly counter to the premise of Smith that, while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from general, neutrally applied legal requirements. That CSS's conduct springs from sincerely held and strongly felt religious beliefs does not imply that the City's desire to regulate that conduct springs from antipathy to those beliefs. If all comment on religiously motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against the religious belief itself, then Smith is a dead letter, and the nation's civil rights laws might be as well.

Third Circuit framed the issue as follows: did the City have the authority to insist, consistent with the First Amendment and Pennsylvania law, that CSS not discriminate against same-sex couples as a condition of working with it to provide foster care services? Or, inversely, has CSS demonstrated that the City transgressed fundamental guarantees of religious liberty?

The Supreme Court accepted certiorari on three issues, of which two are relevant for our purposes: (1) whether *Employment Division v. Smith* should be revisited; and (2) whether the government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs.

IMLA will join an amicus brief being drafted by the SLLC focusing on the issue of the importance of upholding *Employment Division v. Smith.*

4. Other Cases of Interest

A. IRS audits of city attorney status as employee vs. independent contractor

IMLA is asked to participate in responding to audits that conclude that a city attorney who is a private attorney nevertheless is an employee of the city and not an independent contractor. Over the past several years we have provided memoranda in administrative proceedings to support the city attorney. These are difficult cases. The operative IRC sections are §3121, which describes who is an employee for social security and Medicare withholding tax and §3401, which describes who is an employee for purposes of withholding income tax. Insofar as private counsel who are designated the "city attorney," the Service will apply the common law rules to determine if the attorney is an employee or an independent contractor under §3121, but the Service relies on the statute to conclude that a person holding a statutory or constitutional position of city attorney is an "employee" for withholding taxes under §3401. The Service's latest publication (March 14, 2014) reinforces its views. Classification of Elected and Appointed Officials
www.irs.gov/.../Federal,-State-&-Local-Governments/Classification-of-Elected-and-Appointed-Officials - March 14, 2014.

B. Securities and Exchange Commission Enforcement Actions

Over the past few years the SEC stepped up enforcement action in the municipal markets. Without giving an exhaustive list of issues and cases, suffice to say that local government leaders charged with responsibilities associated with financing through municipal bonds should spend time with their bond counsel to learn specific responsibilities and their potential liabilities for failing to fulfill those duties. To give one example, in a recent enforcement action involving a municipal financing authority in Beaumont, California, the authority and its then-executive director, also the city manager, agreed to settle charges that they made false statements about prior compliance with continuing disclosure obligations in five bond offerings. The underwriting firm behind those offerings and its co-founder also settled charges for failing to conduct reasonable due diligence on the continuing disclosure representations.

As described by the SEC, in the Beaumont case, the Beaumont Financing Authority had issued approximately $260 million in municipal bonds in 24 separate offerings from 2003 to 2013 for the development of public infrastructure. For each of those offerings, a community facilities district established by Beaumont agreed to provide investors with annual continuing disclosures, including important financial information and operating data. From at least 2004 to April 2013, the district regularly failed to provide investors with the promised information. The Beaumont Financing Authority failed to disclose this poor record of compliance when it conducted the 2012 and 2013 offerings totaling more than $32 million. As a result, the bonds appeared more

attractive and investors were misled about the likelihood that the district would comply with its continuing disclosure obligations in the future.

"Investors in municipal bonds depend on timely and complete continuing disclosure from municipal issuers," said LeeAnn Ghazil Gaunt, Chief of the SEC Enforcement Division's Public Finance Abuse Unit. "Issuers and underwriters will continue to be held accountable when they fail to provide investors with an accurate picture of past compliance with continuing disclosure obligations."

In a case involving Miami and its Budget Director, IMLA participated as an amicus to argue that Qualified Immunity should apply in SEC civil enforcement actions. So far, this argument has not prevailed as we lost in the 11th Circuit and in a relatively recent case, a federal District Court in California denied Qualified Immunity to officials in an enforcement action against Victorville, California.

In May 2017, a former town supervisor in Ramapo New York was found guilty of 20 counts of conspiracy, securities fraud, and wire fraud in connection with municipal bonds issued by the Town of Ramapo (the "Town") and the Ramapo Local Development Corporation ("RLDC"). The verdict, which came after a four-week trial in federal court in White Plains, marked the first conviction for securities fraud in connection with municipal bonds. Aaron Troodler, the RLDC Executive Director and Ramapo Town Attorney had earlier pled guilty to securities fraud.

While IMLA will wade into cases to try to help local governments and local officials as we did in Miami, local leaders need to understand their responsibilities regarding disclosure and continuing disclosure. More importantly, the Nuremburg defense and the "reliance on professionals" defense do not generally work with the SEC. IMLA is pleased to offer a book by Robert Doty that addresses many of these issues: "Expanding Municipal Securities Enforcement: Profound Changes for Issuers & Officials" available through our website at www.imla.org.

C. Pending Supreme Court Certiorari Cases in Which IMLA Participated as an Amicus

***Hunter v. Cole* – Qualified Immunity**

The issue in this case is whether, if the barrel of a gun is not yet pointed directly at an officer, clearly established federal law prohibits police officers from firing to stop a person armed with a firearm from moving a deadly weapon toward an officer if the officer has not both shouted a warning and also waited to determine whether the imminent threat to life has subsided after the warning; and (2) whether a police officer who inaccurately reports his perceptions of events during a dynamic shooting encounter violates clearly established rights under the 14th Amendment.

D. Pending State Appellate Cases and United States Courts of Appeals Cases in which IMLA Participated as an Amicus

***City of Athens et. al. v. McClain* – Ohio Supreme Court - Preemption / Home Rule**

The State of Ohio passed H.B. 49, which allows businesses to opt for the State to collect and administer municipal net profit taxes. Prior to the passage of H.B. 49, each municipality would control that collection and administration process. Under the new law, municipalities have 90 days to report to the state tax commissioner specific information about the tax payer and if it fails to do so, the tax commissioner may penalize the municipality by withholding 50% of the net-profit-tax revenue due to the municipality. Further, the state retains .5% of all net profit taxes paid as a fee for the collection and administration of services. The law also authorizes the State to decide on taxpayer requests for refunds of municipal taxes and does not allow municipalities to participate in that process.

Ohio has a Constitutional Home Rule Provision, which provides: "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The trial and appellate courts in Ohio found that the challenged provisions of Ohio state law were constitutional under the Home Rule Amendment. Regarding the municipal power to tax, the appellate court concluded that Article XIII, Section 13 of the Ohio Constitution, which states that "laws may be passed to limit the power of municipalities to levy taxes * * * for local purposes," allowed the State to enact the legislation. Specifically, in interpreting the term "levy," the court concluded that the General Assembly was permitted to enact legislation limiting municipalities' power to impose, collect, and administer taxes without violating the Home Rule Amendment.

The municipalities recognize that the Ohio Constitution requires balance with respect to municipal taxation power given the limiting provision. However, they argue that finding a balance necessarily requires a more nuanced examination of how that power is exercised. And in this case, the specific limiting power has been applied to displace municipalities' general power of taxation provided by the Home Rule Amendment, which they argue is unconstitutional.

The issue in this case is whether the Home Rule Amendment of the Ohio Constitution grants municipal corporations a general power of municipal taxation, and if so, where a State law engulfs municipal corporations' general power of taxation, whether that State law is unconstitutional.

***Garfield County Transportation Authority et al. v. State of Washington* – Washington Supreme Court – Home Rule Taxing Authority**

In the general election in November 2019, 53% of Washington voters state-wide approved Initiative No. 976 (I-976), concerning motor vehicle taxes and fees and limited the annual motor-vehicle-license fees to $30. The result was to reduce *locally* enacted annual license fees which ranged from $20-$100 per vehicle registration and in the aggregate bring in millions in revenue for local governments.

Many local governments filed suit, claiming that if I-976 is initiated, they will experience significant financial harm, including drastic reductions in funding for public transit. They also argue
that the Washington Constitution reflects a profound respect for local home rule particularly as to local taxing and spending decisions. Specifically, **Article** XI, section 12 of the Washington constitution states:

> "The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes."

The local government plaintiffs argue that I-976 upends the system of home rule, inserting the State into local government decisions about how to tax and spend to address local concerns and that it will substantially decrease the amount of funding available for transportation projects statewide, including many projects that are critical from a public safety standpoint.

The district court rejected the local governments' arguments that I-976 was unconstitutional, including their argument that the Constitution specifically prohibited the State legislature from directing local governments and its citizens how to tax and spend for local purposes.

The local governments raise a number of state constitutional issues, but as relevant for our purposes, these include:

1. Does I-976 violate article XI, section 12 by depriving municipal governments of vested local taxing authority for local purposes prior to expiration of the local tax?
2. Does I-976 violate article I, section 19 by using a statewide vote to override existing local votes and diluting the voice of local voters on matters of local concern?

***United States Conference of Mayors v. Barr* – Associational Standing**

This litigation concerns the U.S. Attorney General's (AG) ability to attach immigration conditions to the Byrne Jag grant, a formula grant, that Congress charged his office with distributing to State and local governments. The City of Evanston and USCM filed suit, arguing that the imposition of the conditions violated the Administrative Procedure Act (APA) because they were beyond the AG's statutory authority and that they violated the Spending Clause of the Constitution as well as the separation of powers.

The overwhelming majority of courts to review the question of whether the Attorney General had the authority to impose the conditions on a formula grant have ruled that he did not. And like these other courts before it, the district court in this case ruled that the Attorney General violated the APA by imposing the conditions on the grants.

The court ordered that the AG was permanently enjoined from imposing the conditions on Evanston and on any USCM member. USCM is a non-profit and non-partisan membership association. Its members are cities, which are represented in USCM by their mayors.

The DOJ argued that USCM did not have associational standing to litigate this case on behalf of its members. The court rejected DOJ's arguments, finding that USCM did have standing to seek relief on behalf of its members because: 1) at least one of its members would have standing to sue on its own behalf; 2) the interest USCM sought to protect was germane to the association's purpose, namely coordinating cities' interaction with the federal government and preventing overreach by the federal government; 3) the claim and the relief do not require participation of individual USCM members because the suit raises pure legal questions.

The issue IMLA focused on is whether an association has standing to bring suit on behalf of its members.

***Syracuse v. Grant* - Second Circuit / *Monell* / Qualified Immunity**

Police were called to the Grant home on a domestic disturbance call. When they responded, they found the husband in an agitated state and asked him to go outside. They sought to detain him for safety purposes and a fight broke out between the husband, who is much larger, and one of the officers. The police officer struck him a number of times with his hand. A second officer came over during the struggle and hit the husband with a knee strike and head lock. They were then able to subdue him and got him medical attention for a broken nose and concussion.

The husband and wife both sued the police officers and the city, claiming that when the officers arrived the situation was entirely under control and that they told the officers they no longer needed their services, but the officers nevertheless entered their home without permission and proceeded to arrest the husband without probable cause given that the domestic situation was, according to the plaintiffs, entirely under control by the time they arrived. They claim the use of force was entirely unprovoked whereas the officers claim Mr. Grant initiated the physical altercation. The plaintiffs brought claims under Section 1983 for false imprisonment and excessive force as well as claims against the City under *Monell.*

On the *Monell* claim, the plaintiffs allege that the City's deliberate indifference to civil complaints of police brutality has resulted in the customary use of excessive force by its police officers, and, as a proximate result of such policy, they suffered injuries. The plaintiffs introduced evidence at trial from a Citizen Review Board (CRB), which contained information about hundreds of complaints against officers over a multi-year period and the recommendations by the CRB as to discipline, as well as the police department's actual action taken against each

officer. The plaintiffs argued that the CRB report demonstrated a pattern of excessive force that went undisciplined which created a climate whereby officers felt empowered to act with impunity.

The district court denied summary judgment to the officers on the excessive force and false imprisonment charges, finding enough disputed facts to send the case to a jury. The district court also denied summary judgment on the *Monell* claim and refused a motion to bifurcate the *Monell* claim from the individual officers' claims, even though the *Monell* claim relied on evidence from the CRB, which the City argued would prejudice the jury against the officers. A jury returned a verdict for the plaintiffs for nearly 2 million dollars not including attorney's fees.

The issue IMLA focused on in its amicus brief is whether the district court's failure to bifurcate the trial and the introduction of the CRB report constituted an abuse of discretion.

***Rodriguez v. City of San Jose* –** Ninth Circuit - Second Amendment

In 2013, Edward Rodriguez suffered a mental episode at his home. His wife, Plaintiff Lori Rodriguez, called the police, and the San Jose Police responded. An officer detained Edward under California Welfare and Institutions Code ("W&I") §5150, which provides that when probable cause exists that someone is a danger to him/herself or others as a result of a mental disorder, a police officer may take that person into custody for 72 hours for treatment / evaluation.

California W&I § 8102 provides: "Whenever a person, who has been detained or apprehended for examination of his or her mental condition or who is a person described in Section 8100 or 8103, is found to own, have in his or her possession or under his or her control, any firearm whatsoever, or any other deadly weapon, the firearm or other deadly weapon **shall** be confiscated by any law enforcement agency or peace officer, who **shall** retain custody of the firearm or other deadly weapon." (emphasis added).

A San Jose police officer told Lori that he was required to confiscate guns in the house. He asked Lori to provide the combination to the gun safe in the house, and she complied. The officer confiscated eleven guns registered to Edward and one gun registered to Lori. Edward was admitted for a 72-hour hold and as a result is prohibited from owning or possessing firearms under Cal. W&I Code section 8103 for 5 years. Lori requested a return of the firearms to her so that she could store them in the home she shares with Edward.

The City petitioned the state court for a hearing under W&I Code §8102 to determine whether the guns should be returned to Edward. While that case was pending, Lori transmuted the guns into her separate property and registered them in her name. Lori then intervened in the City's suit regarding the return of the guns and the parties agreed she had standing. Even though it was Lori petitioning the court for the return of the guns, the state court decided that the guns could not be returned because doing so would likely result in endangering Edward or others as Lori and Edward were married and lived together. (Edward had a history of domestic violence, mental

illness, weighed 400 lbs. and had exhibited violent tendencies in front of the police and paramedics). The state court also rejected her Second Amendment claims, noting nothing in its order precludes her from keeping firearms in her home for protection (she just wasn't entitled to these particular guns).

Thereafter, Lori filed suit in federal district court, claiming violations of the Second, Fourth, Fifth, and Fourteenth Amendments, and California Penal Code §33800 et seq. On the parties cross-motions for summary judgment, district court granted the City Defendants' motion and denied Plaintiffs' motion.

The issues on appeal are:

1. Whether the Second Amendment protects Lori Rodriguez's right to possess specific firearms.
2. Whether the City Defendants' confiscation of guns and decision not to return them to Lori is an unreasonable seizure under the Fourth Amendment.
3. Whether the City Defendants' confiscation and retention of the guns is a taking of property without just compensation under the Fifth Amendment.
4. Whether the City Defendants violated Lori's Fourteenth Amendment right to procedural due process by refusing to return the guns after the decision of the California Sixth District Court of Appeal, where the court of appeal stated that "the procedure provided by section 33850 et seq. for return of firearms in the possession of law enforcement remains available to Lori." (*Rodriguez*, 2015 WL 1541988 at *8)

***Seattle v. Long* – Washington State Appellate Court - Homelessness / Eighth Amendment**

This case involves a tow and impound of a vehicle being used as a residence by a homeless individual, Mr. Long. The police received a complaint that someone associated with Stephen Long's pick-up truck threatened someone with a knife. No charges were filed related to this incident, however, the officers informed Mr. Long that his car was parked on City property and that it was illegal to park on City property for more than 72 hours. Parking enforcement put a sticker on the vehicle, providing notice that Mr. Long had 72 hours to move his vehicle. Parking enforcement actually gave Mr. Long an extra 4 days to move his car as he had indicated he needed a part for it. When it still wasn't moved, it was towed.

Mr. Long contested the impound. At the contested hearing, Mr. Long did not dispute his vehicle was illegally parked, but instead indicated that he was living in his vehicle and that he was indigent. Rather than require Mr. Long to pay the full amount of costs associated with an impound like everyone else normally does, the magistrate judge: (1) waived the parking ticket; (2) reduced the actual costs of impound; and, (3) provided Long the opportunity to agree to a Payment Plan, whereby he would pay back the City $50 a month, for twelve months without interest. If Mr. Long failed to make payments under the Payment Plan, his vehicle would not be subject to forfeiture, attachment or execution, but instead, he would be potentially subject to administrative penalties and collection efforts.

On appeal from the magistrate judge's decision, Mr. Long argued that the City violated the Fourteenth Amendment's substantive due process clause by acting with deliberate indifference to his personal and physical safety when it impounded his truck as he did not have shelter once it was towed. He also argued the impoundment was a penalty and amounted to an excessive fine under the Eighth Amendment due to the fact that he was homeless / indigent. Finally, he argued that under the State's Homestead Act, the impoundment was unlawful.

The Homestead Act of the Washington Constitution states that "[t]he legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." The Act was amended to include personal property noting that some citizens reside on their boats or in their cars.

On appeal, the Superior Court reversed, in part, concluding that: (1) Long's substantive due process "defense" was groundless; (2) requiring Long to pay any amount associated with impound violated the Eighth Amendment's prohibition against excessive fines; and, (3) that the Payment Plan violated the Homestead Act.

The issue on appeal is whether requiring Mr. Long to reimburse the City for the amount associated with the impound violated the Eighth Amendment's prohibition against excessive fines and whether the Payment Plan violated the Homestead Act.

***LaPorta v. City of Chicago* – Seventh Circuit - *Monell* Liability**

In January 2010, Patrick Kelly, an off-duty police officer, was drinking and hanging out with his life-long friend, Michael LaPorta whom he shot in the head, resulting in lasting injuries.

LaPorta sued the City of Chicago under *Monell* alleging the City violated his due process right to bodily integrity. Specifically, LaPorta argued the city's *de facto* policies led to the January 2010 incident. These policy flaws included failing to discipline officers, failing to investigate officers accused of misconduct, and failing to maintain an adequate Early Warning System (EWS) to identify and correct problematic behavior. Essentially, plaintiff contends that the police department's code of silence and its failure to investigate officer misconduct shield off-duty police officers who commit violence against citizens and these officers therefore believe they can use violence with impunity.

Chicago moved for summary judgment, arguing that because Kelly was acting as a private citizen at the time LaPorta was shot, Kelly could not violate the Constitution as he could not be acting "under the color of state law" for the purposes of Section 1983. Chicago also argues that under *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1988), it had no constitutional duty to protect LaPorta from private misconduct. Finally, Chicago argues that LaPorta's *Monell* claim should fail because there is no underlying constitutional violation.

The district court denied Chicago's motion for summary judgment, concluding that *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990), allows municipal liability under *Monell*

whenever a municipal policy causes private misconduct even if the actor was not acting "under the color of state law" at the time. Further, the court explained that *DeShaney* did not apply in this case because LaPorta's claim alleges that Chicago itself through its policies caused the harm. Here, the court concluded that a jury could find (and summary judgment was therefore inappropriate) that his off-duty decision to drink to excess and shoot LaPorta with his service weapon were caused by the belief that he was impervious to the consequences due to the "code of silence" within the police department.

The case was tried to a jury, which awarded $44.7 million in damages and the court ordered an additional 2.5 million in costs. The court denied Chicago's post-trial motions and the case is now being appealed to the Seventh Circuit.

The issue in this case is whether *Monell* applies to the conduct of an off-duty officer.

***Reilly v. Harrisburg* – Third Circuit – Buffer Zones**

Plaintiffs provide "sidewalk counseling" outside of two healthcare facilities in Harrisburg, PA. Plaintiffs engage in leafletting and individual conversations with women who are attempting to enter the health care facilities to dissuade them from obtaining an abortion. After complaints from patients, the clinic's employees, and violence during a demonstration outside the clinic involving pepper spray being used by protesters, the city council passed an Ordinance adopting a buffer zone around the clinics' entrances. Specifically, the Ordinance's makes it illegal for individuals, other than police or emergency personnel performing official functions, or employees of health care facilities that are assisting patients to enter or exit the facilities, to "knowingly congregate, patrol, picket or demonstrate in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility." When the Ordinance was passed, the City was facing severe financial hardship and was not in a position to station police outside of the healthcare clinics as that would have required hiring additional officers and it therefore believed that the buffer zone was the best way to promote public safety.

Plaintiffs seek to enjoin the enforcement of an Ordinance, claiming it violates their First Amendment rights.

The court first reviewed the Ordinance to determine if it was content-neutral under *Reed,* concluding that it was based on the fact that the ordinance is focused on the actions of the protesters not the content of their speech. The court reasoned that what is relevant for the purposes of enforcing the Ordinance, is not the message of the speaker, but the time, place, and alleged encroachment into personal space of clinical patrons.

The court then explained that the ordinance survived intermediate scrutiny. The district court held that although the Plaintiffs demonstrated that the Ordinance substantially burdens their First Amendment rights (a "minor physical restriction on a profound right"), Defendants met their burden to show that the Ordinance was narrowly tailored to achieve a legitimate governmental interest because the City considered less-restrictive alternatives, ruled them out as less effective,

and demonstrated that other less-restrictive methods had been tried and failed. The court therefore denied the plaintiffs' preliminary injunction.

The issue on appeal is whether the buffer zone violates the First Amendment.

***Metropolitan Government of Nashville & Davidson County* v. *Danyelle Bennett* – First Amendment / Social Media – Sixth Circuit**

The morning after the 2016 Presidential Election, Plaintiff posted an image of an electoral college map that revealed Donald Trump as the winner of the election. A Facebook user, identified as Mohamed Aboulmaouabhib, commented on Plaintiff's post of the electoral college map, "Redneck states voter for Trump, niggaz and latinos states votre for hillary." Plaintiff responded, "Thank god we have more America loving rednecks. Red spread all across America. Even Niggaz and latinos voted for Trump too!"

Plaintiff's response prompted a co-worker, to comment, "Was the niggaz statement a joke? I don't offense easily, I'm just really shocked to see that from you." Plaintiff defended her comment and replied that her post was in response to Mr. Aboulmaouabhib's "ignorant message" and she was "only racists against ignorance and rudeness." Later, another co-worker commented, "I'm offended and this will be reported. As well as deleted."

Several co-workers complained to their respective supervisors, their respective managers, the Emergency Communications Center ("ECC") HR department or the Metro HR department about the content of Plaintiff's Facebook post. A citizen also complained to the Mayor's Office of Neighborhoods and indicated that based on the content of Plaintiff's post, the complainant feared a person of color may not receive adequate assistance when calling 911. The Office of Neighborhoods informed the ECC Director.

When the ECC Director spoke with Plaintiff, Plaintiff indicated she did not feel the post was offensive and was merely mocking the person who posted before her. The Director ultimately terminated her employment after she showed no remorse or accountability. The Plaintiff appealed and an administrative law judge and the civil services commission both upheld the termination decision.

She then filed a federal lawsuit and the district court denied Nashville's summary judgment motion, concluding that under *Pickering*, the factors weighed in the employee's favor such that a jury should decide the issue. Specifically, the court found given "Plaintiff's significant interest in speaking on a matter of core public concern —which did not relate to her job duties—and the relatively slim evidence of workplace disruption resulting therefrom, the Court concludes Defendant's interest in workplace efficiency is less robust than Plaintiff's interest in commenting on a presidential election." The case went to a jury to answer special interrogatories on questions of fact. The district court judge then took those jury interrogatory answers to rule on the legal matters presented in the case such as whether the employee's speech was protected by the First Amendment and to conduct the *Pickering* balancing test. The court ultimately ruled in

favor of the plaintiff, concluding that Nashville violated her First Amendment rights by terminating her employment for the offensive Facebook post and then the jury found the City liable.

Nashville is appealing the decision and among the issues to be appealed is whether the plaintiff's use of the n-word is constitutionally protected conduct in the public employment context. Nashville will also likely appeal the manner in which *Pickering* was applied in this case given that it gave less weight to workplace disharmony than it would have for police and fire departments.

Portland Pipeline Corporation v. South Portland **– Maine Supreme Judicial Court – Local Zoning / Preemption**

Portland Pipeline Corporation (PPLC) operates a number of pipelines which pass underground between South Portland and Montreal, Canada where the oil refineries are. South Portland maintains Pier 2, where tanker vessels have historically docked to deliver oil. Pier 2 is in the City's shipping zoning district ("S") and is adjacent to public parks. PPLC has transported oil northbound to Montreal for decades by offloading oil from Pier 2, transporting it 2.5 miles to its "Main Tank Farm" and then loading it into its pipelines. The Main Tank Farm is zoned "C" for Commercial and is adjacent to residential neighborhoods, schools, etc.

PPLC sought to reverse the flow of oil in some of its pipelines, such that it would be bringing crude oil or "tar sands" oil from Montreal and then load it onto ships in the City's harbor for shipment to both US and international destinations.

In 2012-2013, advocates began opposing the flow reversal project. An initial ordinance that would have banned the project failed in the city council, but the council agreed to a moratorium on development proposals involving the loading of oil sands / tar sands products onto tank vessels docking in the City to study the implications in terms of land use, environmental, health effects, and other regulatory implications of the development proposal.

Over the next six months, the City created a committee to study the impacts of the proposed development and invited PPLC to participate in the hearings held by the committee. The City concluded that higher concentrations of HAP emissions caused by the crude oil loading would cause increases in City residents' risk of cancer and that these risks were particularly concerning due to the proximity of the PPLC facilities to schools, parks, and other areas most used by children and the elderly.

Ultimately, after extensive hearings and study, the city council voted to pass the Clear Skies Ordinance, which sought to protect citizens and visitors from harmful effects caused by air pollutants and conserve natural resources. The Ordinance prohibits the storing and handling of petroleum or petroleum products for the "bulk loading of crude oil onto any marine tank vessel" in commercial and shipping zoning districts. The Ordinance further prohibits the installation or

construction of any structures with the potential to emit air pollutants for the purpose of loading of crude oil onto any marine tank vessel in the C and S zoning districts.

PPLC argues that if it cannot reverse the flow of its pipeline, the company will go out of business and the ordinance prohibits it from doing so. PPLC sued, arguing that the zoning ordinance is preempted by a number of federal and state laws, including the interstate pipeline safety act (PSA), the Port and Waterways Safety Act (PWSA), federal maritime law and that the ordinance violates the dormant commerce clause.

The district court found that the ordinance was not preempted by any federal or state law, did not violate the dormant commerce clause and was instead, a lawful exercise of a local government's historical police powers.

IMLA's amicus brief on appeal will focus on the preemption issues in the context of local zoning powers.

***AT&T v. United States & Federal Communications Commission* – Ninth Circuit – FCC Small Cell / Rights of Way**

The Federal Communications Commission ("FCC") has released a series of Report and Orders and Declaratory Rulings in an effort to streamline deployment of wireless and wireline infrastructure to prepare for the 5G wave in the wireless sector, and to bridge the digital divide in both the wireless and wireline sectors. These orders seek to streamline broadband deployment nationwide through deregulation of the industry.

Six lawsuits have been filed thus far challenging the FCC's Rulings (the "Orders"), which set out standards for the deployment of small cells for 5G. These lawsuits have been consolidated and sent to the Ninth Circuit.

The Orders at issue in the consolidated case significantly limits the authority of local governments in managing the public right of way. The Orders restrict requirements local governments may impose on wireless carriers (for example, no undergrounding requirements are allowed). They also restricts the fees a local government may charge a carrier to cost-based fees, allows for large batched applications, imposes strict shot clocks with less time for local governments to review applications, and forbids the implementation of moratoria. Finally, the Orders broadly prohibit any local rules that prevent wireless expansion. Local governments may still impose aesthetic requirements, though there are significant restrictions on what kinds of aesthetic requirements are allowed.

A number of local governments filed suit, arguing that the FCC exceeded its statutory authority, that the orders violate the Administrative Procedures Act (APA), and they violate the Constitution based on the Tenth and Fifth Amendments. The major wireless carriers are participating in the suit, arguing that the FCC did not go far enough by failing to provide a deemed granted remedy for wireless carriers.

The issues in the case are:

1. Whether the orders exceed the FCC's statutory authority?
2. Whether the orders are arbitrary and capricious and an abuse of discretion under the Administrative Procedures Act?
3. Whether the orders violate the Tenth and Fifth Amendments of the U.S. Constitution?

***NYC v. BP et. al, / City of Oakland v. BP et. al., County of San Mateo v. Chevron et al. / Boulder County v. Suncor / Rhode Island v. Chevron* – Second Circuit / Ninth Circuit / Tenth Circuit / First Circuit – Preemption / State Nuisance Claims**

Cities and counties across the United States have brought lawsuits against major oil and gas companies claiming they knew for decades their products caused climate change but denied or downplayed the threat while promoting their products. The complaints claim that the defendants engaged in an overt public relations campaign intended to cast doubt on climate science. These lawsuits have been brought under state common law (including public and private nuisance, trespass, negligence, etc.). The suits seek damages or compensation for current and future costs associated with climate change (such as health related deaths, flooding due to sea-level rise, etc.).

Presently, three batches of cases are on appeal to the U.S. Courts of Appeal – two to the 9th Circuit (Oakland / San Francisco and San Mateo), and one to the 2nd Circuit (NYC).

Two of the three lower courts (NYC, Oakland / San Francisco) to hear these cases have ruled that cities and counties may not bring state common law claims and dismissed the lawsuits. One court (San Mateo) has ruled cities and counties may bring state common law claims and ordered the cases before it remanded to state court.

By way of background, in *American Electric Power v. Connecticut* (2011) the Supreme Court held a federal common law public nuisance lawsuit seeking an injunction against power companies to reduce greenhouse gas emissions (GHGs), brought by cities and states, was displaced by the Clean Air Act, which delegates authority to regulate GHGs to the U.S. Environmental Protection Agency (EPA). In *Native Village of Kivalina v. ExxonMobile* (2012), the Ninth Circuit held that a federal common law public nuisance lawsuit seeking damages for climate change brought by a Native village in Alaska was also displaced by the Clean Air Act. (Displacement of federal common law by a federal statute is, in essence, the same as preemption of state common law by a federal statute.)

The courts deciding the New York City and Oakland / San Francisco cases relied on the above two cases to conclude that, first, a federal common law public nuisance claim for climate change does exist and, second, that as a result of the existence of a federal nuisance claim cities and counties cannot bring state common law claims for damages for climate change. The courts

concluded that any federal common law nuisance claim was displaced by the Clean Air Act under *American Electric Power* regardless of the actual theory of liability in these cases.

In contrast, the court in *San Mateo* concluded that the existence of a federal common law claim does not eliminate the state common law claim, and that the Clean Air Act's delegation of regulatory authority to EPA does not preempt state law claims. "To the contrary, the Clean Air Act and the Clean Water Act both contain savings clauses that preserve state causes of action and suggest that Congress did not intend the federal causes of action under those statutes "to be exclusive."

The issue in these cases is whether cities and counties may bring state common law claims seeking damages or compensation for climate change impacts.

IMLA's AMICUS PROGRAM

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If your municipality would like to benefit from IMLA's amicus program—as well the many other benefits of IMLA membership--we invite you to join the many thousands of cities, towns and counties who are IMLA members. If you have any questions about membership or any of our programs, please contact Chuck Thompson, IMLA's Executive Director, at cthompson@imla.org or at 202-742-1016 or Amanda Kellar, IMLA's Director of Legal Advocacy, at akellar@imla.org or 202-466-5424 x 7116.