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

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U.S. SUPREME COURT –

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;
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> (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.
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> 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.

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 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. 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 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 will hear the case in the October 2014 term. 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 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.

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, 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 Dori Bernstein, SCI Director, at (202) 662-9630 or dkb37@law.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 in 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.

Until this past term, 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. 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. A new addition to 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.

2. OCTOBER TERM 2013

Stanton v. Sims - Fourth Amendment, "hot pursuit" doctrine (reversed and remanded on November 4, 2013)

The two questions presented in this Ninth Circuit appeal were: (1) whether the "hot pursuit" doctrine articulated in *United States v. Santana*, 427 U.S. 38, 42-43 (1976) applies where police officers seek to arrest a fleeing suspect for a misdemeanor; and (2) whether a police officer is entitled to qualified immunity where he pursued a suspect fleeing the officer's attempt to arrest him for a jailable misdemeanor committed in the officer's presence, into the front yard of a residence through a gate used to access the front door, and the officer had reason to believe the suspect might have been just involved in a fight involving weapons.

The Supreme Court, reversing the Ninth Circuit, without argument, found that the officer was entitled to qualified immunity because the law was not clearly established at the time that a police officer's warrantless entry of someone's home was unjustified simply because the person fleeing was only suspected of committing a misdemeanor. The Court expressed no opinion on whether the entry itself was constitutional.

Sprint Communications Company v. Jacobs – Abstention – Younger Doctrine (decided December 10, 2013)

This case arose out of a telecom dispute in Iowa. Sprint refused to pay another company's intrastate access charge for a service and asked the Iowa Utility Board (IUB) for confirmation that it was under no obligation to do so. The IUB ordered Sprint to pay, and Sprint challenged the IUB's decision in federal and state courts simultaneously. Under the Younger abstention doctrine, the Eighth Circuit ruled that the district court should not hear the case, if at all, until the state court review of the IUB decision was complete.

The issue before the Supreme Court was whether it mattered for the purposes of abstention that Sprint initially asked the IUB for approval—a remedial proceeding— or if Younger abstention only applies where the state brings a party before the court or administrative board in a coercive proceeding. IMLA joined an amicus brief through the State and Local Legal Center. The Supreme Court held on December 10, 2013 that abstention did not apply.

Brandt v. United States - Railroad Rights of Way, Reverter, Takings, Rails to Trails (decided March 10, 2014)

Issue: Whether the United States retained an implied reversionary interest in rights-of-way created by the General Railroad Right-of-Way Act of 1875 after underlying lands were patented into private ownership.

In 1875 the federal government granted significant easements to railroad companies to build tracks across the country. For a number of reasons, many of those railroad tracks have recently become abandoned. In 1983, Congress amended the National Trails System Act (16 U.S.C. 1247 (d)) to allow the federal government to take back abandoned railroad easements and turn them into land for public recreation. The process is commonly referred to as "railbanking." The trails act triggered a slew of litigation against the government, with independent landowners claiming that the original grants from the 19th century did not contain a residual right of possession for the government after tracks had been abandoned. The Seventh and Federal Circuits have previously held that the United States did not retain an implied reversionary interest in the abandoned tracks. In this case, the Tenth Circuit held otherwise, triggering a circuit split, and necessitating a closer look by the Supreme Court.

IMLA joined an amicus brief through the State and Local Legal Center, in support of the Federal government, arguing that state and local governments have long relied on the federal statutes relevant to this case to build public highways in abandoned railroad rights-of-way. On March 10, 2014, the Court held that a private party, rather than the federal government, owns an abandoned railroad right-of-way.

McCutcheon v. Federal Election Comm'n, Campaign Finance, First Amendment (decided April 2, 2014)

Issue: (1) Whether the biennial limit on contributions to non-candidate committees, 2 U.S.C. § 441a(a)(3)(B), is unconstitutional for lacking a constitutionally cognizable interest as applied to contributions to national party committees; (2) whether the biennial limits on contributions to non-candidate committees, 2 U.S.C. § 441a(a)(3)(B), are unconstitutional facially for lacking a constitutionally cognizable interest; (3) whether the biennial limits on contributions to non-candidate committees are unconstitutionally too low, as applied and facially; and (4) whether the biennial limit on contributions to candidate committees, 2 U.S.C. § 441a(a)(3)(A), is unconstitutional for lacking a constitutionally cognizable interest.

By a 4-1-4 vote, the Court struck down federal statutory limits on the aggregate amount an individual may contribute biennially to federal candidates, political parties, and other political committees. The plurality found that the aggregate limits impose "significant First Amendment costs" by allowing an individual to fully contribute only to ten primary and general election campaigns ─ at which point the aggregate "limits deny the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences." The plurality next found that the government failed to show that "the aggregate limits further the permissible objective of preventing quid pro quo corruption": contributing the base limit to additional candidates does not threaten corruption of those additional candidates; and, thanks to "[v]arious earmarking and antiproliferation rules," the aggregate limits do not prevent circumvention of the base limits. Justice Thomas filed a concurring opinion stating that he would overrule *Buckley v. Valeo* and subject contribution limits to strict scrutiny, which the aggregate limits could not survive.

Madigan v. Levin- ADEA (dismissed as cert was improvidently granted and remanded October 15, 2013)

Issue: Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, that state and local government employees may avoid the federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983. In other words should the ADEA be the exclusive remedy in age discrimination claims.

At argument, the Court raised the question of the Seventh Circuit's jurisdiction to decide the case before trial and whether another federal law (Government Employees Rights Act of 1991) was implicated in the case but not discussed by either side. The Chief Justice suggested that the case should be returned to the lower courts and Justice Breyer suggested that the Court dismiss the case as one that was improvidently granted which the Court ultimately decided to do on October 15, 2013. Based on the court's discussion at argument and depending on the results of the remand we may see this issue back before the Court in the same case in a couple of years.

Fernandez v. California – Search and Seizure, Co-Owners Fourth Amendment (decided February 25, 2014)

Question Presented: Proper interpretation of *Georgia v. Randolph*, 547 U.S. 103 (2006), specifically whether a defendant must be personally present and objecting when police officers ask a co-tenant for consent to conduct a warrantless search or whether a defendant's previously-stated objection, while physically present, to a warrantless search is a continuing assertion of Fourth Amendment rights which cannot be overridden by a co-tenant.

In a 6-3 decision the Court concluded that a co-occupant of a dwelling must be present to object to a search where a co-occupant consents to the search. Thus, the Exclusionary Rule does not foreclose use of evidence recovered against a non-consenting absent defendant whose property is searched and seized. Prior cases firmly establish that police officers may search jointly occupied

premises if one of the occupants consents. *See United States v. Matlock*, 415 U. S. 164 (1974). However in 2006, the Court strayed from this absolute rule to note a narrow exception in *Georgia v. Randolph*, 547 U. S. 103 (2006), holding that the consent of one occupant is insufficient when another occupant is present and objects to the search. In *Fernandez*, the Court considered whether *Randolph* applies if the objecting occupant is absent when another occupant consents and if the fact that the police cause the absence by arresting the co-occupant matters.

The Court answered by saying: "Our opinion in *Randolph* took great pains to emphasize that its holding was limited to situations in which the objecting occupant is physically present. We therefore refuse to extend *Randolph* to the very different situation in this case, where consent was provided by an abused woman well after her male partner had been removed from the apartment they shared."

Town of Greece v. Galloway – Legislative Prayer, First Amendment (decided May 5, 2014)

Question Presented: The specific issue before the Supreme Court was this: "Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity."

The Town of Greece, New York had followed the *Marsh* tradition for several decades, allowing local representatives to start the monthly five-member Town Board meetings with prayer. The Town ostensibly welcomed any sect or denomination and contacted houses of worship within the Town's boundaries to make them aware of the prayer opportunity. But there were virtually no non-Christian places of worship in the Town--not a single synagogue, mosque or temple, and no non-Christian speakers were contacted. In practice, every prayer was delivered by a Christian, and the majority invoked the name of Jesus or Jesus Christ, and ended with "in Jesus' name."

In 2008, Town residents Susan Galloway (who is Jewish) and Linda Stephens (who is an atheist) brought suit against the Town in the form of a Section 1983 action, asserting that the prayer practice violated the Establishment Clause. Although they had each lived in the Town for more than 30 years, and could not identify a single non-Christian place of worship within Town boundaries, they argued that the prayer selection practice was either (1) overtly Christian in nature or (2) at a minimum, clearly sectarian, and constituted a "custom or policy" of excluding non-Christians. (Publicity surrounding their complaint subsequently led to members of the Wicca, Jewish and Ba'hai faiths providing a small number of Town Board prayers).

The Western District of New York had held for the Town (*Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010)). It found that, where the prayer forum had been rotated among voluntary speakers, no volunteer had been rejected, the Town did not interfere in the content of prayers, and the prayers did not proselytize or demean, the process was consistent with *Marsh*—notwithstanding references to "Jesus."

The Second Circuit disagreed, reversing and remanding. Noting that the legislative prayer issue was a matter of first impression before it, the Circuit Court acknowledged the seminal role that *Marsh* must play in any such case.

But the Second Circuit then pointed to County of *Allegheny v. American Civil Liberties Union*, 492 U.S. 583 (1989). There, the Court had found *Marsh*'s tradition-based paradigm to be insufficient when applied to a public crèche display: "However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." (492 U.S. at 603).

Assessing the Town's practice in its totality, the Circuit Court found little randomness or openness in the prayer program. The Town essentially sought out only Christian speakers, resulting on an overwhelmingly Christian tone to its public meetings. Out of 121 prayers delivered between 1999 and 2010, all but four were Christian, and fully two-thirds had specifically referenced "Jesus," "Christ" or incorporated some other specifically Christian symbol or dogma. According to the Second Circuit, this did not comport with *Marsh* and violated the First Amendment: "We conclude, on the record before us, that the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint."

The Second Circuit did not ascribe "any animus" to the Town's leaders, and did not state that a single denominational prayer, standing alone, would be constitutionally suspect. But using a "totality of the circumstances" test, the Town's scheme was impermissible.

By a 5-4 vote, the Court held that a town does not violate the Establishment Clause by opening its monthly board meetings with a prayer delivered by volunteer clergy, most of which have been delivered by Christian clergy, many of whom invoked explicitly Christian themes. In an opinion by Justice Kennedy, the Court reversed the Second Circuit.

The Court stated that "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases." The Court pointed to examples of invocations, made near the time of the Founding, that "contain[ed] explicitly religious themes of the sort respondents find objectionable." And it found that the current Congress "acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds." After rejecting dictum in *County of Alleghany v. American Civil Liberties Union*, 492 U.S. 573 (1989), suggesting "that legislative prayer must be generic or nonsectarian," the Court stated that such a rule would create an insurmountable problem: it "would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech," which would unduly "involve government in religious matters." Nor is it likely, found the Court, "that consensus might be reached as to what qualifies as generic or nonsectarian." Accordingly, the Court held that "[p]rayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves th[e] legitimate [invocation] function." But a "different case" would be presented "[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." The Court found that the prayers at Greece's meetings were on the permissible side of the line. Although a few guest clergy's "remarks strayed from the rationale set out in *Marsh*, they do not despoil a practice that on the whole reflects and embraces our tradition." Nor, held the Court, were the invocations invalid

because most of the prayer givers were Christian. "So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing."

In a part of Justice Kennedy's opinion that Justices Scalia and Thomas did not join, a plurality rejected the plaintiffs' contention that "the town's prayer practice . . . coerces participation by nonadherents." The plurality concluded that "[o]n the record in this case" no coercion was proven. Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Scalia joined in part. In the first part of his opinion, Justice Thomas reiterated his view that there is serious reason to doubt whether the Establishment Clause is incorporated so as to apply to the states. In the second part of his opinion, which Justice Scalia joined, Justice Thomas stated that "to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts ─ not the 'subtle coercive pressure' allegedly felt by respondents in this case." Justice Alito filed a separate concurring opinion, which Justice Scalia also joined.

Justice Kagan filed the principal dissenting opinion, which Justices Ginsburg, Breyer, and Sotomayor joined. Justice Kagan concluded that "the Town of Greece's prayer practices violate th[e] norm of religious equality ─ the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian." Justice Breyer filed a separate dissenting opinion to "emphasize several factors that [he] believe[d] underlie the conclusion that, on the particular facts of this case, the town's prayer practice violated the Establishment Clause."

On Scotusblog.com (May 6, 2014), writing about the case, Erwin Chemerinsky lamented the Court's loss of Justice O'Connor in the wars about religion and the First Amendment. Rather than dilute his well reasoned comment, the quote follows:

> "As I read the opinions in *Town of Greece v. Galloway*, I realized once again how the results would have been different if only Justice O'Connor had not left the bench and been replaced by Justice Alito. Justice O'Connor emphasized that the central purpose of the Establishment Clause was to keep anyone from feeling like an outsider (or an insider) as to his or her government. Explicitly Christian prayers before every month's town board meetings inevitably make those of other religions feel that they do not belong there and that they are outsiders.
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> Not long before she left the bench, Justice O'Connor declared: "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate . . . .Why would we trade a system that has served us so well for one that has served others so poorly?"
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> It is deeply unfortunate that the majority of the Court fails to understand this basic insight and is so greatly lessening the protections of the Establishment Clause of the First Amendment."

Navarette v. California – Search and Seizure, DUI, Fourth Amendment (decided April 22, 2014)

Question presented: Does the Fourth Amendment require an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle?

In a 5-4 decision the Court concluded that the traffic stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the truck's driver was intoxicated. Justice Thomas wrote for the majority composed of the Chief Justice, Justice Kennedy, Justice Breyer and Justice Alito while Justice Scalia wrote a dissent for himself and Justice Ginsburg, Justice Sotomayor and Justice Kagan.

On August 23, 2008, a Mendocino County 911 dispatch team for the California Highway Patrol (CHP) received a call from another CHP dispatcher in neighboring Humboldt County. The Humboldt County dispatcher relayed a tip from a 911 caller, which the Mendocino County team recorded as follows: "'Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David-94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago.'" The Mendocino County team then broadcast that information to CHP officers at 3:47 p.m.

A CHP officer heading northbound toward the reported vehicle responded to the broadcast. At 4:00 p.m., the officer passed the truck near mile marker 69. At about 4:05 p.m., after making a U-turn, he pulled the truck over. A second officer, who had separately responded to the broadcast, also arrived on the scene. As the two officers approached the truck, they smelled marijuana. A search of the truck bed revealed 30 pounds of marijuana. The officers arrested the driver, petitioner Lorenzo Prado Navarette, and the passenger, petitioner José Prado Navarette.

Petitioners moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity. Both the magistrate who presided over the suppression hearing and the Superior Court disagreed. Petitioners pleaded guilty to transporting marijuana and were sentenced to 90 days in jail plus three years of probation. Then they appealed the suppression decision. The California Court of Appeal affirmed and the California Supreme Court denied review.

The Court concluded that for the search to be reasonable the "tip" had to be reliable and the Court found reliability in its specificity and in the fact that the tip came through the 911 system where there are penalties for abuse and tracking capabilities. But the Court noted, even a reliable tip is insufficient if it does not provide reasonable suspicion to believe that criminal activity is afoot.

In analyzing the issue of whether the call gave reasonable suspicion to believe criminal activity is afoot, the Court described its function thusly:

> We must therefore determine whether the 911 caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving as opposed to an isolated episode of past recklessness. *See Cortez*, 449 U. S., at 417 ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity").

The Court noted the distinction between past criminal conduct and on-going criminal conduct leaving to another day whether a stop based on a completed criminal activity could be justified under this same test citing *United States v. Hensley*, 469 U. S. 221, 229 (1985).

The majority then concluded:

> We conclude that the behavior alleged by the 911 caller, "viewed from the standpoint of an objectively reasonable police officer, amount[s] to reasonable suspicion" of drunk driving. *Ornelas v. United States*, 517 U. S. 690, 696 (1996). The stop was therefore proper.

Justice Scalia's dissent characteristically blisters the majority. He hammers home the fact that during the five minutes that the officer followed the truck the officer observed nothing to suggest a drunken driver. And he cautions:

> Law enforcement agencies follow closely our judgments on matters such as this, and they will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop. This is not my concept, and I am sure would not be the Framers', of a people secure from unreasonable searches and seizures.

Tolan v. Cotton – Summary Judgment, use of force, qualified immunity (decided May 5, 2014)

Question presented: The question presented is whether courts deciding qualified immunity in Fourth Amendment cases should consider the factual reasonableness of the search or seizure when applying the second, "clearly established" prong of the test.

During the early morning hours of New Year's Eve, 2008, police sergeant Jeffrey Cotton fired three bullets at Robert Tolan, a promising major league baseball prospect and the son of a former major league player; one of those bullets hit its target and punctured Tolan's right lung. At the time of the shooting, Tolan was unarmed on his parents' front porch about 15 to 20 feet away from Cotton. Tolan sued, alleging that Cotton had exercised excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Cotton, and the Fifth Circuit affirmed, reasoning that regardless of whether Cotton used excessive force, he was entitled to qualified immunity because he did not violate any clearly established right. 713 F. 3d 299 (2013).

In a per curiam decision that granted, vacated and remanded the case without argument, the Court explained that "In articulating the factual context of the case, the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.' *Anderson v. Liberty Lobby, Inc*., 477 U. S. 242, 255 (1986)."

Explaining, the Court described the proceedings in the Fifth Circuit noting that the lower court held that even if Cotton's conduct did violate the Fourth Amendment, Cotton was entitled to qualified immunity because he did not violate a clearly established right. So far so good. But, in reaching this conclusion, the Fifth Circuit began by noting that at the time Cotton shot Tolan, "it was . . . clearly established that an officer had the right to use deadly force if that officer harbored an objective and reasonable belief that a suspect presented an 'immediate threat to [his] safety.'" *Id.*, at 306 (*quoting Deville v. Marcantel*, 567 F. 3d 156, 167 (5th Cir. 2009)).

The Court of Appeals reasoned that Tolan failed to overcome the qualified-immunity bar because "an objectively-reasonable officer in Sergeant Cotton's position could have . . . believed" that Tolan "presented an 'immediate threat to the safety of the officers.'" 713 F. 3d, at 307. In support of this conclusion, the court relied on the following facts: the front porch had been "dimly-lit"; Tolan's mother had "refus[ed] orders to remain quiet and calm"; and Tolan's words had amounted to a "verba[l] threa[t]." Most critically, the court also relied on the purported fact that Tolan was "moving to intervene in" Cotton's handling of his mother and that Cotton therefore could reasonably have feared for his life. Accordingly, the court held, Cotton did not violate clearly established law in shooting Tolan. What the Fifth Circuit did not do was value or credit evidence offered by Tolan that contradicted Cotton's evidence. In other words, the Fifth Circuit failed to recognize that evidence in the record disputed the critical evidence upon which it relied for its decision.

Plumhoff v. Rickard - Qualified Immunity, use of force (decided May 27, 2014)

Question Presented: Whether, for qualified immunity purposes, the Sixth Circuit erred in analyzing whether the force was supported by subsequent case decisions as opposed to prohibited by clearly established law at the time the force was used; and (2) whether the Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law when, under the respondent's own facts, the suspect led police officers on a high-speed pursuit that began in Arkansas and ended in Tennessee, the suspect weaved through traffic on an interstate at a high rate of speed and made contact with the police vehicles twice, and the suspect used his vehicle in a final attempt to escape after he was surrounded by police officers, nearly hitting at least one police officer in the process.

The Court held 7-2 that police officers did not violate the Fourth Amendment when they shot and killed the driver of a fleeing vehicle to end a dangerous car chase. In an odd twist, since the Court's decision cannot be reviewed, the Court offered an alternative conclusion by unanimously deciding that the officers were entitled to qualified immunity.

Donald Rickard was pulled over by the police because he only had one operating headlight. The officers noticed a dent in his windshield that might have been caused by striking an object, including a pedestrian. As the officers determined what course to take, Rickard drove away and was pursued by police. He drove over 100 miles an hour and passed more than two dozen vehicles before leaving the highway where he made contact with three police cars. Cornered by the police and a building, Rickard continued trying to elude the police with tires spinning and his car rocking back and forth Officer Plumhoff fired three shots into his car. Rickard then reversed his car, nearly hitting an officer on foot, and again fled. Officers fired 12 more shots, killing Rickard and his passenger.

Rickard's surviving daughter argued that the Fourth Amendment did not allow the police to use deadly force to end the chase and that even if police were permitted to fire their weapons, they fired too many shots. IMLA's joined an amicus brief through the State and Local Legal Center, arguing that officers retain qualified immunity from Fourth Amendment force claims so long as it is arguable, on the historical facts most favorable to the plaintiff, that the force was reasonable.

The Court concluded the use of deadly force was reasonable because "[u]nder the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road." The number of shots wasn't unreasonable because "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended."

The Court concluded that even if the use of deadly force in this case violated the Fourth Amendment the officers would be entitled to qualified immunity as no clearly established precedent existed to guide them differently. Because the Court acts as the final arbiter in this case, it seems odd that the Court felt it appropriate to offer the alternate conclusion. Certainly lower courts do it all the time to protect their decision-making from courts on appeal, but here the Court's conclusion that the Fourth Amendment had not been violated ought to have ended the discussion. Perhaps, the Court wanted to remind the Sixth Circuit of the proper basis for immunity determinations which that court also wrongly decided.

Finally, be warned – the Court noted that its decision in this case did not involve a claim by the passenger.

Wood v. Moss – First Amendment – Public Safety – Protests (decided May 27, 2014)

Question Presented: Whether moving anti-Bush protesters about one block farther from the President than pro-Bush demonstrators violates the First Amendment. Pro- and anti-President Bush demonstrators had assembled on opposite sides of the street on which President Bush's motorcade was supposed to travel to take him to a cottage in Jacksonville, Oregon, for the evening. The President made a last-minute decision to have dinner at the outdoor patio dining area of the Jacksonville Inn. Learning of the route change, protesters moved down the street in

front of the Inn. Secret Service agents moved them two blocks down the street, about a block farther away from the Inn than the supporters. The anti-Bush protesters sued two Secret Service agents claiming their First Amendment right to be free from viewpoint discrimination had been violated. The agents claimed they were entitled to qualified immunity.

The Ninth Circuit denied the agents qualified immunity. The Ninth Circuit focused on its conclusion that the agents engaged in viewpoint discrimination instead of whether it was clearly established that the anti-Bush protesters could not be moved farther away from the President than the pro-Bush demonstrators.

IMLA joined an amicus brief through the State and Local Legal Center arguing in favor of the petitioners and the Court unanimously granted qualified immunity to the Secret Service agents. Justice Ginsburg writing for the Court had little trouble concluding the officers in this case were entitled to qualified immunity: "No decision of this Court so much as hinted that their on-the-spot action was unlawful because they failed to keep the protesters and supporters, throughout the episode, equidistant from the President."

CTS Corp. v. Waldburger - CERCLA, Statutes of Repose, Limitations, Preemption (decided June 9, 2014)

The issue in this case is whether Congress, when passing CERCLA, intended to preempt statutes of limitations and statutes of repose or only statutes of limitations. While more common in ancient times, statutes of repose are less common today. There are five states that continue to have statutes of repose: Alabama, Connecticut, Kansas, Oregon, and North Carolina.

The Supreme Court held 7-2 that the federal Superfund statute, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), does not preempt state statutes of repose. The specific result in the case eliminates a claim that homeowners had against a company that had polluted the groundwater in their neighborhood, but which they knew nothing about until many years after the company had sold its property thereby defining in time its last culpable act and starting the running of the statute of repose.

The Environmental Protection Agency told North Carolina homeowners in 2009 that their well water was contaminated, allegedly by CTS Corporation, which had sold its nearby electronics plant 1987. The homeowners brought a state-law nuisance claim. North Carolina's statute of repose prevents a defendant from being sued for a tort more than 10 years after the defendant's last culpable act. CERCLA was enacted to promote "the timely cleanup of hazardous waste sites." Section 9658 explicitly preempts statutes of limitations applicable to certain state-law tort claims and begins the statute of limitations when the plaintiff discovers that harm was caused by contamination.

The Court held Section 9658 does not preempt statutes of repose. The Court began its analysis by explaining the difference between statutes of limitations and statutes of repose. Statutes of limitations create "a time limit for suing in a civil case, based on the date when the claim

accrued." Statutes of repose bar claims based on the date of the defendant's last culpable act or omission. Statues of limitations encourage plaintiffs to diligently prosecute known claims. Statues of repose effectuate a legislative judgment that a defendant should be free from liability after a specific period of time.

The Court noted that while Section 9658 uses the term "statutes of limitations" four times, it never uses the term "statutes of repose." While the Court concluded this isn't dispositive, "other features of the statutory text further support the exclusion of statutes of repose." These include that Section 9658 describes the covered period in the singular, assumes a claim exists (statues of repose can prohibit a cause of action from coming into existence), and allows for equitable tolling (only available under statutes of limitations).

U.S. v. Wurie - Fourth Amendment (decided June 25, 2014 with *Riley v. California*).

Question Presented: Whether the Fourth Amendment permits the police, without first obtaining a warrant, to review the call log of a cell phone found on a person who has been lawfully arrested.

Riley v. California - Fourth Amendment (decided June 25, 2014)

Question Presented: Whether or under what circumstances the Fourth Amendment permits police officers to conduct a warrantless search of the digital contents of an individual's cell phone seized from the person at the time of arrest absent a warrant or other exigent circumstances.

The Supreme Court on June 25, 2014 decided an important case (actually two cases) involving the intricate balance between privacy and the ability of the police to ferret out crime and take criminals off the street. The Court ruled in favor of privacy and as Chief Justice Roberts penned for the Court "Privacy comes at a cost." The cases, *Riley v. California* 13–132 and *United States v. Wurie* 13–212 concerned the reasonableness of a warrantless search incident to a lawful arrest.

Tracing the history of the law involving searches incident to an arrest the Court explained that in "1914, this Court first acknowledged in dictum "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Weeks v. United States*, 232 U. S. 383, 392. Since that time, it has been well accepted that such a search constitutes an exception to the warrant requirement.

The Court then discussed the trilogy of cases that explain the limits of the "search incident to arrest" to set the foundation for its analysis in this case. These cases: *Chimel v. California*, 395 U. S. 752 (1969) (right to search doesn't extend to whole house); *United States v. Robinson*, 414 U. S. 218 (1973) (right to search includes objects found on the arrestee); and *Arizona v. Gant*, 556 U. S. 332, 350 (2009)(right extends to passenger compartment of the car in which arrestee was travelling) and their progeny focused on the pre-digital world and seemed relatively easy for the Court to find parallels with similar situations in the days of our country's founding.

But today's digital world created a different problem for the Court and it explained:

> Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U. S. 295, 300 (1999). Such a balancing of interests supported the search incident to arrest exception in *Robinson*, and a mechanical application of *Robinson* might well support the warrantless searches at issue here.
>
> But while *Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel*—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.
>
> We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.

The Court responded to arguments that searches have been allowed in the pre-digital age of wallets and phone and date books, similarly private objects that an arrestee might have held dear with the following quotable passage:

> That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

The Court seemed persuaded that delving into a cell phone's depths invaded privacy interests based on the vast storage capacity of today's cell phones recognizing that they can hold more information than a trunk and perhaps more than a house. On this point, the Court noted:

> Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag

behind them a trunk of the sort held to require a search warrant in *Chadwick*, supra, rather than a container the size of the cigarette package in *Robinson*.

The Court acknowledged that today's cell phones can also be more than just simple storage devices as their data "can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." It recognized that information available through a search of the phone might ultimately lead to the search of servers in the cloud, or as the court put it simply finding a key in the arrestee's pocket wouldn't allow the police to search the house or locker that the key opened.

Finally, the Court brushed aside the government's argument that it should allow the government to develop protocols for dealing with the balance between privacy and cloud computing noting that it is "[p]robably a good idea, but the Founders did not fight a revolution to gain the right to government agency protocols."

The Court explained that government may not be entirely thwarted if it needs to search a cell phone as the exigency exception still exists and that there may be reasons of exigency that demand a police offer search a cell phone, but without an exception, law enforcement officers must now obtain a warrant to search the contents of a cell phone.

McCullen v. Coakley - First Amendment, Buffer Zones – (decided June 26, 2014)

Question Presented: (1) Whether the First Circuit erred in upholding Massachusetts's selective exclusion law – which makes it a crime for speakers other than clinic "employees or agents . . . acting within the scope of their employment" to "enter or remain on a public way or sidewalk" within thirty-five feet of an entrance, exit, or driveway of "a reproductive health care facility" – under the First and Fourteenth Amendments, on its face and as applied to petitioners; (2) whether, if *Hill v. Colorado* permits enforcement of this law, *Hill* should be limited or overruled.

Massachusetts imposes a 35 foot buffer zone around abortion clinics prohibiting persons without business at the clinic from picketing or protesting within that zone. Petitioners challenged the constitutionality of the law under the First and Fourteenth Amendments, arguing that it restricts the speech of "only those who wish to use public areas near abortion clinics to speak about abortion from a different point of view." Petitioners also argued that to the extent that the Court's *Hill v. Colorado* (2000) decision controls the outcome of this case, that decision should be overruled.

IMLA joined an amicus brief through the State and Local Legal Center. IMLA's argument in support of the buffer zone contended that buffer zones are an effective administrative place regulation that have been used and approved by the courts in many contexts over the years. As an example, most states limit campaigning around polling places. Lately, many states and local governments have imposed buffer zones around funerals and residences to allow protests but to limit their intrusion into an individual's privacy. Massachusetts had tried a 6 foot floating zone, but found that it was unmanageable. Governments should be able to solve problems at the local

level and to put in place reasonable place restrictions that are designed to protect public safety while at the same time allowing speakers to get their message out.

On June 26, the Supreme Court disagreed with IMLA's arguments and those of the State. The Court concluded that the First Amendment's protections limited the government from making broad use of its authority to protect public safety, favoring use of more narrowly tailored restraints, such as injunctions, individual interactions between police and protestors, and arrests.

Massachusetts had passed a law which it believed better protected prospective patients of abortion clinics from intimidation and harassment than a previous six foot floating buffer that it contended was insufficient. The Court brushed aside the State's arguments regarding its prior difficulties with the less restrictive law by referring to a history that it found held sparse evidence of problems and a legislative history that the Court concluded offered ample basis to believe the State could have used more narrowly tailored means to protect patients, such as injunctions and arrests.

Clearly, the Court felt that the restrictions when applied to the public sidewalks simply went too far when Chief Justice Roberts, in writing for the Court said:

> By its very terms, the Massachusetts Act regulates access to "public way[s]" and "sidewalk[s]." Mass. Gen. Laws, ch. 266, §120E½(b) (Supp. 2007). Such areas occupy a "special position in terms of First Amendment protection" because of their historic role as sites for discussion and debate. *United States v. Grace*, 461 U. S. 171, 180 (1983). These places—which we have labeled "traditional public fora"—"'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Pleasant Grove City v. Summum*, 555 U. S. 460, 469 (2009) (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983)).

While the decision was unanimous, Justice Scalia wrote a blistering concurring opinion for himself and Justices Kennedy and Thomas in which he excoriated his colleagues for concluding that the Massachusetts law was "content neutral." Justice Alito also wrote a concurring opinion in which he quarreled with the Court's conclusion of content neutrality and complained that he believed the law also violated the Constitution because of its viewpoint discrimination. Justice Scalia's dissent referred back to *Hill v. Colorado*, 530 U. S. 703 (2000) and his dissent and Justice Kennedy's dissent in that case to argue that the Court's decision amounted to a tacit reversal of *Hill*, a case the majority opinion cited, but did not discuss.

Buffer zones that affect the public's right to use sidewalks as traditional public *fora* are not necessarily prohibited by this decision, but the decision will require significant evidence to support the government's use of buffer zones. The Court noted that Boston's police testified at the legislative hearing that buffer zones would make their lives easier and responded by saying: "Of course they would. But that is not enough to satisfy the First Amendment. To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that

burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier."

In a post on July 5, 2014, at the *PostBulletin.com* reporting on the City of Rochester's plans to regulate panhandling, the ACLU's representative was quoted citing to *McCullen* that panhandling laws create multiple buffer zones and that cities should be wary of acting to create them in light of the Supreme Court's decision.

> Sarah Wunsch, a staff attorney at ACLU Massachusetts who is working on the case against Worcester's ordinances, said cities considering similar ordinances need to tread lightly.
>
> "Any place that's considering these laws is really going to have to consider them much harder," Wunsch said.
>
> She said the ACLU plans to file another appeal in light of a recent Supreme Court case, McCullen v. Coakley, that ruled buffer zones unconstitutional in relation to abortion clinics in Massachusetts. She thinks the aggressive panhandling ordinances essentially create thousands of buffer zones around the city near ATMs and sidewalk cafes.
>
> "If a city or town is talking about creating buffer zones where panhandling cannot take place … I think they're asking for big legal trouble," Wunsch said."

http://www.postbulletin.com/news/local/city-prepared-for-legal-challenges-against-panhandling-ordinance/article_a7338407-5bec-5e5e-9b2e-25377207a2f5.html (last visited July 7. 2014)

***Lane v. Franks* – First Amendment –** Compelled Testimony – *Garcretti v. Ceballos* Doctrine **–** (decided June 19, 2014)

Question Presented: (1) Whether the government is categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee's ordinary job responsibilities; and (2) whether qualified immunity precludes a claim for damages in such an action.

This was the first public employment First Amendment case the Supreme Court considered since *Garcetti v. Ceballos*. In this case, the employee claimed his employment was terminated in violation of the First Amendment for testifying pursuant to a subpoena. The Eleventh Circuit disagreed and found that the employee was acting pursuant to his official job duties when he testified and therefore his speech was not protected by the First Amendment.

The Supreme Court reversed in a unanimous decision.

Edward Lane was a program director at a public community college in Alabama. He fired state legislator Suzanne Schmitz because she was on his payroll but wasn't doing any work. Lane

testified about why he fired her at the grand jury which led to her indictment and two criminal trials the latter of which resulted in her conviction for theft and mail fraud. Meanwhile, Lane's program experienced "considerable budget shortfalls" and he was laid off after the first criminal trial but before the second trial. Lane claimed he was fired in retaliation for his testimony in violation of the First Amendment. He filed suit and his claim was dismissed before trial.

The First Amendment protects public employee speech made as a citizen on a matter of public concern. In 2006, in *Garcetti v. Ceballos,* the Court held that when public employees speak pursuant to their official job duties they are speaking as employees and not as citizens for First Amendment purposes.

The Eleventh Circuit concluded Lane's speech was not citizen speech protected by the First Amendment. Even though Lane wasn't routinely subpoenaed as part of his official job duties, what he testified about he learned at his job.

The Supreme Court disagreed. The Court described subpoenaed speech as "quintessential" citizen speech because anyone who testifies has an obligation to tell the truth. And in this case it was undisputed that Lane's ordinary job duties did not include testifying in court proceedings, meaning Lane was not speaking as an employee when he testified. "[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee-rather than citizen-speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."

IMLA's amicus brief sought to convince the Court that the First Amendment is a poor vehicle to protect employees from retaliation for their testimony; as it only limits public employers and leaves bare employees of private employers. Rather, IMLA argued, the host of laws that already exist should be sufficient and if not, additional laws could be passed to protect witnesses from retaliation for testifying. Further, by implication, the fact that so many laws protecting workers from retaliation for their testimony ought to give substantial force to the argument that the First Amendment has never been considered the proper vehicle to offer this protection. IMLA also pointed out that governmental employees are likely to be the most frequent witnesses and that many do so as a regular part of their job and that they should not be given a free pass to misbehave by covering their misbehavior under a blanket of First Amendment immunity. Similarly, IMLA argued that employees may admit in testimony that they abused their positions of public trust and should not be protected if they do so.

We believe our amicus efforts paid off as the Supreme Court specifically limited its ruling so as not to cover those employees who testify regularly as part of their jobs and also noted that the ruling would not protect employees who testified to their own misconduct.

As Justice Thomas pointed out in his concurring opinion, for some public employees like police, crime scene technicians, and laboratory analysts, "testifying is a routine and crucial part of their employment duties."

Finally, the Court granted college President Steve Franks qualified immunity concluding that Eleventh Circuit and Supreme Court precedent did not preclude him from concluding that he could fire Lane because of Lane's testimony under oath was outside the scope of his ordinary job responsibilities.

During an interview following the case Chuck Thompson was asked what the impact of this case might be. The answer was not what the interviewer was looking for. As we see it the case does not further the Constitutional goals that protect freedom of speech as much as it opens the public checkbook to Plaintiffs and the Plaintiffs attorneys by switching employment cases based on statutory protections from state courts to federal courts and by converting federal statutory protections into Section 1983 Constitutional claims thereby increasing the costs to government with attorney fee awards and in reducing the likelihood of dismissal of a case prior to trial. The ample protections against retaliation that already exist limit the need to reconsider how a government conducts business, so the decision only adds protections in those few jurisdictions that had limited whistleblower protections in place and in those few cases where an employee who does not regularly testify suffers an adverse job action the employee wants to challenge.

Burwell v. Hobby Lobby Stores and Conestoga Wood Specialties Corp v. Burwell – RFRA and RLUIPA (decided June 30, 2014)

Question Presented: Whether the Religious Freedom Restoration Act (RFRA) applies to for-profit, closely held secular corporations.

The Supreme Court in a 5-4 decision concluded that RFRA covers for-profit, closely held corporations in its definition of "person" thereby invalidating the contraceptive mandate of the Affordable Care Act. The Court reasoned that to hold otherwise would leave merchants with a difficult choice either they could give up the right to seek judicial protection of their religious liberty or they could forgo the benefits of operating as corporations. The Court determined that RFRA's text evidences that Congress wanted the statute to provide very broad protection for religious liberty and did not intend to put merchants to such a choice. Instead, Congress intended to protect the religious liberty of the people who controlled those closely held corporations.

The Court discounted the arguments by HHS and the dissent that RFRA does not cover corporations because they cannot exercise religion since RFRA includes protections for nonprofit corporations. The Court also relied on the fact that the definition of "person" includes corporations unless the law makes clear that such was not the intent. Similarly, the Court discounted arguments that the profitmaking objective of the corporations ought not to support the claim that corporations cannot exercise religion because the Court has entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants in its prior decisions. For example in *Braunfeld v. Brown*, 366 U. S. 599 the Court denied the claim of orthodox Jewish merchants, including a closely held corporation, that a Sunday closing law worked a disadvantage to them, but did not throw out the claim for lack of standing.

The Court concluded that the contraceptive mandate burdens the owners' free exercise rights by demanding that they support financially that which they cannot support morally while holding

true to the tenets of their faith. The Court assumed a compelling governmental interest motivates the regulations, nevertheless found the government did not choose the least restrictive means to enact the regulations. For example, it could pay for the contraceptives itself or it could offer the same accommodation to these for profit corporations as it did to not for non-profit religious entities. The Court stressed that the decision only extends to the specific issue before the Court: whether for profit, closely held corporations whose owners have strong religious objections to the contraceptive mandate in the Affordable Care Act are required to comply with the law. The Court made clear that the decision concerns only the contraceptive mandate and should not be understood to hold that all insurance-coverage mandates, e.g., for vaccinations or blood transfusions, must necessarily fall if they conflict with an employer's religious beliefs. Nor does it provide a shield for employers who might cloak illegal discrimination as a religious practice. Nor does it limit *United States v. Lee*, 455 U. S. 252, which upheld the payment of Social Security taxes despite an employer's religious objection, as there is no less restrictive alternative to the categorical requirement to pay taxes.

Justice Ginsberg wrote in dissent to stress that the Court's decision was not nearly so narrow as the Court claimed and that it could play havoc when applied to other efforts by religious corporations to avoid federal laws applying to them. Because the case only involved RFRA, the decision does not apply to local government, but since RLUIPA will be construed similarly, expect to face claims by corporations that various land use laws effect a burden on their faith and that they should be given accommodation. Justice Ginsberg cited to the amicus brief IMLA joined, which was submitted by the State and Local Legal Center on this point.

3. OCTOBER TERM 2014

Integrity Staffing Solutions v. Busk – Fair Labor Standards Act

Question Presented: Whether time spent in security screenings is compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act.

IMLA filed as an amicus asking the court to review this case due to its potential impact on local governments. Certiorari was granted on March 3, 2014 and IMLA joined an amicus brief submitted by the State and Local Legal Center.

Holt v. Hobbs - RLUIPA

The inmate in this case asserted that one of his fundamental Muslim beliefs is that he must grow a beard. The Arkansas Department of Correction's (ADC) grooming policy prohibits beards. The inmate sought a half-inch beard as a compromise position, which ADC rejected. The issue in this case is whether the ADC's grooming policy violates the Religious Land Use and Institutionalized Persons Act (RLUIPA) because it prohibits the inmate form growing a half-inch beard in accordance with his religious beliefs.

North Carolina Board of Dental Examiners v. Federal Trade Commission - Anti-trust, State Action Exemption

Issue(s): Whether, for the purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

T-Mobile South, LLC v. City of Roswell - FCC, Wireless Tower Siting

In order to promote the prompt deployment of telecommunications facilities and to enable expedited judicial review, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, provides that any decision by a state or local government denying a request to place, construct, or modify a personal wireless service facility "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332 (c)(7)(B)(iii).

The question presented is whether a document from a state or local government stating that an application has been denied, but providing no reasons whatsoever for the denial, can satisfy this statutory "in writing" requirement. IMLA joined an amicus brief submitted by the State and Local Legal Center.

Wynne v. Comptroller of Maryland – Dormant Commerce Clause

Question Presented: Does the United States Constitution prohibit a state from taxing all the income of its residents-wherever earned-by mandating a credit for taxes paid on income earned in other states?

IMLA filed as an amicus asking the court to review this case due to its potential impact on local governments and their ability to tax their residents. Certiorari was granted and IMLA joined an amicus brief submitted by the State and Local Legal Center.

Reed v. Town of Gilbert, AZ (9^{th} Circuit) – First Amendment; Signs

Question Presented: Does the Town's mere assertion of a lack of discriminatory motive render its facially content based sign code content-neutral and justify the code's differential treatment of Petitioners' religious signs?

Perez v. Mortgage Brokers Association – Administrative law

Question Presented: Whether a federal agency must engage in notice-and-comment rulemaking pursuant to the Administrative Procedure Act before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation.

City of Los Angeles v. Patel – Fourth Amendment / Facial Challenge to Municipal Ordinance

Los Angeles Municipal Code § 41.49 requires hotel and motel operators to keep specific information about their guests like their name, address, room number, and information about their vehicle parked at the hotel. Section 41.49 also states that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection." In a facial challenge to the ordinance, motel operators objected to § 41.49 authorizing warrantless inspection of guest records.

Questions Presented: (1) Whether facial challenges to ordinances and statutes are permitted under the Fourth Amendment; and (2) whether a hotel has an expectation of privacy under the Fourth Amendment in a hotel guest registry where the guest-supplied information is mandated by law and an ordinance authorizes the police to inspect the registry, and if so, whether the ordinance is facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry.

Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. – Fair Housing Act

Question Presented: Whether disparate-impact claims are cognizable under the Fair Housing Act. This is the third time the Court has accepted a case involving the issue of whether disparate-impact claims can be brought under the Fair Housing Act. (The prior two cases settled).

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Alabama Department of Revenue v. CSX Transportation – Railroads / Taxation

Questions Presented: (1) Whether a state "discriminates against a rail carrier" in violation of 49 U.S.C. § 11501(b)(4) when the state generally requires commercial and industrial businesses, including rail carriers, to pay a sales-and-use tax but grants exemptions from the tax to the railroads' competitors; and (2) whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. § 11501(b)(4), a court should consider other aspects of the state's tax scheme rather than focusing solely on the challenged tax provision.

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. Supreme Court Petition Stage Cases

***San Francisco v. Sheehan* –** ADA / Fourth Amendment

Question Presented: Does the ADA apply to arrests so as to require the police to provide a mentally disabled person a "comfort zone" as an accommodation as opposed to immediately placing her under arrest; and are the police required to retreat when faced with an armed suspect.

In this case, two police officers were called by a social worker to take Sheehan (the Respondent) into custody for an involuntary mental evaluation after Sheehan had threatened a social worker with a knife. When the officers arrived, they opened the door to Sheehan's residence and she threatened to kill them and brandished a knife. They closed the door to her residence and called for backup. However, they then made the determination to reenter her residence before backup arrived to effectuate the arrest, in order to prevent Sheehan from harming herself or others. When they reentered, Sheehan rushed them with a knife. The officers tried to use pepper spray to stop her and when that didn't work, they shot her several times. She survived and sued under 42 U.S.C. § 1983 and the ADA.

The Ninth Circuit held that the first entry was lawful (under the warrantless search exemption to render emergency assistance or respond to exigent circumstances) as was the officers' ultimate use of deadly force under the circumstances. However, the Ninth Circuit concluded that the officer's second entry into Sheehan's residence was unlawful under both the Fourth Amendment and ADA. The court held that the second entry was unreasonable under the Fourth Amendment, on the basis that it was unreasonable to make an otherwise lawful entry when the officers could have desisted from their efforts to arrest Sheehan in light of her resistance and mental illness, and used different tactics that might have resulted in a different outcome. Regarding Sheehan's claim under the ADA, the Ninth Circuit held that the "reasonable accommodation" requirement of Title II of the ADA applies to officers' conduct in the course of an arrest – including an arrest of a violent individual like Sheehan. The court further held that the issue of the reasonableness of the accommodations proposed after this incident by Sheehan's litigation expert (i.e., that the officers should have allowed Sheehan to remain in her "comfort zone" until they were able to calm her down), was one for the jury.

IMLA's brief argues, among other things, that individual police officers should not be required to perform an analysis regarding what accommodations are necessary under the ADA, but rather, police officers should be afforded broad discretion in these circumstances.

Wyatt v. Gonzalez - Fourth Amendment / Qualified Immunity / Summary Judgment

Question Presented: When a police officer is sued by the family of a person who was killed in the course of an arrest should the rules of summary judgment be relaxed to allow the plaintiffs to defeat summary judgment based upon minor inconsistencies in an officer's recollection of events where the officer's life was threatened and the events involved a fast paced scenario.

In this case, the police officer used deadly force after he became a prisoner in a vehicle controlled by an individual who had already committed several dangerous felonies. The Ninth Circuit held that because the parties disputed how fast the van was traveling at the time the trapped officer shot and killed the driver, summary judgment was inappropriate as a reasonable jury could conclude that the use of deadly force violated the Fourth Amendment. In a scathing dissent, Judge Trott explains that the majority's focus on the speed of the van is entirely misplaced for the purposes of the Fourth Amendment and that under *Garner* and other well-established Supreme Court precedent, the officers' actions were objectively reasonable under the circumstances. Specifically, Judge Trott notes that the "factual dispute" relied upon by the majority - i.e., the speed of the van at the time the officer shot the driver – is not a "material" fact and therefore should not have been considered in the Fourth Amendment reasonableness analysis.

IMLA's brief argues that the Ninth Circuit's holding renders Rule 56 of the Federal Rules of Civil Procedure essentially impotent in excessive force cases brought under 42 U.S.C. § 1983. On November 17, 2014, the Court denied certiorari in this case.

Schultz v. Wescom – Qualified Immunity / Interlocutory Appeals

Question Presented: This case involves a question of whether a municipality/police officer may immediately appeal a decision by a district court to defer the issue of qualified immunity until the completion of discovery.

The Circuit Courts are split on this question with the Seventh and Ninth Circuits holding that such a decision is not appealable on an interlocutory basis, while the majority of the other Circuit Courts hold that such a decision is immediately appealable. In this case, the Ninth Circuit held on appeal that there is no appellate jurisdiction of a rule 56(d) deferral for a limited time to conduct discovery as it is not a denial of qualified immunity.

IMLA's brief argues that the purpose of qualified immunity is to shield officers from the costs of having to go through the litigation process and it is certainly in municipalities/police officers' best interest to have questions of qualified immunity resolved at the earliest possible time-frame.

Kalamazoo County Road Commission v. Deleon – Employment Discrimination / Retaliation

Question Presented: Whether an employee has suffered an adverse employment action when an employer transfers the employee to a position that the employee himself requested.

The Respondent, Robert Deleon, worked for the Kalamazoo County Road Commission ("the Commission"). A vacancy arose for a new position within the Commission for which he applied. Deleon was interviewed, but was not ultimately offered the position. The Commission hired another candidate, but that candidate left shortly after he was hired. Subsequently, the Commission transferred Deleon to the position that he had originally applied for. Deleon objected to the transfer (even though he originally requested it) and demanded a raise at the time of the transfer, which he was denied. After the transfer, he took a medical leave and the Commission ultimately terminated his employment after eight months of leave, indicating that he had exhausted all of his available leave.

The Sixth Circuit concluded that a reasonable jury could find that Deleon had suffered an adverse employment action based on the lateral transfer. The court concluded that the mere fact that Deleon had previously applied for the position does not "categorically bar a finding of an adverse employment action." The court reasoned that the "key focus of the inquiry should not be whether the lateral transfer was requested or not requested, or whether the aggrieved plaintiff must *ex tempore* voice dissatisfaction, but whether the 'conditions of transfer' would have been 'objectively intolerable to a reasonable person.'"

IMLA's brief argues, among other things, that as a result of an existing circuit split, employers do not have a clear, workable standard regarding transfer decisions. Further, the Sixth Circuit's decision subjects employers to potential liability for both granting employee requests or denying them, which IMLA notes is especially problematic for public-sector employers whose employees are often governed by collective bargaining agreements, which often include provisions regarding transfers.

IMLA's AMICUS PROGRAM

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