

LEGAL ADVOCACY PROGRAM
2009 Congress of Cities in San Antonio, TX
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This report summarizes the legal proceedings the National League of Cities (NLC) joined since the 2008 Congress of Cities. (Lars Etzkorn, etzkorn@nlc.org, 202.626.3173).

CONCLUDED U.S. SUPREME COURT CASES

NLC participated to protect local discretion and to promote judicial deference to policy determinations made by local governing bodies.

Ricci v New Haven, in which the Supreme Court held that if a city uses a hiring or promotion test it has to accept the test's results — unless it has strong evidence the test was flawed and improperly favored a particular group. The case involved a challenge by a group of largely white firefighters who argued they were unfairly denied promotions because of their race, after the city decided not to certify the results of a civil service exam in order to avoid a charge of discrimination from a group of black firefighters who did not score as high on the test. In rejecting New Haven's decision to discard the test, the Court held the "city could be liable for disparate-impact discrimination only if the examinations were not job related" or the city failed to use a less discriminatory alternative, Justice Anthony Kennedy said writing for the majority. "We conclude that there is no strong basis in evidence to establish that the test was deficient in either of these respects." NLC joined the International Municipal Lawyers Association's amicus brief because of its support for local discretion in employment determinations.

NLC participated to prevent federal pre-emption of concurrent state or local regulation.

Cuomo v. Clearing House, in which the Supreme Court refuted an attempt by the U.S. Comptroller of the Currency (OCC) to preempt the New York State Attorney General's ability to enforce state anti-discriminatory residential lending laws. Specifically at issue was whether a regulation passed by the OCC preempted state enforcement of fair lending laws against national banks. The legality of the underlining law was not challenged by the federal government; the federal government challenged state enforcement. Justice Scalia, writing for the majority emphasized the distinction between supervisory powers (where OCC has a monopoly) and law enforcement (where other federal agencies also have jurisdiction over national banks, as well as states). Although the Court applied *Chevron* deference to the OCC's interpretation of its authority granted by the National Bank Act, it still held its interpretation was unreasonable. NLC joined the State and Local Legal Center's amicus brief because of the precedential value in opposition to federal preemption.

NLC participated to establish qualified immunity to police officers who conduct warrantless searches if they did not violate clearly established law.

Pearson v. Callahan, in which the Supreme Court unanimously discarded the rigid two-step process for analyzing a qualified immunity defense it developed in *Saucier v. Katz*. Specifically at issue was whether police officers who raided the house of someone after their drug informant was allowed in the house to make a drug purchase (thus extending the permission to enter to the officers under the doctrine of "consent once removed") had the doctrine of qualified immunity open to them as a defense from suit (i.e., did the owner consent to the entry by previously permitting an undercover informant into the home). Under *Saucier*, lower courts first determine whether a constitutional violation occurred in the case and then decide whether the defendant's actions violated clearly established federal law. If the court answers either question in the negative, then qualified immunity shields the defendant from liability. In *Pearson*, the Court held, "On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." NLC joined the State and Local Legal Center's amicus brief because of the opportunity the case presented to reduce the burden required to establish qualified immunity for warrantless police searches as a result of using informants.

NLC participated to clarify that absolute prosecutorial immunity applies to questions of training provided by supervisory prosecutors.

Van de Kamp v. Goldstein, in which the Supreme Court ruled that supervisory prosecutors are absolutely immune from claims they violated a plaintiff's constitutional rights by failing to adequately train or supervise the prosecutors working under them and failing to establish an information management system to avoid violating their constitutional duty to provide impeachment evidence to defense counsel. Under Court precedent, prosecutors are absolutely immune from liability in suits alleging violations of constitutional rights against prosecutorial actions that are "intimately associated with the judicial phase of the criminal process," but absolute immunity may not apply when a prosecutor is not acting as an "officer of the court" but rather is engaged in investigative or administrative tasks. The Court ruled that the supervisory prosecutors' conduct at issue here is entitled to absolute immunity. It said that determining which information should be included in training, supervision, or information-system management requires legal knowledge and the exercise of related discretion, and that requiring such prosecutorial decisions to be defended, often years later, could impose unique and intolerable burdens on prosecutors. NLC joined the State and Local Legal Center's amicus brief because of the added administrative burden and expense for local governments from the potential liability if prosecutorial immunity did not apply to the adequacy of training provided by supervisory prosecutors.

U.S. SUPREME COURT CASES CERTIORARI ACCEPTED

NLC participated to clarify that absolute prosecutorial immunity applies to pre-indictment investigative work by prosecutors.

Pottawattamie County v. Harrington, in which the Supreme Court will consider whether absolute prosecutorial immunity should extend to pre-indictment investigative work by prosecutors. This case presents an important question concerning the boundaries of absolute immunity for prosecutors and the circumstances in which they can be sued for money damages by criminal defendants whose convictions are later vacated. Specifically, the questions presented are whether the substantive Due Process rights of former criminal defendants are violated by prosecutors who allegedly (1) procured false evidence during a criminal investigation, and (2) introduced that evidence at trial. NLC joined the State and Local Legal Center’s amicus brief because of the administrative burden and expense for local governments from the resulting potential liability if prosecutorial immunity does not apply pre-indictment.

NLC participated to prevent redundant post-seizure preliminary hearings.

Smith v. Alvarez, in which the Supreme Court will consider whether the Due Process Clause requires a state or local government to provide a post-seizure probable cause hearing *prior* to a statutory judicial forfeiture proceeding and, if so, what standard should be used to determine if property was lawfully seized. Because the widespread use of drug-related civil forfeiture laws is relatively new, courts are now beginning to address the rights of owners whose property is seized by law enforcement in anticipation of a formal civil forfeiture proceeding at which the ultimate issue of forfeiture will be decided. Cities administering courts and municipal police departments would essentially pay twice, while those whose property has been seized are given two bites at the apple. Many of the issues relevant to the interim probable cause determination of the propriety of keeping the property pending the outcome of a forfeiture proceeding are the same for determining the propriety of the actual forfeiture. NLC joined the State and Local Legal Center’s amicus brief because of the administrative burden and expense for local governments from the resulting redundancy if a probable cause/informal preliminary hearing is required.

NLC participated to prevent whistleblowers from being able to use a local government’s own report as evidence.

Graham County Soil & Water Conservation Dist. v. United States, ex rel. Karen T. Wilson, in which the Supreme Court will decide whether an audit or investigative report regarding the use (or misuse) of federal funds, performed by a state or local government, is an “administrative” report under a provision of the False Claims Act (FCA) that precludes the use of such audits or reports as the basis for FCA suits. NLC joined the

State and Local Legal Center's amicus brief because of the economic impact for local governments if they are liable for damages as a result of a whistleblower using the government's own report as evidence.

NLC participated to limit the scope of takings for which a city is liable under the Fifth Amendment.

Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection, in which the Supreme Court will consider whether a state court's construction of a state statute can be "judicial taking" of property. Specifically, the petitioner argues a Florida Supreme Court ruling that a Florida beachfront-restoration statute does not effectuate a regulatory taking is itself a taking in violation of the U.S. Constitution. NLC joined the State and Local Legal Center's amicus brief because of the potential detrimental economic impact for local governments if the Florida Supreme Court is reversed and cities thus become liable for takings. In addition, participation is consistent with ensuring judicial deference to policy determinations by local governing bodies.

NLC participated to prevent Bankruptcy Courts from discharging debts owed to cities without providing notice.

United Student Aid Funds, Inc. v. Espinosa, in which the Supreme Court will consider whether a bankruptcy debtor can proclaim a debt discharged in a confirmed Chapter 13 plan even though that debt is statutorily non-dischargeable in bankruptcy (the practice is commonly referred to as "discharge by declaration"). The case raises an important question regarding the propriety of a bankruptcy discharge without proving "undue hardship" as required by statute, and without commencing an adversary proceeding and giving the creditor individual notice by service of a summons and complaint as required by bankruptcy court rules. NLC joined the National Association of Attorneys General's amicus brief to protect local public revenue authority as many fines, penalties or forfeitures payable to local governments have not been dischargeable in bankruptcy, just as student loans were not dischargeable until this case.

PENDING IN A LOWER FEDERAL COURT

NLC participated to protect the land-use regulatory prerogatives of local governments.

Rocky Mountain Christian Church v. Board County Commissioners, the Tenth Circuit Court of Appeals will consider the scope of the Religious Land Use and Institutionalized Persons Act (RLUIPA) in relation to local government's traditional power to plan and regulate land use. The case presents an opportunity to reassert local control over land use limited by an act of Congress. Citing RLUIPA, Rocky Mountain Christian Church sued the Boulder County, Colorado, Board of County Commissioners when they turned down its application for special use permits to double its size to accommodate growing church

ministries. County officials argued the church's expansion plan violated the county's established land use code and wasn't in character with its rural surroundings. Good land use planning necessarily requires the consideration of a diverse set of factors tied to local geography, community needs and the area's history and vision. NLC joined the Colorado Municipal League's amicus brief in order to protect important principles of federalism, respect for dual sovereignty and practicalities.

DISMISSED IN A LOWER FEDERAL COURT

NLC participated to clarify the First Amendment rights of local elected officials.

Rangra v. Brown, in which the Fifth Circuit Court of Appeals would have decided whether restrictions on the official speech of local elected officials are subject to strict scrutiny review, as are regulations of speech by other individuals. The case, however, was dismissed by the Fifth Circuit as moot after the sole remaining plaintiff was term-limited. Several Alpine, TX council members, who faced jail time for using e-mail to discuss whether a particular item should be placed on a future council meeting agenda, had challenged the constitutionality of the Texas Open Meeting Act. In an opinion favorable to city officials, a panel of the Fifth Circuit had remanded to the trial court with an instruction to apply the strict scrutiny standard to the criminal provision. Before the case was dismissed as moot, two motions for rehearing en banc were filed and accepted: (1) the Texas Attorney General's to overturn the original opinion; and (2) the plaintiffs' (the city officials who were prosecuted for violating the Texas Open Meeting Act) filed a competing motion for rehearing. The competing motion argued that the trial record was complete, and that the Fifth Circuit should just declare the criminal provision unconstitutional. NLC joined the Texas Municipal League's amicus brief that supported the plaintiffs' motion, and by definition opposed the Attorney General's motion. In the next few months, the original plaintiffs' attorneys – including the Alpine City Attorney – are planning to file a direct constitutional challenge to the Texas Open Meeting Act.