



## LEGAL ADVOCACY PROGRAM December 2010

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This report summarizes legal proceedings the National League of Cities (NLC) joined since the 2009 Congress of Cities. (Lars Etzkorn, [etzkorn@nlc.org](mailto:etzkorn@nlc.org), 202.626.3173)

### CONCLUDED UNITED STATES SUPREME COURT CASES

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

*Pottawattamie County v. McGhee*, in which the Supreme Court was asked to consider whether absolute prosecutorial immunity should extend to pre-indictment investigative work by prosecutors. After oral argument, the case was dismissed at the request of all parties and settled. The case presented 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 were whether the substantive due process rights of former criminal defendants were 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 should prosecutorial immunity not apply pre-indictment.

**NLC participated to prevent redundant post-seizure preliminary hearings.**

*Smith v. Alvarez*, in which the Supreme Court was asked to 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. The Court held the plaintiffs' procedural due process claim in *Alvarez* was moot after the parties resolved their property disputes during the course of the litigation (the state returned all seized cars, and individual property owners either forfeited the cash or accepted the state's partial return as final). 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 essentially pay twice, while those whose property has been seized are given two bites at the apple, because 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 against local governments.**

*Graham County Soil & Water Conservation Dist. v. United States ex rel. Karen T. Wilson*, in which the Supreme Court held that a private citizen (known as a "relator") cannot bring a lawsuit to recover misspent funds if that individual learned of the payments in an official state or local government agency report or audit. The controversy revolved around a law that is nearly a century-and-a-half old, the federal False Claims Act, which allows private citizens to file lawsuits on behalf of the federal government, when there is evidence that someone has wrongly made a claim for money from the federal government. Under the law, the suing citizen is entitled to a portion of any monies recovered. Justice John Paul Stevens wrote for the majority in the 7-2 decision, blocking lawsuits based on "administrative" disclosures, whether from a federal source or an official state or local source. The Court's ruling may not stand for long. Even as this case was pending before the Court, legislation was introduced in Congress to change the federal law, at least for cases not already filed. The Court took note of the pending legislation in a footnote, and thus appeared to limit its ruling to cases that had been pursued previously. NLC joined the State and Local Legal Center's amicus brief because of the economic impact for local governments should they be 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 held that the Florida Supreme Court did not take property in violation of the Fifth and Fourteenth Amendments to the Constitution when it ruled that a Florida state beachfront-restoration statute does not effectuate a regulatory 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 was reversed and cities thus became liable for takings. In addition, participation was 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 held that 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”). Notably, the Court strictly limited its holding to the student loan context presented, avoiding any related questions concerning other types of nondischargeable debt stemming from specified tax debts, domestic support obligations, and DWI-related debt. The Court did note, however, a statutory difference between student debt and these other forms of debt; the former *is* sometimes dischargeable (upon a finding of undue hardship), while the latter is *not* dischargeable under *any* circumstances. The case raised 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.

**NLC participated to ensure cities can establish reasonable workplace rules concerning electronic devices.**

*City of Ontario v. Quon*, in which the Supreme Court held unanimously that the City of Ontario’s (California) review of employee text messages sent on City-issued pagers did not constitute an unreasonable search and did not violate the Fourth Amendment to the Constitution. The case pitted employee interests against privacy expectations, which is nothing new in case law, but was unsettled as applied to mobile electronic texting. Generally courts have found there is no expectation of privacy in a workplace environment. But at issue was whether that same principle applies to mobile devices commonly used both inside and outside the workplace. NLC joined a brief filed by the State and Local Legal Law Center to protect the important principle of ensuring judicial deference to policy determinations by local governing bodies.

**NLC participated to protect local government anti-discrimination policies and to further NLC policy on equal opportunity.**

*Christian Legal Society v. Martinez*, in which the Supreme Court held in a 5-4 decision that the University of California Hastings School of Law did not violate the First Amendment by withdrawing recognition from a Christian student group that requires its officers and voting members to share its core religious commitments which conflicted with the university’s anti-discrimination policy. In order for a student group to be

recognized by the university, the group must follow said anti-discrimination policy, including having an open membership policy so that any student can participate in the group's activities and all students have the ability to assume leadership positions and/or have voting rights within the group. Applying the university policy, the law school denied recognition status to the student group because it did not allow homosexual students to become voting members and/or assume leadership positions with the group. NLC joined a brief filed by the International Municipal Lawyers Association to ensure judicial deference to policy determinations by local governing bodies and to promote NLC policy on equal opportunity (National Municipal Policy § 4.05A & B).

## **UNITED STATES SUPREME COURT CASES WITH CERTIORARI PENDING**

**NLC participated to maintain deference to policy determinations by local governing bodies relative to the scope of non-law enforcement training provided to police officers.**

*City of Reno v. Conn*, in which the Supreme Court is asked to decide whether the Constitution requires municipalities to train police officers to diagnose and report symptoms of suicidal tendencies in arrestees, in order to avoid liability under Section 1983 and the Due Process Clause. While transporting the decedent to civil protective custody, two Reno, Nevada police officers witnessed her wrap a seatbelt around her neck in an apparent attempt to choke herself and then scream that they should kill her or else she would kill herself. The officers failed to report the incident to jail personnel or take the decedent to a hospital. She was released from protective custody a few hours later. The next day, she was again detained on a misdemeanor charge. During this second detention, she hanged herself in her cell. The Tenth Circuit held that a reasonable jury could find the defendant police officers liable under 42 U.S.C. § 1983 for their deliberate indifference to the decedent's serious medical need, and that their actions were a cause in fact and a proximate cause of her suicide. If it accepts the case, the Court will examine an issue dividing lower federal courts. Reno's certiorari petition notes the Ninth Circuit ruling allowing municipal liability accords with a Third Circuit decision but conflicts with decisions of the First, Fifth, Sixth, Seventh and Eleventh Circuits. Also, the Ninth Circuit's authorization of individual officer liability conflicts with decisions of the First and Third Circuits. NLC joined a brief filed by the International Municipal Lawyers Association to maintain deference to policy determinations by local governing bodies and local legislative discretion.

**NLC participated to protect local regulations promoting clean vehicle use.**

*City of New York v. Metropolitan Taxicab Board of Trade*, in which the Supreme Court is asked to decide whether federal law – the Energy Policy and Conservation Act and Clean Air Act – prevents states and local governments from enacting regulations to promote clean vehicle use, specifically whether New York City can regulate the taxicab industry to encourage clean vehicle use through pricing incentives. NLC joined a brief

filed by the City of Chicago to ensure judicial deference to policy determinations by local governing bodies and local legislative discretion.

## **CASES DECIDED IN A LOWER FEDERAL COURT**

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

*Rocky Mountain Christian Church v. Board of County Commissioners*, in which the Tenth Circuit Court of Appeals limited local control over land in a case considering 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. 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 an increasing congregation. 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. In addition, 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 and respect for dual sovereignty.

## **CASE PENDING IN A STATE APPELATE COURT**

**NLC participated to protect local collection of taxes on federally owned, occupied or controlled property.**

*Riverside v. State of Ohio*, in which the Ohio Court of Appeals will decide whether an Ohio statute exempting the income of federal employees and contractors earned on an Air Force base from municipal income taxation is preempted by the federal Buck Act, 4 U.S.C. § 106. The City of Riverside imposes a municipal income tax of 1.5 percent on contractors and employees who work or live within its boundaries. As a result of a merger in 1994, certain portions of Wright-Patterson Air Force Base are located within the City of Riverside. After unsuccessful attempts to enter into a withholding agreement with the Department of the Treasury, Riverside began efforts to impose its income tax on civilian employees and contractors in 2007. In response, the Ohio General Assembly enacted Section 718.01(H)(11) of the Ohio Revised Code, which prevents the City from imposing its income tax on those employees and contractors. Ohio Rev. Code § 718.01(H)(11) was enacted as an eleventh-hour amendment to the State's biennial budget bill. Upon passage of the statute, Riverside ceased its efforts to collect the income tax, and brought a declaratory judgment action to have the statute declared unconstitutional. The trial court held the Buck Act preempts the Ohio statute and is therefore void. NLC joined the Ohio Municipal League's amicus brief to protect local revenue sources.