



LEGAL ADVOCACY PROGRAM November 2011

This report summarizes legal proceedings the National League of Cities (NLC) joined in 2011.

CONCLUDED UNITED STATES SUPREME COURT CASE

NLC participated to clarify when a local government is liable under the Petition Clause of the U.S. Constitution for employee grievances.

Borough of Duryea v. Guarnieri, in which the Supreme Court held 8-1 there is no liability under the Petition Clause of the U.S. Constitution for an employee grievance unless the complaint was of public concern. Respondent Charles J. Guarnieri, Chief of Police for Duryea, Pennsylvania, sued his employer under Section 1983 for damages for retaliation because he filed workplace grievances through his union concerning adverse treatment in the workplace. Mr. Guarnieri was awarded a substantial amount of damages at trial, his judgment was affirmed by the Third Circuit Court of Appeals, and had he ultimately prevailed he would have been entitled to substantial attorney's fees. Mr. Guarnieri relied on a First Amendment legal theory based on the Petition Clause, which protects the right "to petition the Government for a redress of grievances." Under this theory, which was endorsed by the Third Circuit but not by any other federal court of appeals, a public employee has constitutional protection under the First Amendment against retaliation for filing a lawsuit or grievance against a municipality because the Third Circuit considered such lawsuits or grievances to be "petitions" within the meaning of the Petition Clause. NLC joined the State and Local Legal Center's amicus brief because of the potential of the case to spur public employee Section 1983 retaliation claims in federal court against municipal employers. In addition, NLC sought to protect local public revenue authority and to maintain judicial deference to policy determinations by local governments.

UNITED STATES SUPREME COURT CASE WITH CERTIORARI PENDING

NLC participated to protect local revenue authority and to defend the absolute immunity that witnesses have before a grand jury and in other such proceedings.

Rehberg v. Paulk, in which the Supreme Court is asked whether a local government official who acts as a “complaining witness” by presenting perjured testimony against an innocent citizen is entitled to absolute immunity from a Section 1983 claim for civil damages. Generally, prosecutors have absolute immunity when they perform prosecutorial functions. In this case it is undisputed that an investigator for the Dougherty County, Georgia, prosecutor testified falsely to a state grand jury in an effort to secure an indictment. The issue is presented with the assertion that prosecutorial immunity protects even perjured testimony, while recognizing the appropriate remedy should be a conviction for perjury. NLC joined a brief filed by the International Municipal Lawyers Association to protect local revenue and to defend the absolute immunity that prosecutors have before a grand jury and in other such proceedings. If the Court expands civil liability for prosecutors before a grand jury, it would erode the confidential nature of the proceedings and subject local government to increased expense.

UNITED STATES SUPREME COURT CASES WITH CERTIORARI DENIED

NLC participated to protect land use regulatory prerogatives of local governments that have been limited by Congress.

International Church of the Foursquare Gospel v. City of San Leandro, in which the Supreme Court was asked to review the Religious Land Use and Institutionalized Persons Act (RLUIPA), in relation to local governments’ traditional power to plan and regulate land use. The City of San Leandro, California, was sued by a church after denying its rezoning application to build a new sanctuary on industrially-zoned property. The U.S. District Court for the Northern District of California, on summary judgment, rejected all of the church’s claims, finding the city acted fairly and lawfully in all of its actions. The District Court held “RLUIPA does not require cities to grant churches preferential rights over other property owners” and further noted the city had expanded the areas zoned to allow church uses and found no evidence of religious discrimination by San Leandro. The church appealed the District Court decision to the Ninth Circuit Court of Appeals, which reversed the granting of summary judgment by interpreting RLUIPA broadly and in conflict with other circuit courts addressing similar issues. The appellate court did not find San Leandro violated RLUIPA but only that the District Court should reexamine whether the city’s denial of the church’s rezoning request placed a “substantial burden” on the church under the federal land use law, which provides benefits solely to religious landowners. NLC joined an amicus brief filed by the League of California Cities and International Municipal Lawyers Association in order to protect important principles of federalism, respect for dual sovereignty and practicalities. Good land use planning necessarily requires consideration of a diverse set of factors tied to local geography, community needs and the area’s history and vision.

NLC participated to protect the taxing ability of local governments over natural gas stored in a tank connected to an interstate pipeline.

Harrison Central Appraisal District v. The Peoples Gas, Light and Coke Co., in which the Supreme Court was asked if the dormant Commerce Clause prohibits a state from imposing a generally applicable, nondiscriminatory ad valorem tax on natural gas stored in the state but connected to an interstate pipeline system for out-of-state transport. A Texas appeals court concluded that the oil and gas were exempt from ad valorem tax under the dormant Commerce Clause because the product remained in interstate transit. The Texas Supreme Court declined to revisit the case. NLC joined an amicus brief filed by the Texas Municipal League to protect local revenue authority over entities that enjoy the benefits of local governments.

CASE DECIDED IN A LOWER FEDERAL COURT

NLC participated to establish a legal distinction between “services” and “facilities” under the Americans with Disabilities Act.

Frame v. City of Arlington, in which a panel of the Fifth Circuit Court of Appeals found that a city's curbs, sidewalks, and parking lots do not, themselves, constitute a "service, program, or activity" within the meaning of Title II of the Americans with Disabilities Act (ADA), and the two-year statute of limitations period for a claim begins on the date the plaintiff knew or should have known that he or she was excluded from a city service, program or activity. The plaintiffs were persons with disabilities who depended on motorized wheelchairs for mobility. They alleged Arlington, Texas, failed to make its curbs, sidewalks and parking lots ADA-compliant. The city argued the claim was out of time; the plaintiffs lacked standing to invoke Title II or Section 504 of the Rehabilitation Act; and the alleged facts did not constitute a legal claim of discrimination (that an enforceable duty only arose when new construction or alteration triggered the duty). The court held that sidewalks, curbs and parking lots are not Title II services, programs or activities because they are physical infrastructure not services. Thus, the plaintiffs lacked a private right of action to enforce the regulations unless noncompliance has denied access to a service, program or activity. Where a cause of action is established, the statute of limitations is triggered when the plaintiff knew or should have known that he or she was excluded from a city service, program or activity. NLC joined a brief filed by the City of Dallas, Texas, to protect local public revenue authority, judicial deference to policy determinations by local governments, and to clarify the scope of ADA relative to infrastructure investments.

CASE PENDING IN A LOWER FEDERAL COURT

NLC participated to provide clarity for municipal officials subject to open meeting laws with jail time penalties.

Asgeirsson v. Abbott, in which the Fifth Circuit Court of Appeals is asked to consider the constitutionality of the Texas Open Meetings Act and whether a local government official's speech, made pursuant to official duties, has the same constitutional protections that the First Amendment grants to other types of speech. The case involves Alpine, Texas, council members, who face jail time for using e-mail to discuss whether a particular item should be placed on a future council meeting agenda. They assert jail time as a penalty is not the least restrictive means of promoting open government and thus runs afoul of the First Amendment. While not seeking to undermine basic principles of open and transparent government, the hope is this case will provide realistic operational clarity for municipal officials subject to open meeting laws with jail time penalties. NLC joined a brief filed by the Texas Municipal League to protect local legislative discretion and judicial deference to policy determinations by local governing bodies. Local elected officials cannot effectively serve their communities with a threat of fines and jail time for sharing or exchanging information outside of a meeting.