

Supreme Court Compliance for Local Governments

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About the Webinar

- Type your questions in anytime in the box on the upper right hand side of your screen
- A recording of the webinar will be available on the SLLC's website shortly after the webinar
- The views expressed in this webinar do not necessarily reflect the views of the SLLC member groups

About the SLLC

- Members:
 - National Governors Association
 - National Conference of State Legislatures
 - Council for State Governments
 - National Association of Counties
 - National League of Cities
 - U.S. Conference of Mayors
 - International City/County Management Association
- Associate members: International Municipal Lawyers Association and Government Finance Officers Association

About the SLLC

- Since 1983 the SLLC has filed over 300 briefs
- The SLLC filed 12 briefs before the Supreme Court this term—including many of the cases discussed in this webinar
- The SLLC is a resource for Big Seven members on the Supreme Court—this webinar is an example

What's Different This Term?

- More local government cases
- More losses
- More cases requiring ACTION

Two Big Cases

- Sign case
- Hotel registry ordinance case

Sign Law Chaos

- If things were confusing before they are worse now
 - Every code had problems before
- New sign case requires changes to sign codes and muddies the water
- Every local government should review its sign code

Sign Code Chaos

- Treating signs differently based on their content is likely unconstitutional
- Content based is bad
- Why only “likely”?

Sign Code Chaos

- What does content based mean?
- Categorizing signs by function and purpose isn't okay
- This case:
 - All signs prohibited without a permit except: ideological signs, political signs, temporary event signs
 - Different rules apply to each category

Sign Code Chaos

- Our code isn't the same as Gilbert's
- **Any** regulation by category or function is in trouble
- Categorical signs are not content-neutral:
 - Directional, drive thru, grand opening, coming soon, address
 - Temporary event-based signs
 - Speaker-based (who or what giving message; gasoline station signs)
 - Real estate, construction

Still Okay?

- Rules that probably won't be content based
 - Size
 - Location
 - Lighted v. unlighted
 - Fixed and changing message
 - Public v. private property
 - Commercial v. residential
 - Off-premises v. on-premises (billboards)
 - Total number of signs
 - Governments sign
- Why only “probably”?

Billboards

- Commercial speech is its own category of speech
- It may be disfavored over non-commercial speech
- Local governments may still ban commercial billboards
- Two federal district court cases so far contemplate whether this case applies to billboards—one says yes, one says no

Practical Advice

- Review sign codes *ASAP* looking for content bias
- In the meantime, don't enforce provisions or deny permits that are content based
- But don't temporarily stop giving **all** permits
- Work with legal counsel and planner
- Reduce exceptions to permitting requirements

Don't Know Where to Start

- Typical problem areas
 - Political/ideological signs
 - Religious signs
 - Event signs
 - Real estate signs
 - Holiday lights
- Creative solutions are possible
- *Reed v. Town of Gilbert, Arizona*

Election Signs

- Give each resident a number of square feet to say whatever they want to say
- Time period (corresponding with the election) lift all number and size restrictions for noncommercial signs

Address Sign

- Everyone can have one small sign they can put on their house, mailbox, or a post
- But people could put anything on that sign (not just their address)
- Tell that to Justice Thomas...

Much Bigger than Signs?

- Lower courts are applying *Reed* outside of the sign context
 - *Rideout v. Gardner*, 2015 U.S. Dist. LEXIS 105194 (D.N.H. 2015) (Ban on people taking photos of their completed ballot and posting on social media violated First Amendment under *Reed*)
 - *Norton v. City of Springfield*, 2015 U.S. App. LEXIS 13861 (7th Cir. 2015) (striking down panhandling ordinance in light of *Reed*)
 - *Cabaly v. Larosa*, 25 F.Supp. 3d 817 (4th Cir. 2015) (concluding South Carolina's prohibition against certain robo-calls were unconstitutional under *Reed*)

Additional Resources

- SLLC Sign Case webinar—recording is available!
 - Go to the “events” page on the SLLC’s website www.statelocallic.org
- Street Graphics and the Law—watch the APA website
- IMLA Annual Conference, October 3-7, Las Vegas
 - Three sessions in *Reed*

Searching Hotel Guest Registries

- Hundreds of cities allow police to inspect hotel registries without warrants or subpoenas
- As do the following states:
 - Indiana
 - Florida
 - Massachusetts
 - Maine
 - New Hampshire
 - New Jersey
 - Wisconsin
 - District of Columbia

Searching Hotel Guest Registries

- Why ask hotel to keep registries?
- Why have police search registries?
- Why not require police to get a warrant?
- Why would hotels object to searches?

Searching Hotel Guest Registries

- Warrant not necessary
- Subpoena is necessary (assuming no consent)
- Police may “guard” the registry if they fear tampering until the subpoena is acted on

What to do Now

- Old ordinance
- New ordinance
- Non-compliant state statute
- IMLA has a model ordinance

Beyond Hotel Registry Ordinances

- No really good reason to believe this ruling doesn't apply to all government inspection programs EXCEPT closely regulated businesses
- Closely regulated business=no warrant, no subpoena
 - SCOTUS has held four industries
 - Liquor sales, firearms dealing, mining, automobile junkyards

Beyond Hotel Registry Ordinances

- Tons of other inspection laws
 - Mobile home parks, pawn shops, scrap metal dealers, massage parlors
 - Restaurant records, environmental records, labor records
- Local government officials may be doing these inspections
- Mostly controlled by state statute not ordinance
- Subpoena=conservative approach

Numerous City Officials Affected

- City council must rewrite the ordinance(s)
- Police/code enforcement/inspectors must seek a subpoena if they don't get consent
- *City of Los Angeles v. Patel*

Why Has This Case Been a Sleeper?

- Seen as hotel registry case only?
- Consent is common?
- SCOTUSblog coverage on *Patel*

Two Police Cases

Post-Stop Dog Sniffs

- Conducting a dog sniff *after* a completed traffic stop violates the Fourth Amendment

Post-Stop Dog Sniffs

- Dog sniffs *during* traffic stops are okay (*Illinois v. Caballes*)
- How is this different?
- The “critical question” “is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff ‘prolongs’—i.e., adds time to—‘the stop’”

Post-Stop Dog Sniffs

- But officers prolong stops to check a driver's license, vehicle's registration, proof of insurance
- How is this different?
- A dog sniff is not aimed at officer or highway safety—it is aimed at discovering illegal drugs

What Do Officers Have to Do Different?

- Conduct drug sniffs *during* traffic stops
- Be quick about it
- *Rodriguez v. United States*

Does the ADA Apply to Arrests?

- ADA says:
 - “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity”

Does the ADA Apply to Arrests?

- The Court did not decide
- Why?
- San Francisco assumed it did but argued the plaintiff wasn't a "qualified" individual with a disability

Does the ADA Apply to Arrests?

- Is an arrest
 - An “activity”
 - In which the arrestee “participates”
 - Or from which the arrestee may “benefit”

What's Next?

- Depends on your circuit
 - 5th and 6th Circuits say police do not have to accommodate until the scene is secure
 - 4th, 8th, 9th, and 11th Circuits say police must reasonably accommodate
 - Other circuits: accommodate to avoid lawsuits?
- Court's view of this issue may be affected by the facts
- *City and County of San Francisco v. Sheehan*

Two Jail Cases

Jail Excessive Force Claims

- Officers may be liable for money damages if officers act “objectively unreasonable” in using force against pretrial detainees

Jail Excessive Force Claims

- On its face this doesn't sound so bad
- But it is more complicated...

What to Do?

- Conservative strategy
 - Train officers to interact with all inmates using the “objectively unreasonable” strategy
- All the money in the world strategy
 - Two separate facilities
- House inmates based on pre-trial/post-conviction status
 - Is this even a good idea?

One Thing is Certain

- No matter what you do jails will see more pretrial detainee excessive force litigation
- It will be harder to get these cases thrown out of court early
- Don't take it personally!
- *Kingsley v. Hendrickson*

Beard Length in Jail

- Jails may no longer prevent inmates from growing a 1/2 inch beard for religious reasons
- Do most jails prohibit 1/2 inch beards at all?
 - Federal government and most states do not

Beard Length in Jail

- Religion Land Use and Institutionalized Persons Act (RLUIPA)
 - Government
 - May not substantially burden
 - Free exercise
 - Institutionalized person unless
 - Least restrictive means
 - Furthering a compelling government interest

Beard Length in Jail

- Compelling interests—no problem!
- Disallowing half inch beards isn't the least restrictive means of furthering prison safety and security
 - Hide contraband in beards “hard to take seriously”
 - Photographing inmates before and after
 - Allow other hair?

Beyond 1/2 Inch Beards

- Jails may still prohibit inmates from growing 1/2 inch beards
- Exception=religious reasons
- Can inmates grow any length beard they want for religious reasons now?
 - Can an inmate really conceal contraband in a beard of that length?
 - Is a beard of that length hard to search?
- *Holt v. Hobbs*

Four Employment Cases + Same Sex Marriage

Same Sex Marriage

- Some government officials have resisted issuing marriage licenses on religious grounds
- So far a Kentucky county clerk has lost her case
- Here appeals are not over
- First Amendment or state Religious Freedom Restoration Act claim

Same Sex Marriage

- Accommodations may be possible but they should not burden same-sex couples
 - Americans United for Separation of Church and State
 - Texas Attorney General opinion

Same Sex Marriage

- Employee benefits in order
- Health insurance is tricky
- Public/employee relations

Same Sex Marriage

- Domestic partner benefits
 - May now have to offer them to opposite-sex couples if you don't already
 - Getting rid of them may not be easy/a good idea
 - Both same and opposite sex couples may still want them
 - State law may prevent you from getting rid of them
- Case name: *Obergefell v. Hodges*

Pay for Security Screening

- Do any of your employees go through security screenings?
- If you don't know, who might?
 - Courthouses, correctional institutions, and warehouses
- Employees do not have to be compensated for this time
 - Standing in line and going through screening

Pay for Security Screening

- Why?
 - Amazon.com contractors were hired to retrieve and pack products not go through security screenings
- But this can take a while
 - True, up to 25 minutes in this case

What Should I Do Now?

- Check to make sure employees aren't being paid for this time
- Check state law
- Check collective bargaining agreements
- Case name: *Integrity Staffing Solutions v. Busk*

Religious Accommodation

- City suspects—but does not know—that an applicant needs a religious accommodation
- City does not hire applicant because City does not want to offer an accommodation
- City has violated federal antidiscrimination law!

Religious Accommodation

- Why? It cannot be “motivated” by a desire to avoid religious accommodation
- Does not matter that City did not “know” the applicant needed a religious accommodation
- Employers have generally tried to not “know” about an employee’s religion

What Should I Do Now?

- Hypothetical: City a no beards policy. City interviews a beard-styling applicant. Interviewer knows some people wear beards for religious reasons. What does interviewer do?

Scenario 1

- Interviewer: We have a no-beards policy. Are you able to comply with it?
- Interviewee: Yes.

Scenario 2

- Interviewer: We have a no-beards policy. Are you able to comply with it?
- Interviewee: No. I wear a beard as a religious practice.
- City: Don't refuse to hire because of beard.
Determine if allowing interviewee to wear a beard is a reasonable accommodation

Scenario 3

- Interviewer: We have a no-beards policy. Are you able to comply with it?
- Interviewee: No.
- At this point, the interviewer can't avoid asking about religion

Unanswered Question

- What if the employer does not so much as suspect that an applicant will need a religious accommodation?
- How easy is it to credibly make this argument?
- *EEOC v. Abercrombie & Fitch*

Pregnancy Discrimination

- Pregnant employee says: I can't do X. I am pregnant. I need an accommodation
- City determines that it has **always** or **sometimes** has accommodated other employees for reasons other than pregnancy
- What if the city wants to say **no** to the accommodation?

Title VII

- New Title VII analysis
 - City must be able to assert a “legitimate, nondiscriminatory” reason for denying the accommodation
 - Reason can’t be it is more expensive or less convenient to accommodate pregnant women
 - Employee may show that the city’s proffered reasons are in fact pretextual

What about the ADA?

- Protections under the ADAAA (and state law) may be broader under Title VII
- In this case a pregnant woman requested an accommodation from a lifting requirement
 - ADAAA had her covered!
 - Employees can be impaired in lifting
 - Employers must accommodate employees whose temporary lifting restrictions originate off the job

Lesson Learned

- Pregnant woman requests an accommodation
 - Do an analysis under **all** applicable laws
 - Follow the most generous law
- *Young v. UPS*

Where's My Conciliation?

- Reasonable cause for discrimination=EEOC must conciliate before suing an employer
- If EEOC fails to conciliate=local governments sue the EEOC
- *Mach Mining v. EEOC*

Other Cases

Denying Cell Tower Applications

- Telecommunications Act says a denial must be “in writing and supported by substantial evidence contained in a written record”
 - Does “in writing” mean the reasons must be in the denial letter?

Denying Cell Tower Applications

- Local governments can't deny cell tower applications without providing reasons
- Reasons must be provided at the same time as the denial
- But they don't have to be in the letter (transcript/minutes are okay)

Denying Cell Tower Applications

- Two choices
 - Write a letter than includes your reasons
 - Wait and write a letter that doesn't necessarily include your reasons and include the minutes/transcript
- What you can't do
 - Write a letter saying "denied" and provide no reasons or minutes/transcript
- *T-Mobile v. City of Roswell*

Fair Housing Lawsuits

- Fair Housing Act disparate impact claims are possible
- No claim of intentional discrimination
- Local government's policy had a disproportionately adverse impact on a particular group

Fair Housing Lawsuits

- Basically the status quo remains
- Why?

Fair Housing Lawsuits

- But, wait there's more
- Local governments should not get in trouble for making tough housing policy choices
 - Housing policies necessary to achieve valid objectives should be okay
 - Only “artificial, arbitrary, and unnecessary barriers” not okay
 - Statistical disparities not enough: local government's policy must have caused the disparity

What Do I Do Now?

- Are some/many/most/all housing policy decisions run by legal counsel for disparate impact review
- The Court's cautions may now be a part of the analysis
- Won't reduce claims; may reduce *successful* claims
- Local governments sue other entities under the FHA
- *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*

Redistricting

- Local governments can't keep a particular percent of minority voters in majority minority districts and claim the Voting Rights Act made them do it

Redistricting

- Is this a common practice for local governments?
- It has been for states

Supreme Court Preview Webinar

- FREE
- October 14, 2015
- Register at www.statelocalc.org

Questions?
