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MUNICIPAL LAW

BY JEFFREY D. FRIEDLANDER

N.Y.'s Law Department and the U.S. Supreme Court

Given the broad scope of issues in which the New York City Law Department is involved, it is hardly surprising that its attorneys have briefed and argued a significant number of matters of importance and difficulty before the U.S. Supreme Court.

Since the Law Department was created in 1849, its attorneys have appeared in 65 cases before the Supreme Court. Lawyers representing the City have argued landmark cases on questions of free speech, establishment of religion, land use regulation, one-person, one-vote and other matters of fundamental constitutional impact.

Attorneys of the Law Department's appeals division, working closely with the corporation counsel and attorneys who represented the city in earlier stages of the proceeding, petition the Court for certiorari and, where certiorari has already been granted, appear for the city before the Court on the merits of a case.

The opening of the Supreme Court's current term on the first of this month presents a good opportunity to review those matters most recently on the Court's docket in which the Law Department is or has been involved.

Children With Disabilities

• ***Reimbursement for Private School Tuition for Disabled Children.*** The Individuals with Disabilities Education Act (IDEA) seeks to ensure that all children with disabilities have access to a free appropriate public education, and school districts are required to develop an Individualized Education Plan (IEP) for every disabled child seeking services.

Parents who are dissatisfied with the school district's IEP sometimes pay to enroll their children in private school, challenge the IEP, then claim tuition reimbursement if the IEP is found inadequate.

The question the Court was asked to resolve was whether the IDEA, as amended in 1997, permits reimbursement when the child has not previously received special education or related services from a public entity. The U.S. Court of Appeals for the Second Circuit held that tuition reimbursement is available, and the Supreme Court granted the city's petition for a writ of certiorari. *Board of Education v. Tom F.*, 193 Fed. Appx. 26 (2d Cir. 2006), cert. granted, 127 S. Ct. 1393 (2007). The city, supported by an earlier decision of the U.S. Court of Appeals for the First Circuit, argued that the plain language of the IDEA creates a threshold requirement that the student must have previously received special education and related services from the public entity before the parent may be reimbursed for the student's private school tuition.

The case was argued on Oct. 1, the opening day of the current term. Nine days later, the Court voted 4-4 (Justice Anthony Kennedy had recused himself), which had the result of affirming the Second Circuit decision but without precedential effect, therefore postponing conclusive resolution of the question to a later date.

Chief Assistant Corporation Counsel Leonard Koerner, chief of the appeals division, presented the city's case in his sixth appearance before the Court, having previously successfully argued *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (right to free expression not violated by Parks Department requirement that city employee regulate volume of music during concerts in city parks); *Marino v. Ortiz*, 484 U.S. 301 (1988) (another tie vote affirming Second Circuit's dismissal of plaintiffs' challenge to consent decree in employment discrimination action on ground that plaintiffs could have intervened in underlying action but did not); *Guardians Assn. v. Civil Service Commission*, 463 U.S. 582 (1983) (compensatory damages not available under Civil Rights Act Title VI absent proof of discriminatory intent); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (Historic Landmarks Law restricting alteration or demolition of privately owned designated landmarks not a taking of property requiring just compensation under Due Process Clause); and *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) (foster families not entitled to procedural Due Process when foster children removed from their homes).

Taxation of Foreign Missions

• In a previous column, I discussed *City of New York v. Permanent Mission of India*, 446 F.3d 365 (2d Cir. 2006), aff'd, 127 S.Ct. 2352 (2007), in which the Second Circuit rejected claims by the governments of India and Mongolia that they could not be sued by the city in U.S. courts for property taxes levied on the residential quarters of their foreign missions to the United Nations. The Foreign Sovereign Immunity Act (FSIA) generally precludes lawsuits against foreign governments, but an exception allows suits involving "rights in immovable property."

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The Indian and Mongolian governments argued unsuccessfully in the Second Circuit that this exception applies only when title or possession are directly at issue. Following the decision in the Second Circuit, the two governments, with the support of the U.S. solicitor general, petitioned for a writ of certiorari, and last spring the case was argued before the Supreme Court. Corporation Counsel Michael A. Cardozo appeared for the city.

In a 7-2 decision, the Court affirmed the Second Circuit, agreeing with the city that U.S. courts have jurisdiction over the tax case. The Court applied the FSIA exemption allowing suits over property rights because a "lien on real property runs with the land and is enforceable against subsequent purchasers," and such a lien "has an immediate adverse effect upon the amount which could be received on a sale, constituting a direct interference with the property." 127 S.Ct. at 2356. The case is now on remand to the U.S. District Court for the Southern District of New York on the question of whether real property taxes are in fact owed for the properties in question.

Corporation Counsel Cardozo's appearance for the city continues a tradition of appearances before the Court by corporation counsels in important cases. These have included Paul A. Crotty in *Agostini v. Felton*, 521 U.S. 203 (1997) (no establishment of religion occurs when public school employees enter parochial school to provide educational services to disabled children); Peter Zimroth in *Board of Estimate v. Morris*, 489 U.S. 688 (1989) (adjudicating constitutionality of Board of Estimate under one-person-one-vote rule), and *New York State Club Assn. v. City of New York*, 487 U.S. 1 (1988) (adjudicating constitutionality of City Human Rights Law provision prohibiting discrimination by private clubs); and J. Lee Rankin in *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970) (no establishment of religion results from property tax exemption for property used exclusively for religious, educational or charitable purposes).

Greenhouse Gas Emissions

• The city, represented by attorneys of the Law Department's environmental law division, played an important role in *Massachusetts, et al. v. Environmental Protection Agency*, 549 U.S.___, (April 2007). That case addressed whether the U.S. Environmental Protection Agency (EPA) has authority to regulate carbon dioxide and other air pollutants associated with climate change under the federal Clean Air Act and whether the EPA may decline to issue motor vehicle emission standards for such air pollutants on the basis of policy reasons not enumerated in §202(a)(1) of the act. That section requires the EPA administrator to set emission standards for "any air pollutant" from motor vehicles or motor vehicle engines "which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare."

In 2003, the EPA administrator denied a petition to regulate greenhouse gas emissions. A coalition of state and local governments and environmental groups challenged the agency's determination in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The city, as lead city petitioner in that coalition, sought to win the support of other localities for the litigation, and its attorneys contributed to the extensive briefs submitted to the D.C. Circuit and the Supreme Court and further prepared a declaration on the crucial question of whether petitioners had standing to seek legal redress against the EPA.

The D.C. Circuit , in a split decision, upheld the EPA's refusal to act. However, the Supreme Court, by a 5-4 majority, accepted the petitioners' arguments and reversed. Finding that "greenhouse gases fit well within the Clean Air Act's capacious definition of air pollutant," the Court held that the EPA has clear authority to regulate such pollutants. Moreover, because the "EPA ha[d] offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change," the Court further held that the EPA is required to review its denial of the rule-making petition and properly determine whether endangerment of public health or welfare exists from such emissions so as to warrant regulation. Finally, and arguably most importantly, the Court held that the petitioners had standing to appear in this matter in federal court.

In addition, in two cases recently heard on the merits by the Court, the city has participated as an amicus curiae because the cases presented significant issues of public policy affecting the city and its residents.

• ***Overtime Wages for Home Health Aides.*** Under the Medicaid program, the city provides noninstitutional long-term care and personal care services to approximately 80,000 frail elderly and disabled individuals, using home attendants employed by private home care providers. In a lawsuit arising in Nassau County, a home attendant sued a home care provider, challenging a U.S. Department of Labor regulation interpreting the federal Fair Labor Standards Act. Pursuant to that legislation, employees providing companionship services are exempt from the act's minimum wage and overtime requirements, including time-and-a-half pay for overtime. The contested regulation applies the statutory exemption to employees of third parties, including home care providers.

Plaintiff argued that the exemption applies only when workers are employed by the individual or family seeking services. The city participated as an amicus curiae because of its substantial financial stake in the outcome and the implications for the provision of care. While providers are required to pay home attendants in Medicaid's Personal Care Services Program wages under the city's Living Wage Law, invalidation of the Labor Department's regulation would

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have increased the program's cost (shared by the federal, state and city governments) by at least $250 million annually, due largely to overtime pay. A unanimous Supreme Court, reversing the Second Circuit, upheld the regulation, finding that Congress had explicitly framed the companionship exemption in general terms and entrusted the Labor Department to implement it in detail. *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007).

Judicial Elections

• The process for nominating and electing justices of the New York State Supreme Court is a matter of great importance to the bar and to residents of the city and state. In a recently argued case, the city joined in an amicus brief prepared by Preeta D. Bansal of Skadden, Arps, Slate, Meagher & Flom with significant input from former Corporation Counsel Victor A. Kovner, chairman of the Fund for Modern Courts, supporting affirmance of the Second Circuit Court of Appeals decision in *López Torres v. New York State Board of Elections*, 462 F.3d 161 (2d Cir. 2006), cert. granted, 127 S.Ct. 1325 (2007). Under New York state law, state Supreme Court justices are nominated by delegates at judicial conventions, and placed on the ballot at the general election. The system has been criticized on the ground that local party leaders choose the convention delegates and nominees, often based on political connections rather than merit, affording the voters no real choice.

Brooklyn Surrogate Margarita López Torres, who unsuccessfully sought the Democratic nomination for Supreme Court Justice on several occasions, challenged this process in federal court. In August 2006, a three-judge panel of the Second Circuit unanimously affirmed a District Court ruling that the current system violates the First Amendment rights of candidates and voters because it allows local party leaders too much control over the process. The District Court found that the plaintiff, like others who sought their party's nomination without the support of the local party leader, were shut out of the process and had no realistic chance of being nominated, notwithstanding significant popular support.

The Second Circuit held that "the First Amendment affords candidates and voters a realistic opportunity to participate in the nominating process," 462 F.3d at 187, and upheld the District Court's interim remedy of direct primary elections for judges until a new selection system can be established by state legislation. The Supreme Court heard oral argument on Oct. 3, with former Corporation Counsel Frederick A.O. Schwarz Jr. of Cravath, Swaine & Moore presenting the plaintiff's case on behalf of the Brennan Center for Justice, attorney for Judge López Torres.

The Law Department, on behalf of the city, has also petitioned the Supreme Court to accept certiorari in two recent cases. One of the petitions has been denied, and one is pending.

Clean Water Act

• ***Federal Clean Water Act and Water Transfers.*** Under the Federal Clean Water Act, discharges of pollutants to surface waters require "National Pollutant Discharge Elimination System" or "NPDES" permits. Recently, several courts have considered whether the NPDES program applies not only to discharges of wastewater, but also to transfers of untreated water from municipal reservoirs or flood management systems. Several sport fishing groups sued the city in 2000, alleging that the city needed an NPDES permit to transfer water from a city reservoir to the Esopus Creek, the main tributary of another city reservoir. In *Catskill Mountains Chapter of Trout Unltd. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), the Second Circuit became the first appellate court to hold that such transfers are subject to the NPDES program. The *Catskill Mountains* case subsequently came before the Second Circuit again, which adhered to its earlier statutory interpretation. *Catskill Mtns Chapter of Trout Unltd. v. City of New York*, 451 F.3d 77 (2d Cir. 2006). The city sought certiorari, but its petition was denied. *City of New York v. Catskill Mtns. Ch. of Trout Unltd.*, 127 S.Ct. 1373 (2007).

• ***Licensing of City Public School Teachers.*** Section 3001 of the New York Education Law requires that the New York City Board of Education hire only state-licensed applicants as teachers. A class action on behalf of minority teachers alleges that the state-administered licensing test, known as the Liberal Arts and Science Test (LAST), is unconstitutional because of disparate racial impact, and they have sought relief under Title VII. In *Gulino v. Board of Education*, 460 F.3d 361(2d Cir. 2006), the Second Circuit held that, since the Department of Education is the teachers' employer, the city, not the state, is potentially liable under federal employment discrimination law if the test is found to be unlawful.

The Department of Education has petitioned for certiorari on the ground that the LAST is a licensing test, not an employment test, and so falls outside the scope of such law. Moreover, the department argues, it cannot be held liable for deficiencies in a test it must use but neither prepares nor administers. Finally, the department maintains that the Second Circuit's decision improperly places in jeopardy licensing procedures in various other disciplines. The department's certiorari petition is pending.

Two Certiorari Petitions

In addition to the above-discussed matters, the Law Department has recently filed two certiorari petitions on behalf of district attorneys of counties within New York City. Certiorari is pending in one of those cases, *McKithen v. Brown*, 481 F.3d 89 (2d Cir. 2007), which turns on whether a federal civil rights action is available under 42 U.S.C. §1983 to challenge a state court's denial of an

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application for DNA testing, made by a convicted felon in the hope of overturning his conviction and opposed by the Queens district attorney. In the other case, *Reuland v. Hynes*, 460 F.3d 409 (2d Cir. 2006), cert. denied, No. 06-1601, 2007 U.S. LEXIS 10459 (Oct. 1, 2007), an employee of the Brooklyn district attorney successfully challenged as violative of the First Amendment's free speech protection a personnel action taken against him for statements relating to his area of professional expertise. Certiorari in that matter was denied.

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