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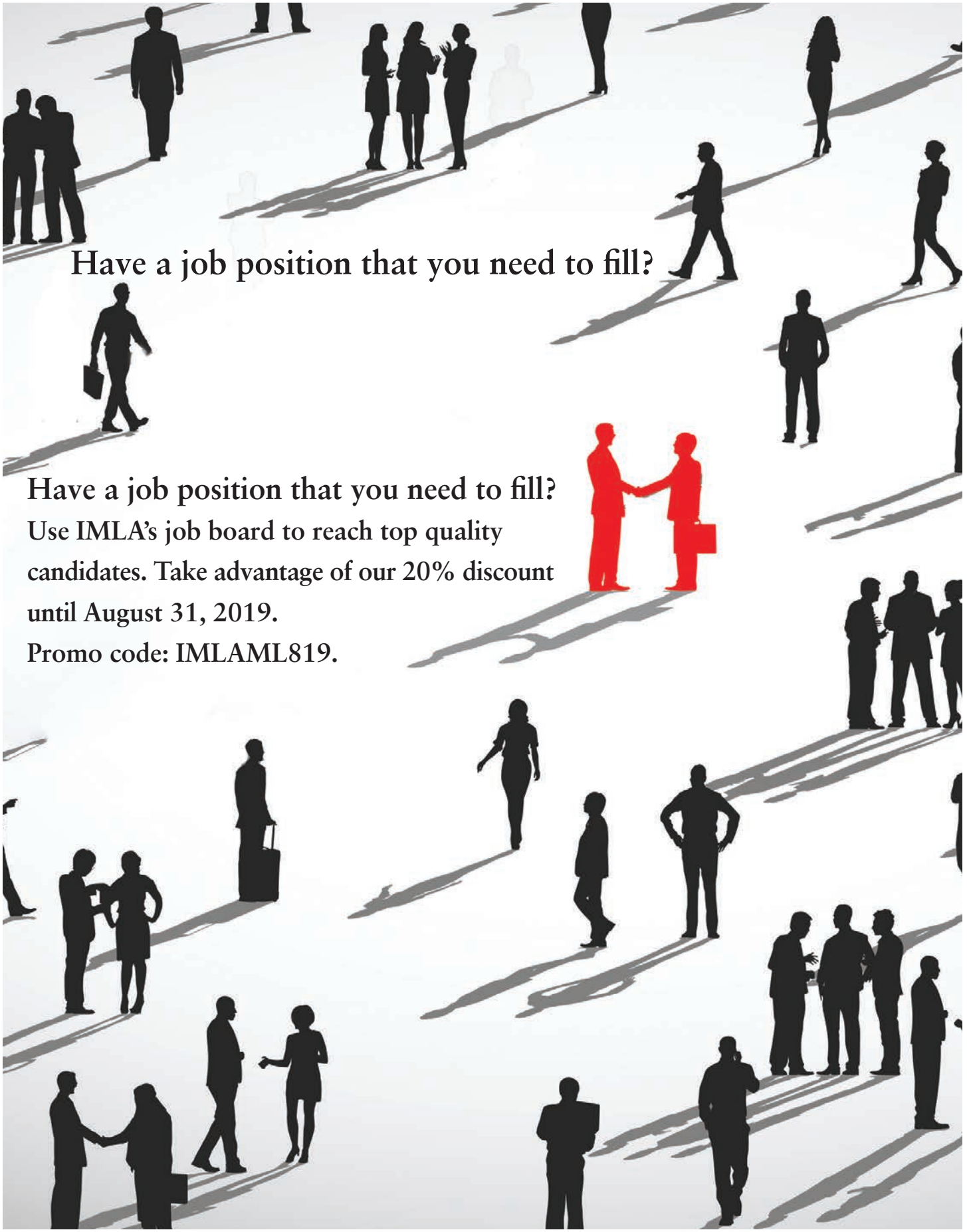

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BY ERICH EISELT
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Celebrating the Rule of Law

The digital version of this May-June 2019 *Municipal Lawyer* is reaching you on May 1—Law Day, as our OP-ED writer notes. In addition to practicing law—an attribute we share with millions of lawyers worldwide--IMLA members can celebrate a more immediate link to Law Day: it was instituted 60 years ago by our founder Charles Rhyne.

If an abundance of lawyers correlates to greater justice, then our society should be more just than ever. In 1900, there were 114,000 lawyers in America for a population of 76 million. Since then, our nation's population has more than quadrupled, to 325 million—but our lawyer cohort has multiplied twelve-fold. Today there are nearly 1.4 million active practitioners in the United States and Canada, with more than 350,000 lawyers in New York and California alone.

Many of us might assume that the US is the most litigious, most over-lawyered culture on the globe. That is not entirely accurate. On a per-capita basis, Israel has twice as many lawyers as the US—about one per 140 persons. Germans and Swedes are more likely to be involved in legal actions than Americans, again on a per capita basis. And India has the most lawyers in the world, with a number estimated to exceed 1.5 million (although in fairness, a *Times of India* article in 2017 discussed efforts by the nation's bar associations and judges to curb the number of unlicensed persons roaming court houses and posing as attorneys—believed to be as many as 45% of India's ostensible lawyer population).

Regardless, today we take the opportunity to reaffirm the seminal role that laws, fairly derived and evenly applied, play in our democracy, recognizing that not all legal institutions and courtrooms around the world are animated by equality or fairness. The primary subject matter of this *ML*—section 1983 litigation—illustrates the equipoise that our legislatures and courts have sought to achieve, first providing a vehicle to redress governmental wrongs and then recognizing the need for defensive mechanisms. As each article in this issue manifests, IMLA members are active participants in a system which, while not always perfect, aspires to transparency and is grounded in a steadfast respect for the rule of law.

Happy Law Day to our IMLA colleagues.

Best regards-

Erich Eiselt

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PRESIDENT'S LETTER

BY ANDREW J. WHALEN
IMLA President and City Attorney, Griffin, Georgia

As I write this message for *Municipal Lawyer*, Tiger Woods has just made one of the greatest, if not **the** greatest, comebacks in Sports history, or maybe the greatest comeback, period…in any field. Having reached the pinnacle in the world of golf a decade ago, Woods had fallen from grace due to a number of reasons. Yet he is now back at the very top, having once again won the Masters Tournament in Augusta, Georgia. Congratulations, Tiger, your achievement inspires all of us—and gives hope to Executive Director Chuck Thompson that his golf game might someday improve.

IMLA's 2019 Mid-Year Seminar is also now in the books and, with survey results just in, was a great success. Overall, attendees ranked the quality of our speakers and their written materials very high. Attendance was excellent and it appears quite a few of you came specifically for the Section 1983 civil rights presentations. The ability to network at the Seminar draws many of you to Washington each year and our first-time attendees seem to have enjoyed the ability to be recognized by their red name badges. Thank you to those repeat attendees who made a special effort to speak to the first-timers and made them feel welcome. We hope to see all of the newcomers back next year. And a special thanks to the IMLA staff for making the Mid-Year—and all our conferences--such a big success.

In terms of IMLA business, the Membership Committee held a meeting with Regional Vice-Presidents and State Chairs attending the Semnar. Committee Co-Chairs Arthur Gutekunst and Doug Haney reviewed the Committee's plans to boost membership in IMLA, emphasizing how critical it is for the RVP's and SC's to actively recruit new members. If all current IMLA members would simply talk to one city or county attorney about our organization and encourage them to join, I would be elated. If you know a prospect, please don't keep it a secret…recruit them…IMLA staff is ready to help you.

At the Seminar, the International Committee reported on last year's mission to Israel and discussed plans for this year's delegation to Germany for the 30th Anniversary of the fall of the Berlin Wall. The trip is planned for November 3-8, 2019, with lodging at the Hilton Berlin City Centre. IMLA is applying for CLE credits of 6-7 hours. The deadline to register for this mission and pay your deposit is May 17, 2019, so you'll need to hurry. Interested members should contact Jenny Ruhe at IMLA or Committee Co-Chairs Ben Griffith and Tyler Wallach.

It was my great pleasure to present awards during our Mid-Year to those attorneys who, without compensation, wrote amicus briefs for our Legal Advocacy Committee. This Committee does an outstanding job of screening cases important to local governments and consistently advocating policies that foster the goals and objectives of our cities and counties on a wide range of issues. This year's brief writers have done our organization a real service and certainly made us proud.

The theme for this issue of *Municipal Lawyer* is Section 1983 litigation. The issue features some of the excellent articles on civil rights defense presented at the Seminar – discovery in police misconduct cases, and moving for summary judgment based on qualified immunity. Also featured in this issue is a reprint of an article about our IMLA founder Charles Rhyne, which is quite fitting for Law Day on May 1. At the Seminar I heard many accolades for the excellence of our publications and want to congratulate Erich Eiselt for his excellent performance as Editor.

As your President, I am looking forward to our Annual Conference in Atlanta on September 18-22, 2019. The Atlanta Host Committee is working hard on an action-packed week of events, while staff is putting together another excellent program of substantive CLE. The Georgia City & County Attorneys Institute will be held in conjunction with the Conference, with a separate day of programming set aside for those Georgia attorneys attending our event.

If you haven't already registered for the Conference, now is the time to do so. Atlanta is truly an international city and has a lot to offer visitors. Many of you told me at the Seminar that you were excitedly looking forward to a great visit to Georgia and its Capitol City. I hope to see all of you, *(locally pronounced "Y'all")* in Atlanta in September. ML

Covering The Bases: Tips for Litigating Qualified Immunity On Summary Judgment

BY: TIMOTHY T. COATES | *Managing Partner, Greines, Martin, Stein & Richland LLP, Los Angeles, California*

ILLUSTRATION:TRUJILLO DESIGN

Introduction.

As any plaintiff's section 1983 attorney will tell you, nothing is more certain than death, taxes, and a qualified immunity summary judgment motion by the defense. While pretty much any civil case will require an assessment of whether summary judgment is appropriate by one side or the other, in a section 1983 case the defense must always ask whether a try at summary judgment is warranted, and the answer is almost always "yes." The reason for this is qualified immunity. The Supreme Court has emphasized that in light of the purpose of the doctrine—to shield defendants not simply from liability, but participation in litigation—the issue should be raised and determined at the earliest possible point in the lawsuit.[1] Given the relatively low bar that plaintiffs must meet in order to overcome a motion to dismiss under Rule 12(b)(6), i.e., simply make allegations sufficient to avoid dismissal, it is often difficult to successfully assert a qualified immunity argument at the pleading stage, leaving summary judgment as the most viable option for prevailing on the defense.

The purpose of this article is to provide some tips for drafting a successful motion for summary judgment based on qualified immunity. It is not a guide to summary judgment motions in general, and although FRCP Rule 56 sets the general standards for summary judgment, the local federal district courts throughout the country often have varying rules concerning the format of such motions. Instead, the article will focus on the particular issues that arise in the context of qualified immunity summary judgment motions, including particular evidentiary problems, recurring issues and navigating the ins and outs of seeking further appellate review. A motion for summary judgment based on qualified immunity is the strongest weapon in the defense arsenal. The goal is to assist defense counsel in employing this weapon to its greatest effect.

I. Overview of Summary Judgment Standards.

Standards for granting summary judgment. FRCP Rule 56 allows a party to move for summary judgment on a claim or defense and provides that "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." As a result, the question whether a defendant is entitled to summary judgment generally depends upon whether there is a dispute of fact, and if so, whether the dispute is material. As we discuss later, because of the unique aspects of qualified immunity, there may indeed be circumstances where there is a genuine dispute of fact, i.e., the parties disagree on what occurred, but nonetheless the defendant will be entitled to qualified immunity and summary judgment. In those circumstances it is not so much that there is a factual dispute, but whether the dispute is material to disposition of the case. The burden is on the moving party to show the absence of a genuine issue of material fact, either by providing affirmative evidence, or pointing it to the absence of evidence to support the opposing party's position.[2] The latter is generally done by citing discovery responses showing that plaintiff lacks evidentiary support for his or her version of what occurred. Once the moving party meets its burden, it is incumbent on the opposing party to submit admissible evidence creating a genuine issue of material fact. As the Supreme Court has observed, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts," rather, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'"[3]

Although Rule 56 sets a specific standard applicable to all cases, nonetheless, several circuit courts have suggested that the statutory standards have to be applied with particular rigor with

respect to summary judgment motions in excessive force cases where police officers are the only surviving witnesses to the incident.[4]

Evidentiary standards. A motion may be supported by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" under FRCP 56(c)(1)(A). It is important to note that the evidence must be in admissible form. Declarations must be made based on personal knowledge, and documentary evidence should be authenticated, with a proper foundation established. Many attorneys who would never allow a witness at trial to testify as to hearsay, will, nonetheless, submit a declaration rife with hearsay. Similarly, a common evidentiary failing is simply attaching a document to a motion or declaration, without properly authenticating the document or laying the foundations as to why its contents would be admissible. With the advent of body cameras and cameras in police vehicles, and the Supreme Court's decisions in *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 572 U.S. 765 (2014), video evidence has become commonplace in qualified immunity summary judgment motions.

Absent a stipulation, the party moving for summary judgment based on video evidence must, as with other evidence, authenticate the video and lay a proper foundation for its admission as evidence. Moreover, many courts have local rules governing submission of video evidence, i.e., specifying the number of copies to be submitted to the court, as well as the proper format. In addition, some courts will reject a video as supporting a motion for summary judgment if the motion is premised on viewing the video in slow motion, the reasoning being that the officer did not experience the event in slow motion, hence the video does not accurately depict what the officer perceived.

II. Overview of Qualified Immunity.

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[5] .It involves a two-prong inquiry: (1) whether the facts that a plaintiff has alleged (for a motion to dismiss) or shown (for summary judgment or trial) make out a violation of a constitutional right; and (2) whether the right at issue was "clearly established" at the time of defendant's alleged misconduct.[6] Where a defendant raises both grounds, a court is free to decide whether to address one or both prongs.[7]. In preparing a motion for summary judgment based upon qualified immunity, one of the initial decisions is whether to move on one or both prongs. Many defense counsel almost reflexively move on both grounds, figuring "why not?" However, in many circumstances, determination of whether a constitutional violation actually occurred at all is highly fact-dependent, with the attendant risk that the plaintiff will be able to present a conflicting version of the facts sufficient to defeat the motion. As we discuss in further detail below, the presence of "bad facts" with respect to the merits of whether a constitutional violation occurred, might well counsel towards moving solely on the ground that even assuming the plaintiff's version of the incident is correct, the propriety of the officer's conduct was not clearly established based upon existing case law. Conversely, are there circumstances in which there may be a strong case for moving for summary judgment on the merits, without addressing whether the right was clearly established in light of governing case law?

Almost inevitably, if you are moving for summary judgment on the merits of a constitutional claim, it is worthwhile to also move for summary judgment based on the clearly established law prong. Indeed, for reasons discussed below, a significant debate about whether an underlying constitutional violation occurred at all, invariably strengthens any argument that the officer's conduct does not violate clearly established law.

In my experience, such situations are few and far between. Almost inevitably, if you are moving for summary judgment on the merits of a constitutional claim, it is worthwhile to also move for summary judgment based on the clearly established law prong. Indeed, for reasons discussed below, a significant debate about whether an underlying constitutional violation occurred at all, invariably strengthens any argument that the officer's conduct does not violate clearly established law.

III. Moving for Summary Judgment Based on the Absence of Clearly Established Law.

The United States Supreme Court has repeatedly held that a police officer is entitled to qualified immunity if "a reasonable officer could have believed [his actions] lawful, in light of clearly established law and the information the . . . officer[] possessed.[8] In order for the law to be clearly established, "[t]he contours of [a] right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right."[9]

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In other words, "existing precedent must have placed the . . . constitutional question beyond debate."[10] Moreover, clearly established law must be determined "'in light of the specific context of the case, not as a broad general proposition.'"[11] Indeed, the Supreme Court has repeatedly admonished the appellate courts for defining the clearly established law at too high a level of generality.[12] Qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[13]

In drafting a motion for summary judgment based on the clearly established law prong of qualified immunity the focus is on two elements. First, what level of authority is sufficient to define clearly established law? District court cases from my jurisdiction? Circuit court cases from my circuit? State appellate decisions from my jurisdiction? Second, how closely analogous fact wise must the cited cases be to my case in order to constitute "fair notice" to the officer of potential liability?

What court can "clearly establish" the law in question? Precisely what constitutes "clearly established law" is currently an open question, yet to be authoritatively resolved by the Supreme Court. Does there have to be a Supreme Court opinion on point? How about a circuit court opinion from the circuit in which the case arose? How about a case on point from another circuit? How about a district court case from within the circuit where the case arose? How about a relevant state Supreme Court decision from the state in which the case arose? The fact is that at one time or another, any and all of the foregoing have been cited by the Supreme Court as a basis for establishing the governing law for purposes of qualified immunity.

In *Wilson v. Layne*, 526 U.S. 603 (1999), officers violated the Fourth Amendment by bringing reporters into a home during the execution of a warrant when their presence was not in aid of execution. The Court held the officers were entitled to qualified immunity because "[p]etitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident that clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."[14] The Court also noted that, given the absence of a "decided body of case law,"—including a circuit split on the issue, the officers were not unreasonable in relying on their internal "ride-along" policy, which permitted third parties to accompany officers during certain procedures.[15] Noting that an internal policy "could not make reasonable a belief that was contrary to a decided body of case law," the Court observed that "here the state of the law as to third parties accompanying police on home entries was at best undeveloped," hence "it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies."[16] "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."[17]

The Court found in *Hope v. Pelzer*, 536 U.S. 730 (2002), that state prison officers were not entitled to qualified immunity for handcuffing a prisoner to a hitching post for extended periods of time. The majority acknowledged that no published decisions expressly held that such conduct violated the Eighth Amendment, but noted that officers need only have "fair warning" that their conduct is unlawful (the same standard for criminal statutes to avoid a challenge for vagueness). The majority noted that circuit precedent holding that handcuffing inmates to a fence could violate the Eighth Amendment and that denying prisoners water for purposes of punishment was unconstitutional, gave fair notice to the officers, as did state regulations. The Court concluded that unpublished district court decisions cited by the dissent that rejected similar claims, did not indicate the law was not clearly established.

In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Court held that the officers were entitled to qualified immunity for a search conducted based on consent to entry given to a confidential informant, because prior to the Tenth Circuit's decision in the case, "three Federal Courts of Appeals and two State Supreme Courts" had found such consent valid.[18] In fact, "prior to the Tenth Circuit's decision in the present case, no court of appeals had issued a contrary decision;" thus, "[t]he officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on . . . [such] entries."[19].

The Court held in *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364 (2009),that a strip search of a middle school student for a prohibited drug violated the Fourth Amendment based on prior Supreme Court precedent, but concluded that school officials were entitled to qualified immunity because of debate about the scope of the Court's prior opinion: "We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case. We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted."[20]

The Court found in *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011), that the Attorney General was entitled to qualified immunity for invoking the material witness warrant procedure as pretext for another investigation because at the time of the events, "not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional"; one district court's holding to the contrary did not represent "a robust 'consensus of cases of persuasive authority'" to make law clearly established.

In *Ryburn v. Huff*, 565 U.S. 469 (2012), the Court held the officers were entitled to qualified immunity for entering a residence without a warrant when, during an investigation of a shooting threat, the plaintiff abruptly terminated the interview and ran into the house in response to a question of whether there were guns in the residence. The Court emphasized that "[n]o decision of this Court has

found a Fourth Amendment violation on facts even roughly comparable to those present in this case. On the contrary, some of our opinions may be read as pointing in the opposite direction.[21]

The Court held in *Reichle v. Howards*, 566 U.S. 658, 663 (2012) that secret service agents were entitled to qualified immunity for arresting the plaintiff for touching the Vice President while expressing opposition to his policies, because, at the time of the arrest, "it was not clearly established that an arrest supported by probable cause could violate the First Amendment." The Court emphasized that "[t]his Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of Howards' arrest."[22] Significantly, for the first time, the Court suggested that circuit court authority might not be enough to render the law "clearly established" for purposes of qualified immunity. In addressing the Tenth Circuit authority, which had been cited as a basis for denying qualified immunity, the court noted: "Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here."[23]

> Given the Court's repeated admonition to the circuits to apply qualified immunity with rigor, both regarding factual similarities between underlying cases and existing precedent, and, more critically, with respect to the binding nature of existing authority, the existence of a circuit split provides a compelling basis for asserting qualified immunity. This would seem especially true of federal officials, who technically operate on a national basis, and whose conduct should not be subject to varying standards of liability depending upon where the underlying incident occurred.

In *Stanton v. Sims*, 134 S. Ct. 3 (2013), the court found that police officers were entitled to qualified immunity for a hot pursuit of a misdemeanor suspect into the curtilage of a residence to effect an arrest because (1) the Court had never addressed the issue of whether an officer may engage in hot pursuit entry to arrest for a misdemeanor; (2) the Ninth Circuit had not clearly addressed the issue, and district courts within the circuit indicated the law was not clearly established; (3) other circuit courts throughout the country were divided on the question; and (4) state courts where the pursuit occurred had held such pursuits were lawful.

The Court concluded in *Lane v. Franks*, 573 U.S. 228 (2014), that the First Amendment barred a government employer from firing an employee on account of testimony the employee gave under oath and outside the scope of his ordinary job responsibility, but that individuals were entitled to qualified immunity because "[a]t the time of Lane's termination, Eleventh Circuit precedent did not provide clear notice that subpoenaed testimony concerning information acquired through public employment is speech of a citizen entitled to First Amendment protection. At best, Lane can demonstrate only a discrepancy in Eleventh Circuit precedent, which is insufficient to defeat the defense of qualified immunity."[24] Similarly, in *Carroll v. Carman*, 135 S. Ct. 348 (2014), the court found that officers were entitled to qualified immunity from a Fourth Amendment claim premised on their alleged unlawful entry into the side yard of a residence to speak with a resident at a side door because the law was not clearly established. The court once again cast doubt on the question of whether circuit court precedent in the jurisdiction where the claim arose could ever constitute clearly established law. The court noted: "Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances," here, "the Third Circuit cited only a single case to support its decision that Carroll was not entitled to qualified immunity," that decision was inapposite, and "other federal and state courts" rejected the rule adopted by the Third Circuit.[25] As a result, the lawfulness of the officers' conduct was not "beyond debate" and hence, he was entitled to qualified immunity.

In *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), the Court again emphasized, "[w]e have not yet decided what precedents—other than our own— qualify as controlling authority for purposes of qualified immunity."[26] The Court held that the officer in the case before it was entitled to qualified immunity for wrongful arrest because the lower court had relied on a single decision from that court, which the Supreme Court found largely inapposite. The Court emphasized that "'a body of relevant case law' is usually necessary to" clearly establish the law for purposes of qualified immunity.[27] Most recently, in *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) the Court once again noted that it had not decided what precedents other than its own could clearly establish the relevant law, but granted qualified immunity based upon the absence of applicable law within the circuit in which the case arose concerning the precise factual situation confronted by the officer.

Given the varying approaches the Supreme Court has taken with respect to what constitutes a body of law that is sufficiently controlling for purposes of rendering the law "clearly established," the circuit courts have taken different approaches to the issue. Not surprisingly, the Ninth Circuit takes one of the broader approaches in determining what constitutes clearly established law, noting that "for purposes of qualified immunity, a Ninth Circuit precedent is sufficient to clearly establish law within our circuit."[28] The Ninth Circuit has emphasized that in "the absence of binding precedent, we look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of state courts, other circuits, and district courts."[29] Although

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the Ninth Circuit has held that an unpublished district court decision did not clearly establish the federal law, it has indicated that such opinions might clearly establish the law if the defendant officials repeatedly chose not to appeal unfavorable district court decisions in order to avoid adverse circuit court precedent.[30]

The Sixth Circuit has held that a recent case from one circuit is generally not sufficient to constitute clearly established law in another circuit.[31] The Tenth Circuit has held that a conflict among circuit courts on an issue, while relevant to the qualified immunity inquiry, is not dispositive, because it would effectively "bind this circuit by the decisions of others."[32] The Fifth Circuit has similarly rejected the presence of a circuit split as dispositive of the qualified immunity issue when its own precedent establishes that the conduct in question is unlawful.[33]

Given the Court's repeated admonition to the circuits to apply qualified immunity with rigor, both regarding factual similarities between underlying cases and existing precedent, and, more critically, with respect to the binding nature of existing authority, the existence of a circuit split provides a compelling basis for asserting qualified immunity. This would seem especially true of federal officials, who technically operate on a national basis, and whose conduct should not be subject to varying standards of liability depending upon where the underlying incident occurred. The Supreme Court in recent years seems to be heading towards a rule that in all but the most obvious of cases, a defendant will be entitled to qualified immunity virtually any time there is a circuit split, and perhaps whenever the high court itself has not yet spoken on an issue. As a result, in preparing a motion for summary judgment based on the absence of clearly established law, look first to case law within your own circuit, but do not despair if you find nothing directly on point. If anything, the absence of such authority is a good sign, because it provides a strong basis for arguing that the law is not clearly established. Moreover, if the law in your circuit is adverse to your position, look to the law of other circuits, or state appellate courts, which might provide a basis for arguing that the law is not clearly established.

How factually analogous must a case be in order to "clearly establish" the law? After identifying what level of authority is sufficient to establish the law in your jurisdiction, the next question is how factually on point must the case law be? The good news for defendants is that over the last several years the Supreme Court has held that existing authority must be highly factually analogous to the situation confronted by the officers in a particular case in order to constitute clearly established law for purposes of defeating qualified immunity. As the Court emphasized in *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014), "[T]he crucial question [is] whether the official acted reasonably in the particular circumstances that he or she faced." (Emphasis added.) This is particularly true in cases involving the use of force. In the past, use of force cases were often difficult to knockout via a summary judgment motion because they typically involved numerous underlying factual issues which could spawn a factual dispute for purposes of defeating the motion. However, the Supreme Court has recently emphasized that the fact specific nature of the use of force inquiry itself means that in many, if not most circumstances, the law will not be clearly established and hence an officer may be entitled qualified immunity, even if there is a factual dispute about whether the level of force was reasonable under the Fourth Amendment.

In *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam), the Supreme Court reversed the denial of summary judgment to an officer who had shot an armed suspect shortly after arriving at the scene as back up, finding the officer was entitled to qualified immunity based on the absence of clearly established law governing the factual situation he confronted. In so holding, the Court emphasized that the generalized standards for use of force articulated in *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), were not sufficient to "clearly establish" the law in other than the most obvious cases.[34] Instead, the appellate court was required to identify some factually analogous authority—a task made particularly difficult when the case involves unusual facts. As the Court emphasized, that "this case presents a unique set of facts and circumstances," "alone should have been an important indication to the majority that White's conduct did not violate a 'clearly established' right."[35] Similarly, just last term in *Kisela v. Hughes*, 148 S. Ct. 1148 (2018) (per curiam), the Court again summarily reversed the denial of qualified immunity to an officer based on the absence of clearly established law concerning factual situations closely analogous to those confronted by the officer. The Court highlighted the fact-specific nature of the use of force inquiry, which made it essential that there be some authority directly on point in order to defeat immunity. "Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue."[36]

Although *Kisela's* description of clearly established law as case law that "'squarely governs' the specific facts at issue," is probably the Court's most stringent application of qualified immunity, earlier case law is also helpful in analyzing clearly established law in the use of force context.[37]

The malleable standards governing other aspects of the Fourth Amendment such as arrest and search and seizure, have also led the Supreme Court to require some degree of factual specificity in applicable case law in order to avoid qualified immunity. For example, in the context of wrongful arrest, the recent *Wesby* decision emphasized the absence of case law putting the officers on notice that they could be held liable for wrongful arrest simply based on their assessment of various factors that might have undermined probable cause.[38] As the Court noted, in order to defeat qualified immunity "[i]n the context of a warrantless arrest, the rule must obviously resolve 'whether the circumstances with which [the particular officer] was confronted . . . constitute[d] probable cause.'"[39] (emphasis added).

IV. Moving for Summary Judgment Based on the Absence of a Constitutional Violation.

As noted, moving for summary judgment on the merits (i.e.,

by establishing that no constitutional violation occurred), can be problematic in that most such determinations are fact intensive, and hence create the risk of a genuine issue of material fact. Nonetheless, under appropriate circumstances it may be worth moving for summary judgment even in a close case because it may strengthen your argument on the "clearly established law" prong of qualified immunity. In cases where the propriety of the officer's underlying conduct is hotly debated, a strong argument can be made that if the question is even close, then qualified immunity should apply. In sum, the unlawfulness of the conduct cannot be "clearly established" if there is serious doubt about the issue.

> How factually analogous must a case be to "clearly establish" the law? After identifying what level of authority will establish the law in your jurisdiction, the next question is how factually on point must the case law be? The good news for defendants is that over the last several years the Court has required that existing authority be highly factually analogous to the situation confronting officers in a particular case in order to constitute clearly established law for purposes of defeating qualified immunity.

The paradigm case concerning the grant of summary judgment based on the merits in a use of force claim is *Scott v. Harris*, 550 U.S. 372 (2007). In *Scott*, the Court held that the undisputed evidence in the form of video of the police pursuit and resulting use of force established that the force was reasonable as a matter of law and hence the plaintiff had no Fourth Amendment claim. In *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021 (2014), citing *Scott*, the Court similarly found that the officers were entitled to judgment because the undisputed evidence established that the force used to terminate a pursuit was reasonable as a matter of law. With the increased availability of video evidence, it is anticipated that there will be more opportunities to assert merits-based motions for summary judgment in use of force cases.

The Supreme Court's decision last term in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) provides strong authority in support of moving for summary judgment in wrongful arrest cases. The case has very helpful language concerning the broad discretion given to officers in evaluating the totality of circumstances relevant to probable cause to arrest, and in assessing the credibility of witnesses.[40] In some circumstances the reasonableness of a search may be established as a matter of law. For example, in *City of Ontario v. Quon*, 560 U.S. 746 (2009), the Court found that the plaintiff police officer did not have a reasonable expectation of privacy with respect to a department issued text pager, and hence there was no violation of the Fourth Amendment based upon monitoring text messages on the device.

V. Dealing with Factual Conflicts.

As noted, given the standards for granting summary judgment, the existence of a genuine issue of material fact would seem to be the death knell for any motion. If you have a case with a true dispute as to what occurred think twice before attempting to move for summary judgment absent some argument that the dispute is ultimately not material to whether the defendant is entitled to qualified immunity. It is better to concede an obvious factual dispute and proceed to the "clearly established law" prong of qualified immunity than it is to fight a losing battle that will only divert the court's attention from a truly meritorious argument.

However, the reality is that a factual dispute need not doom a motion for summary judgment based upon either prong of qualified immunity. The key is whether the disputed fact is material to determination of the qualified immunity defense. The fact that an officer is mistaken about a particular fact does not foreclose qualified immunity, as the Supreme Court has made it clear that "[t]he protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'"[41] Thus, in many cases where there is a factual dispute it is important to make it clear that even assuming the plaintiff's version of the facts is correct, the officer is still entitled to qualified immunity because there is no clearly established law concerning the specific circumstances confronted by the officer.

Moreover, the existence of a genuine issue of fact need not defeat a merits-based motion for summary judgment, depending upon the nature of the constitutional right at issue. In the Fourth Amendment context, it is all too easy to forget that the applicable standard of reasonableness encompasses reasonable mistakes of fact. In sum, an officer need not be correct, just reasonable. This is underscored by the Court's enunciation of the excessive force standard in in *Graham v. Connor*, 490 U.S. 386 (1989), where the Court observed that just as "[t]he Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises" so too "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment."[42] An officer need only believe that there is probable cause to believe the force is necessary, and as the Court has observed, "the probable-cause requirement: . . . '[D]oes not deal with hard certainties, but with probabilities.'"[43]

VI. What to Do if You Lose—Appealing the Denial of Summary Judgment Based on Qualified Immunity.

As any plaintiff's lawyer will tell you, one of the main leverage points the defense has in section 1983 cases is the ability to obtain interlocutory review of a trial court's decision denying qualified immunity. Many a case has been brought to a

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standstill by a defendant's appeal of an order denying summary judgment based on qualified immunity. However, not all orders denying summary judgment based on qualified immunity are immediately appealable. In *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985), the Court held that where a district court denies a motion for summary judgment on qualified immunity based upon its determination of what constituted clearly established law, the order is immediately appealable. The Court reasoned that such an order fell within the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949).[44] This is because determination of the legal question as to whether the law was clearly established, was independent of the merits of the underlying claim.[45] More significantly, interlocutory appellate review is required because qualified immunity is an immunity not simply from liability, but from participation in litigation at all. Hence, the benefits of that protection would be lost if an officer was required to undergo a full trial, before being able to obtain review of a district court's failure to grant immunity.[46]

In *Johnson v. Jones*, 515 U.S. 304 (1995), the plaintiff asserted that various defendants had either unlawfully beat him or failed to stop other officers from doing so. The officers moved for summary judgment based on qualified immunity, arguing that there was no evidence they had participated in the beating. The district court denied summary judgment, finding that there was evidence that defendants were, contrary to their statements, in or near the room where the beating occurred, and that this created a genuine issue of material fact barring summary judgment. The defendants appealed, and the appellate court dismissed the appeal for lack of jurisdiction.[47]

The Supreme Court affirmed, noting that *Mitchell* held that an order denying summary judgment that was based upon the district court's application of law, i.e., assessing whether or not it was clearly established for purposes of qualified immunity, was subject to immediate review.[48] In *Johnson* however, the defendants were not contesting whether the district court properly applied the law, but rather, whether the district court was correct in assessing that there was sufficient evidence to support plaintiff's account of what transpired. As the Court observed, the question whether a factual dispute is "genuine" is the sort of task performed by trial courts, not appellate courts.[49]

In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court reaffirmed the broad scope of appellate review afforded by *Mitchell*. There, the district court had denied defendants' summary judgment motion on qualified immunity, based on its determination that there was a genuine issue of material fact, but without specifying the particular conduct that was subject to the factual dispute. The plaintiff argued that the order was not appealable under *Johnson*, but the Supreme Court rejected the contention, noting that "[d]enial of summary judgment often includes a determination that there are controverted issues of material fact, see Fed. Rule Civ. P. 56, and *Johnson* surely does not mean that every such denial of summary judgment is nonappealable."[50] The Court emphasized that "*Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case; " instead, "summary judgment determinations are appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity" such as whether the law was clearly established with respect to the conduct at issue.[51] Thus, the Court held that the order was appealable, and that in light of the district court's failure to specify precisely what conduct was disputed, the task for the appellate court was "'to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed'" and then apply the law to those facts.[52]

At bottom, *Behrens* stands for the proposition that just because a district court denies summary judgment based upon a genuine issue of material fact, that statement in and of itself does not foreclose appellate review. Under such circumstances it is incumbent upon the defendant to show that the alleged factual dispute is not material to resolving the qualified immunity issue. This is underscored by the Court's decision in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). In *Plumhoff* the district court had denied summary judgment, finding a triable issue of fact on whether the force used by defendants was excessive. However, the Supreme Court dismissed concerns about appealability, noting that no party was really disputing the factual record, but simply the legal significance of the facts:

> The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.[53]

It is worth noting that there is currently a circuit split on whether an order denying summary judgment on qualified immunity based on conflicting inferences that might be drawn from otherwise undisputed evidence, forecloses immediate appellate review under *Johnson*.[54] This issue is particularly significant given the increased use of video in support of motions for summary judgment, as the fact of the video itself may be undisputed, but conflicted inferences may be drawn from what is depicted.[55]

Conclusion.

The qualified immunity defense remains a potent mechanism for obtaining summary judgment on behalf of law enforcement officers and other municipal actors. Local government counsel are well-served to remain knowledgeable about the evolving nuances of qualified immunity—and the optimal time and manner to deploy the defense—so as to minimize the locality's exposure to ever-increasing Section 1983 litigation.

Notes

1. Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam); Pearson v. Callahan, 555 U.S. 223, 231 (2009).
2. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).
3. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 US 574, 586-587 (1986).
4. Gonzalez v. City of Anaheim, 747 F. 3d 789, 795 (9th Cir. 2014) ("summary judgment should be granted sparingly in excessive force cases," and "[t]his principle applies with particular force where the only witness other than the officers was killed during the encounter"); Cruz v. City of Anaheim, 765 F.3d 1076, 1079 (9th Cir. 2014) ("[I]n the deadly force context, we cannot simply accept what may be a self-serving account by the police officer"); Texas v. Kleinert, 855 F.3d 305, 310, n.1 (5th Cir. 2017) ("Because Kleinert is the only surviving witness to his encounter with Jackson, we view his testimony with caution."); Flythe v. Dist. of Columbia, 791 F.3d 13, 19 (D.C. Cir. 2015) (same). *But see*, Lamont v. New Jersey, 637 F.3d 177, 182 (3d Cir. 2011) (while courts must carefully scrutinize evidence in deadly force cases, "[t] his is not to say that the summary judgment standard should be applied with extra rigor in deadly-force cases. Rule 56 contains no separate provision governing summary judgment in such cases").
5. Harlow v. Fitzgerald, 457 U.S. 800, 818, (1982)
6. Pearson v. Callahan, 555 U.S. 223, 233 (2009).
7. *Id*. at 236.
8. Anderson v. Creighton, 483 U.S. 635, 641 (1987); White v. Pauly, 137 S. Ct. 548, 551, (2017) (per curiam); Kisela v. Hughes, 138 S. Ct 1148, 1152 (2018).
9. *Anderson*, 483 U.S. at 640.
10. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).
11. Brosseau v. Haugen, 543 U.S. 194, 198 (2004).
12. *See Kisela*, 138 S.Ct, at 1152; City and County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1775-76 (2015); *al-Kidd,* 563 U.S. at 742.
13. *Id*. at 743.
14. Wilson v. Layne, 526 U.S. 603, 617 (1999) (italics added).
15. *Id*.
16. *Id*.
17. *Id*. at 618.
18. *Pearson* v. Callahan, 555 U.S. 223, 244 (2009).
19. *Id*.
20. Safford Unified School Dist. No. 1 v. Redding, 557 U.S. 364, 378-79 (2009).
21. Ryburn v. Huff, 565 U.S. 469. 474 (2012).
22. Reichle v. Howards, 566 U.S. 658, 664-65 (2012).
23. *Id*. at 665-66.
24. Lane v. Franks, 573 U.S. 228, 245 (2014).
25. Carroll v. Carman, 135 S. Ct. 348, 350 (2014).
26. District of Columbia v. Wesby, 138 S. Ct. 577, 591 n.8. (2018).
27. *Id*. at 590.
28. Perez v. City of Roseville, 882 F.3d 843, 856-57 (9th Cir. 2018).
29. Tekle v. United States, 511 F.3d 839, 847 (9th Cir. 2007).
30. *See* Sorrels v. McKee, 290 F.3d 965, 971 (9th Cir. 2002).
31. Eugene D. v. Karman, 889 F.2d 701, 706 (6th Cir. 1989).
32. Garcia v. Miera, 817 F.2d 650, 658 (10th Cir. 1987).
33. *See* Brady v. Fort Bend County, 58 F.3d 173, 175-76 (5th Cir. 1995).
34. White v. Pauly, 137 S. Ct. 548, 552 (2017).
35. *Id*.
36. Kisela v. Hughes, 148 S. Ct. 1148, 1153 (2018).
37. *See, e.g*., Mullenix v. Luna, 136 S. Ct. 305 (2015) (per curiam) (Officer shot at suspect's moving vehicle from overpass to terminate pursuit: "Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted"); Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam) (officer did not violate clearly established law when she shot a fleeing suspect out of fear that he endangered other officers on foot as well as citizens); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) (no clearly established law concerning firing at moving vehicle attempting to evade police); City and County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) (no clearly established law concerning use of force against an armed, barricaded and mentally disturbed suspect); Saucier v. Katz, 533 U.S. 194 (2001) (overruled in part, Pearson v. Callahan, 555 U.S. 223 (2009) (officer entitled to qualified immunity for shoving protester: "In the circumstances presented to this officer, which included the duty to protect the safety and security of the Vice President of the United States from persons unknown in number, neither respondent nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did, nor are we aware of any such rule").
38. District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018).
39. *Id*. (emphasis added).
40. *Id*. at 588-89.
41. Pearson v. Callahan, 555 U.S. 223, 231 (2009).
42. Graham v. Connor, 490 U.S. 386, 396 (citations omitted).
43. Texas v. Brown, 460 U.S. 730, 742 (1983) (plurality); Hill v. California, 401 U.S. 797, 804 (1971) ("[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . .").
44. Mitchell v. Forsyth, 472 U.S. 511, 527 (1985).
45. *Id*. at 527-28.
46. *Id*. at 525-27.
47. Johnson v. Jones, 515 U.S. 304, 308 (1995).
48. *Id*. at 304.
49. *Id*. at 313, 316.
50. *Id*. at 312, 313.
51. Behrens v. Pelletier, 516 U.S. 219, 312-313 (1996).
52. *Id*. (citing *Johnson*, 515 U.S. at 319).
53. *Plumhoff* v. Rickard, 134 S. Ct. 2012, 2019 (2014)
54. *See* Romo v. Largen, 723 F.3d 670, 686 (6th Cir. 2013) (Sutton, J., concurring and collecting cases).
55. *See, e.g., Raines v. Consulting Associates*, 883 F.3d 1071, 1074-75 (8th Cir. 2018) (district court denial of summary judgment based on conflicting inferences to be drawn from video forecloses appellate review under *Johnson*. ML

Navigating Discovery in Section 1983 Police Misconduct Cases: Setting the Stage for Success at Trial

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ILLUSTRATION: TRUJILLO DESIGN

Introduction

Discovery in Section 1983 police misconduct cases can be daunting, particularly when there is a municipal claim involved. Police officers are sued in their individual capacities and, as a result, any unfavorable result could have a negative impact on their future career prospects and personal lives. A judgment on a municipal claim could force a town or city to change its policies or practices.

The decisions you make during discovery can influence the likelihood of your success at trial. What follows is a step-by-step guide to ensure you avoid common pitfalls and put your client in the best possible position for trial.

I. Evolution of the Scope of § 1983 Discovery

The Civil Rights Act of 1871, codified as 42 U.S.C. § 1983, provides that every "person" who, under color of any statute, ordinance, regulation, custom, or usage of State, subjects, or "causes to be subjected," any person to the deprivation of any federally protected rights, privileges, or immunities shall be civilly liable to the injured party.

In *Monroe v. Pape*,[1] the Supreme Court held that a municipal corporation was not a "person" within the meaning of § 1983 and, therefore, could not be sued under the statute. Civil lawsuits under § 1983 were limited to actions against police officers and state actors themselves. Discovery was necessarily focused on the *conduct* of these state actors.

This changed in 1978 when the Supreme Court overturned *Monroe v. Pape* and found that municipal bodies *do* constitute "persons" within the meaning of § 1983. In *Monell v. Dep't of Soc. Servs.*,[2] the Supreme Court held that local governing bodies *can* be sued directly under § 1983 for monetary, declaratory, and injunctive relief, but *only* when the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy.[3] Local officials and supervisors could now also be sued under the holding in *Monell*, but could be found liable only on the basis of their own acts and omissions, not under a tort theory of *respondent superior*.[4]

Following *Monell*, discovery in § 1983 cases became much more expansive. If the plaintiff is suing the municipality itself, the plaintiff is permitted to discover information about the municipality's policies, ordinances, and regulations. The plaintiff is permitted to depose the municipality's policy makers. An action that was once about an officer's use of force or stop of a suspect becomes an inquisition into the thought-processes and policies of high-ranking government officials. In short, municipal discovery in a *Monell* action is a behemoth.

II. Dealing With a § 1983 Claim Under *Monell*

A. Moving to Dismiss a *Monell* Claim

If the municipality you are representing is sued under *Monell*, the first thing you should do in an attempt to limit municipal discovery is see if there are grounds to dismiss the claim. Pleading a *Monell* claim is extremely difficult. Hold the plaintiff to the burden.

Whether alleging an official policy or a governmental custom, a plaintiff who brings a § 1983 action against a municipality bears the burden of demonstrating that "through its *deliberate* conduct,

the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights."[5] Liability for a governmental custom cannot be predicated on an isolated incident.[6] Rather, "it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy."[7] More often than not, a plaintiff is speculating in his complaint as to whether a municipality's custom or procedure was the "moving force" behind the constitutional deprivation alleged. *This is not sufficient*. As with all motions to dismiss, while the court is obliged to accept plaintiff's well-pleaded facts as true, this tenet does not apply to legal conclusions.[8]

SAMPLE INSUFFICIENT ALLEGATION:
In violation of 42 U.S.C. § 1983, Defendant, City of Boston, through its acts and omissions, showed a deliberate indifference to Plaintiff's constitutional rights and caused Plaintiff to suffer a deprivation of his constitutional rights by: 1) failing to take advantage of easily available measures to ensure its officers did not engage in constitutional violations; 2) failing to adequately train its officers in the use of force; and 3) tolerating a custom and practice in which officers use excessive force.

This allegation is insufficient because it simply parrots the elements of a *Monell* claim.[9] In the absence of factual enhancement as to *how* the city failed to do these things, this type of allegation is not enough to survive a motion under Fed. R. Civ. P. 12(b)(6).[10]

Be wary of any argument by plaintiff that he needs to do discovery in order to gather factual support for his *Monell* claim. Many plaintiffs argue that, since the municipality is in possession of the information needed to support a *Monell* claim, the pleading standard should be relaxed in this context. This argument fails for two reasons. First, there is no case law to support it. Second, there are many ways for a potential plaintiff to gather facts prior to filing suit.[11] The burden does not shift to the municipality simply because the pleading standard is stringent.[12]

More often than not, a plaintiff is speculating in his complaint as to whether a municipality's custom or procedure was the "moving force" behind the constitutional deprivation alleged. *This is not sufficient*. As with all motions to dismiss, while the court is obliged to accept plaintiff's well-pleaded facts as true, this tenet does not apply to legal conclusions.

B. Bifurcating Discovery and Trial
In the event a *Monell* claim survives a motion to dismiss, the municipal lawyer should move to bifurcate the *Monell* claim from the claim(s) against the individual police officer(s) for the purposes of both discovery and trial. Ideally, the discovery and trial concerning the individual police officer(s) would take place first, before any trial against the municipality. This is because without a finding of liability against a defendant police officer, you almost never reach the *Monell* claim.[13]

Bifurcating the *Monell* discovery and trial from the individual officer(s)' discovery and trial furthers the objectives of Fed. R. Civ. P. 42.[14] Aside from reducing the length of trial dramatically, there are serious evidentiary issues to contend with if the claims against the municipality are tried at the same time as the claims against the state actor(s). For example, an officer's internal affairs history may be admissible in a *Monell* case to show a municipal policy of failing to discipline officers, whereas that history would constitute inadmissible prior bad act evidence in an excessive force case against the officer.[15]

III. Dealing With a § 1983 Claim Against an Individual Officer
A. Moving to Dismiss an Individual Officer
As in any case, you should screen the complaint for the possibility of a motion to dismiss. Oftentimes, particularly in excessive force cases, plaintiffs will lump police officer defendants together without articulating who did what to whom. This does not satisfy the pleading requirements of the federal rules,[16] and federal courts have been willing to dismiss complaints that fail to specify the conduct attributable to each officer.[17]

B. Discovery Concerning an Individual Officer
Discovery in a § 1983 case against an individual police officer generally consists of interrogatories, requests for admissions, document requests, and depositions.

1. *Interrogatories*
In federal court, a party may serve on any other party no more than 25 interrogatories, including all discrete subparts.[18] When answering interrogatories, consider objecting to questions that are not proportional to the needs of the case.[19] For example, if the municipal claim has been dismissed, consider objecting to interrogatories concerning an officer's internal affairs or discipline history.

When answering interrogatories, be sure to use language that a police officer would actually use, not "legalese." These answers may be read at trial. You want the interrogatories to sound like your client, not a legal scholar.

2. *Requests for Admissions*
The federal rules place no limit on the number of admissions that may be served on any party.[20] A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Fed. R. Civ. P. 26(b)(1) relating to: a) facts, the application of law to fact, or opinions about either; and b) the genuineness of any described documents.[21]

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3. *Document Requests*
The federal rules place no limit on the number of document requests that may be propounded on any party.[22] As with answering interrogatories, be mindful of requests that may exceed the scope of discovery in your case. Again, if the municipal claim is dismissed, consider objecting, for example, to requests for an officer's personnel file or internal affairs history. Depending on your officer's assignment, length of time with the department, and a number of other factors, these files might be quite lengthy and burdensome to produce. Alternatively, consider placing time limits on a plaintiff's request. For example, if a plaintiff requests an officer's internal affairs history from the beginning of time to present, consider producing only those records dating back five or ten years from the incident in question.

SAMPLE DOCUMENT REQUEST & RESPONSE:

REQUEST NO. 30
The Boston Police Department internal affairs files of Boston Police Officers John Doe and Jane Doe.

RESPONSE NO. 30
Objection. Defendants object to Request No. 30 on grounds that it seeks material that is not relevant, is not likely to lead to the discovery of admissible evidence, and is not proportional to the needs of this case, particularly given that Plaintiff's *Monell* claim was dismissed. Defendants further object on grounds that accumulating these irrelevant records is unduly burdensome.

4. *Depositions*
Depositions are arguably the most important part of discovery. Be sure to depose all of a plaintiff's witnesses—basically, anyone who is going to come to trial and say something negative about your client.[23] It is critical that you have the entire universe of information (including the bad information) before proceeding to trial.

Take your time with the deposition of the plaintiff. Make sure you lock the plaintiff into his version of events and have the plaintiff authenticate any documents that might be at issue at trial (for example, text messages, phone records, social media posts, etc.). The federal rules permit audiovisual recording,[24] so you should consider video-recording the plaintiff. That way, if the plaintiff acts drastically different at trial, you can play the video from his deposition to give the jury a fuller picture of his personality.

The deposition of your client is crucial. Police officers are not used to having their deposition taken. They are used to testifying in criminal court. To ensure that your client is in the best possible position for trial, his deposition needs to go well. To that end, it is important that you take the time to explain to your client the differences between criminal law and civil litigation and how that affects the process. Keep the following points in mind:

The officer is being sued in his individual capacity. If he does not already know by now, make sure your officer understands that he is being sued in his individual capacity and what that means. He is a defendant, not a witness. As a defendant being sued in his individual capacity, questions (particularly at his deposition) are going to be more personal than what he is used to. He will need to be present for the *entire* trial, not just his testimony.

Humanize your client. At trial, you want to humanize your client as much as possible. He is not just a police officer; he is an individual being sued. The officer should wear a suit (rather than his police uniform) when he is testifying at his deposition and at trial. If possible, have the officer's spouse and/or partner and/or adult children present for the trial. Jurors pick up on who is in the gallery. At trial, you will ask general questions about the officer's background so the jurors can have a more complete picture of who your client is.

Explain the "usual stipulations" and what that means for your officer's deposition. More often than not, attorneys agree to the "usual stipulations" at a deposition (*i.e.*, all objections (except as to the form of the question) are reserved until trial). A police officer needs to understand that, as a general rule, you will not be objecting to questions based on relevancy, which is what he is used to seeing at a criminal trial. You should explain this process to him before his deposition to avoid cagey answers and awkward moments if an officer thinks he does not need to answer a question that is not directly relevant to the incident in question.

Prepare, prepare, prepare. Make sure your officer is fully prepared before going into his deposition. He should read his answers to interrogatories and any other statements he may have given about the incident in question (for example, trial testimony from the underlying criminal case or internal affairs testimony). You should show him any potential exhibits so that he is comfortable with the documents that may put before him. Remind your client that his deposition will be the plaintiff's attempt to size up his demeanor, so he should remain calm, cool, and collected at all times.

IV. Expert Discovery
Experts can be an invaluable tool in explaining to the jury any aspects of your case that might be technical in nature or not within the realm of common knowledge. For example, in an excessive force case, consider using a police practices expert to explain the use of force continuum. The use of force is not always intuitive, and many jurors do not understand how the continuum works. Many lay people, for example, question why police officers shoot at center mass rather than shooting a suspect in the foot. A police practices expert can explain to the jury why the use of deadly force may be appropriate and necessary in some circumstances, and how the use of force is not an emotional reaction to the plaintiff's disrespect of authority but, rather, a tactical response based on years of training and experience. You might also consider a forensic expert to reconstruct the scene to demonstrate what the officers were facing at the time the force was used or

a force science expert to explain tunnel vision, decisional lag time, or officer fatigue (which creates danger to officers after a prolonged struggle). You may also need medical experts to rebut a plaintiff's purported injuries.

In federal court, experts are required to submit reports, signed by them, which set out the grounds for their opinions.[25] The report *must* contain the following: 1) a complete statement of all opinions the witness will express and the basis and reasons for them; 2) the facts or data considered by the witness in forming them; 3) any exhibits that will be used to summarize or support them; 4) the witness's qualifications, including a list of all publications authored in the previous 10 years; 5) a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition; and 6) a statement of the compensation to be paid for the study and testimony in the case.[26]

In the event the report you receive does not contain these six items (or you do not receive a report at all), consider moving to exclude the expert.[27] Federal courts are generally not hospitable to incomplete expert reports.[28]

V. Summary Judgment

Summary Judgment should be used as a tool to either get rid of the lawsuit entirely or at the very least limit the claims that will be tried. At the onset of the case, you should evaluate what you think are the strengths and weaknesses of your case and keep those in mind as you engage in discovery. You should often be referring back to these throughout the case and using them as a gut check for where you are in the case and where you are headed. Evaluating your case early on helps when it comes time to decide whether to file summary judgment, because you a) will have a good idea of what claims, if any, you plan on moving for summary judgment; and b) should have a record to support your position.

Summary judgment should be used as a tool to either get rid of the lawsuit entirely or at the very least limit the claims that will be tried. At the onset of the case, you should evaluate what you think are the strengths and weaknesses of your case and keep those in mind as you engage in discovery.

Some Things to Keep in Mind When Deciding Whether to File Summary Judgment in §1983 cases:

1. Is there still an issue of disputed facts?
2. Is there an issue of qualified immunity?
3. Are there still any unresolved factual issues? If so, is there any way to overcome them (i.e. through an affidavit)?
4. Are there facts to support each and every claim the plaintiff has brought?

Qualified Immunity

Resolving a qualified immunity issue at the earliest possible stage of litigation is preferable because qualified immunity is "an immunity from suit rather than a mere defense to liability."[29] Defendants should assert a qualified immunity defense at the onset of the case, including in a 12(b)(6) Motion. "Qualified immunity inoculates government officials from civil liability based on their discretionary actions and decisions which, although injurious, 'do[] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[30] If a 12(b)(6) Motion fails to dispose of the case on qualified immunity grounds, keep qualified immunity in mind during the course of discovery. Revisit the issue of qualified immunity when considering whether to move for summary judgment.

The only issues that should go to the jury are genuine disputes of material facts. It is common in §1983 cases for plaintiff's to bring overlapping claims, so it important to hold plaintiffs to their burden of proof on each and every claim they have brought. Summary judgment is a great way to do that and to streamline the claims that will be tried. Keep in mind that juries can often times be unpredictable, so even if you can get rid of one or two claims against your client(s), it is worth it!

VI. Conclusion

Discovery in §1983 police misconduct cases is multi-layered and at different stages there are different issues to consider. The best thing you can do for your client is to familiarize yourself with the applicable law and try to engage in discovery that is focused on what you need to defend your client should the case need to be tried.

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Navigating Discovery cont'd from page 17

1. 365 U.S. 167 (1961).
2. 436 U.S. 658 (1978).
3. *Id.* at 659.
4. *Id.*
5. Bd. of Cty. Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 404 (1997).
6. *See* Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996).
7. *Id.*
8. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). *See also* Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990) ("Despite the highly deferential reading which we accord a litigant's complaint under Rule 12(b)(6), we need not credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation.").
9. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("formulaic recitation[s] of the elements of a cause of action" without factual support cannot survive a motion to dismiss).
10. *See Iqbal*, 556 U.S. at 678.
11. For example, a plaintiff can issue requests to a municipality under the Freedom of Information Act, 5 U.S.C. § 552.
12. *See* Aguaristi v. County of Merced, No. 1:18-cv-01053-DAD-EPG, 2019 WL 330908, at *4 (E.D. Cal. Jan. 25, 2019) ("The court recognizes the inherent difficulty of identifying the presence or lack of specific policies prior to conducting discovery, but 'that is nonetheless the burden of plaintiffs in federal court.'") (citing *Roy v. Contra Costa County*, No. 15-cv-02672-THE, 2016 WL 54119, at *4 (N.D. Cal. Jan. 5, 2016)).
13. *See* City of Los Angeles v. Heller, 475 U.S. 796 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessiveforce is quite beside the point."); *see also* Amato v. City of Saratoga Springs, 170 F.3d 311 (2d Cir. 1999) (noting that separate trials are appropriate were litigation of the first issue may eliminate the need to litigate the second issue and/or where one party will be preju- diced by evidence presented against another party); Bellamy v. City of New York, No. 17-1859-cv, 2019 WL 347201, at *20 n. 29 (2d Cir. 2019) (noting that non-*Monell* discovery was bifurcated from *Monell* discovery).
14. Fed. R. Civ. P. 42(b) states: "For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims."
15. *See* Fed. R. Evid. 404.
16. Fed. R. Civ. P. 8(a)(2) provides that a pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" *See also* Sires v. Hefferman, C.A. No. 10-11993-MLW, 2011 WL 2516093, at *5 (D. Mass. Jun. 21, 2011) ("To provide the notice required under Rule 8(a), a plaintiff cannot "lump" defendants together when it cannot be reasonably inferred that all of the defendants were involved in the alleged misconduct, or it is otherwise not clear to which defendant or defendants the plaintiff is referring."); *see also* Bagheri v. Galligan, 160 Fed. Appx. 4, 5 (1st Cir. 2005) (upholding district court's dismissal of action where the original complaint did not state clearly which defendant or defendants committed each of the alleged wrongful acts) (internal quotations omitted); Atuahene v. City of Harford, 10 Fed. Appx. 33, 34 (2d Cir. 2001) ("By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, [plaintiff's] complaint failed to satisfy [the] minimum pleading standard under Fed. R. Civ. P. 8(a).").
17. *See id.*; *see also* Mitchell v. Las Vegas Met. Police Dep't, No. 2:18-cv-00646-RFB-GWF, 2019 WL 320559, at *3 (D. Nevada Jan. 24, 2019).
18. *See* Fed. R. Civ. P. 33(a)(1).
19. Fed. R. Civ. P. 26(b) states that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable." *Id.* (emphasis added).
20. *See* Fed. R. Civ. P. 36.
21. *See id.*
22. *See* Fed. R. Civ. P. 34.
23. Pursuant to Fed. R. Civ. P. 30(a)(2), you must seek leave of court if you need to take more than ten depositions.
24. *See* Fed. R. Civ. P. 30(b)(3).
25. Fed. R. Civ. P. 26(a)(2)(B) states: "Unless otherwise stipulated or ordered by the court, [the expert disclosure] must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony.
26. *See id.*
27. Fed. R. Civ. P. 37(c) states that: "A party without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such error is harmless, permitted to be used as evidence at trial." *See also* Alves v. Mazda Motor of Am., Inc., 448 F. Supp. 2d 285, 293 (D. Mass. 2006) ("[Rule 37(c)] generally provides for exclusion of a party's experts[.]").
28. *See* Pena-Crespo v. Puerto Rico, 408 F.3d 10, 13-14 (1st Cir. 2005) (noting that the failure to provide an expert report is grounds for exclusion of the expert even if some of the information was separately provided in discovery). *See also* Adams v. J. Meyers Builders, Inc., 671 F. Supp. 2d 262, 270 (D.N.H. 2009) ("As the circuit has also recognized, the expert disclosure requirements promote fairness both in the discovery process and at trial by better preparing attorneys for cross-examination, minimizing surprise, and supplying a helpful focus for the court's supervision of the judicial process") (internal quotations and citations omitted); Michel v. Ford Motor Co., Civil Action No. 18-4738, 2018 WL 6831102, at *2 (E.D. La. Dec. 28, 2018) (excluding plaintiffs' experts due to their failure to produce reports on time).
29. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); *see also* Maldonado v. Fontanes, 568 F.3d 263, 268 (1st Cir. 2009).
30. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). ML


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BY: RANDALL S. KULAT
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How to Survive the Zombie LIBOR Apocalypse

They're out there now, in small towns and big cities, getting ready to rise up and wreck financial havoc on the unsuspecting. Unless they're sought out early and neutralized, zombie LIBOR interest rates could take a big bite out of municipalities with outstanding bonds, loans or swap contracts bearing interest rates tied to LIBOR.

You may already know that LIBOR, the London Interbank Offered Rate, is being phased out as a reference rate and, by the end of 2021, will be replaced with another, as yet undetermined, benchmark rate. Bank regulators in the United Kingdom and the United States have belatedly realized that LIBOR never was an efficient or fair way to set international benchmark interest rates. LIBOR is basically an average of what a small number of banks estimate on a daily basis to be their cost to borrow unsecured funds from each other. These unregulated self-reported estimates (or, more accurately, educated guesses based on an extremely small number of unsecured interbank lending transactions) are not based on actual transactions and were ripe for inaccuracies and even manipulation.

Following some headline-grabbing charges of LIBOR-rigging, LIBOR's days were numbered, and the British authority overseeing LIBOR announced that, after 2021, banks will no longer be compelled to submit estimates for the determination of LIBOR. The only question left then was what would replace LIBOR – or would a seemingly undead LIBOR continue to control interest rates as Zombie LIBOR?

Beware the Zombie LIBOR

LIBOR is now, in effect, a dead rate walking. Although LIBOR will be around as a benchmark interest rate until the end of 2021, many imaginative market observers are calling it "Zombie LIBOR," because it's not really alive now, and it may not really be dead after 2021. LIBOR is no longer considered to be a reliable benchmark rate, and may become even less reliable as fewer banks provide LIBOR estimates and others move to alternate benchmark rates. Municipalities may begin to wonder whether their existing LIBOR-indexed bonds, loans or swap instruments actually reflect the real cost of borrowing money, and those entering into new transactions may eschew LIBOR altogether in favor of another benchmark rate, without waiting for 2022 to roll around.

However, because so many currently outstanding bonds, loans and swap transactions have LIBOR baked into them, with no easy way to switch to another interest benchmark or comparable rate, it's possible that LIBOR may need to stay around even after 2021 in order to provide these "legacy" deals with a benchmark rate, no matter how unreliable. Some legacy deals may have no other good choice but to stick with a zombified LIBOR, even as new deals and other legacy deals have switched over to another, more nimble, benchmark rate. LIBOR, kept artificially alive by a small number of reporting banks, would then go head to head with another rate, until the legacy deals all mature or find a way to provide an alternate benchmark rate.

SOFR to the Rescue?

In the United States, a committee convened by the Federal Reserve Bank to study LIBOR replacements recommended the adoption of an alternative interest rate benchmark tied to the U.S. treasuries-backed repurchase agreement market from actual market transactions. The recommended rate – called the Secured Overnight Financing Rate, or SOFR – represents rates that banks are able to fund overnight on a basis secured by U.S. government debt.

As a benchmark rate, SOFR has some structural advantages over LIBOR. SOFR is an overnight secured rate based on actual transactions, whereas LIBOR is an unsecured rate based on estimates of future rates, so SOFR is less susceptible to manipulation and abuse. LIBOR is based on unsecured loans and, therefore, builds in a risk premium; SOFR is a secured rate, with no risk premium, so SOFR generally produces a lower rate and is considered less volatile. SOFR is currently the heir apparent as the benchmark rate in the U.S. following LIBOR's demise.

Who's in Harm's Way?

For decades, LIBOR has been ubiquitous in bond, loan and swap transactions for municipalities. State, county and municipal issuers and school, park and library districts have issued bonds or entered into loan or letter of credit transactions which provide that interest is to be determined by reference to a floating LIBOR rate, together with an "applicable margin" or spread. Bond issuers have also been frequent participants in swap transactions, under which the issuer pays a fixed

interest rate to a counterparty and receives in return a floating rate as a percentage of LIBOR. In these transactions, the bonds are issued with a fixed rate, which is then exchanged with the swap counterparty for a LIBOR-based rate, so that the bondholders receive interest at a floating rate tied to some percentage of LIBOR.

The Specter of a LIBOR Legacy

With LIBOR's demise staring down at them, municipalities with existing, or legacy, transactions with interest rates pegged to some fraction of LIBOR will need to pour over their existing documents and get a handle on what happens to their interest rates once LIBOR is history. Issuers will need to scrutinize the "fallback" language, if any, setting out an alternate benchmark rate to be used if LIBOR is not available, in each of their legacy LIBOR contracts with an eye towards such critical issues as:

- **What's the alternative?** Does the fallback language clearly and unambiguously identify an alternate benchmark rate? Is the alternate benchmark rate readily ascertainable in today's market, and does the alternate benchmark rate accurately reflect the cost of borrowing money? If the fallback rate is the prime rate, the issuer will be facing a rate substantially higher than LIBOR. There's no sense in replacing a Zombie LIBOR with another unreliable rate, or a rate that gives one party a distinct advantage over the other.

- **Who's in charge?** The fallback language may give the lender, a bond trustee or some other party carte blanche to determine if LIBOR is indeed unavailable and what alternate benchmark rate is to be used in LIBOR's place. Does the issuer have any say in the matter? If it doesn't like the new alternate benchmark rate or the resulting new interest rate, can the issuer or borrower refinance or redeem without getting hit with a prepayment penalty?

- **What's the spread?** The fallback language in many legacy contracts may have described an alternate benchmark rate, but probably did not provide a mechanism for adjusting the applicable margin or spread in the event LIBOR is not available. Many legacy LIBOR documents set the interest rate for a bond or loan at a multiple of LIBOR – for example, 0.75 of LIBOR for a tax-exempt bond. As mentioned above, LIBOR runs higher than risk-free reference rates such as SOFR. A higher or lower applicable margin may be required so that the actual interest rate paid under LIBOR will be roughly comparable to the actual interest rate under the alternate benchmark rate. Issuers and lenders may need to perform mathematical gymnastics to come up with a new spread to use with the new benchmark rate, but the end result should be that the actual interest rate charged to the issuer won't fluctuate wildly if and when an alternate benchmark rate replaces LIBOR.

- **How do we fix this?** There's a good chance that your legacy LIBOR contracts will have to be amended because the fallback provisions are absent, confusing or inadequate, or because the margin is too high or too low for the new alternate benchmark rate. But it may not be so easy to amend legacy contracts. Loan agreements with banks may require the bank's consent, or the consent of all or a majority of syndicated lenders. Indentures for bond issues may require the consent of all or a majority of bondholders. Issuers should determine what consent, if any, is needed to amend legacy documents and, if so, can the required consent be readily obtained or waived?

- **But not so fast.** Amending legacy documents for tax-exempt bonds or loans could result in a "reissuance" for federal income tax purposes. The IRS considers a tax-exempt obligation to be reissued if there are "significant modifications" to the terms of the obligation so that it is essentially a new obligation. A reissued tax-exempt bond or loan is subject to a re-testing of the requirements for tax exemption. At a minimum, a new Form 8038 will need to be filed with the IRS, bond counsel may be required to perform additional tax due diligence, and bond counsel may have to give a new opinion. The bottom line is that bond counsel should always be consulted prior to any amendments of legacy documents for tax-exempt obligations.

Getting Around LIBOR Before It Goes Away

Municipalities entering into new floating rate bond or loan deals will also need to be very careful in their negotiations over issues such as:

- **A workable alternative.** New contracts tied to LIBOR should provide for a definitive alternate benchmark rate to go into effect as soon as LIBOR is no longer available. As of early 2019, SOFR seems to be the leading contender for the new benchmark rate, but other benchmark rates may emerge as we get closer to 2021. The key thing is to not leave it to chance but instead have a workable, fair fallback benchmark rate waiting in the wings.

- **Who's pulling the trigger?** New contracts should also clearly state who is responsible for determining when LIBOR is no longer available, and how that party will make that determination. Should the new benchmark rate kick in on January 1, 2022, or can the new benchmark rate go into effect earlier, when someone, somewhere determines that LIBOR is nothing but a hollow zombie?

- **Setting the spread.** The spread or margin for LIBOR may not necessarily be the appropriate spread for another

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AMICUS CORNER

BY: AMANDA KELLAR
IMLA Deputy General Counsel and Director of Legal Advocacy

The Second Amendment and a Conservative Supreme Court Majority

The United States has nearly 400 million civilian-owned firearms, which is 67 million more guns than American citizens.[1] The Second Amendment, which provides: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed" protects the rights of those gun owners. But what exactly does it mean? In the 228 years since the Second Amendment was ratified, the Supreme Court has only weighed in on its meaning twice. First in 2008, in *District of Columbia v. Heller*,[2] where the Court held that the Second Amendment protects an individual's right to possess a firearm for purposes of self-defense in the home. In so holding, Justice Scalia, writing for the Court explained:

> [t]he [District's] handgun ban amounts to a prohibition of an entire class of arms that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family, would fail constitutional muster.[3]

Although the Court noted that the law would fail under any level of scrutiny, it effectively took rational basis review off the table: "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[4]

Two years after *Heller,* the Supreme Court concluded, in *McDonald v. City of Chicago,*[5] that the Second Amendment was incorporated into the Fourteenth Amendment and thus, the right of individuals to keep and bear arms in self-defense applies equally against state and local governments as it does to the federal government.

That's it as far as Supreme Court jurisprudence. Among many questions left unanswered in the wake of the *Heller* and *McDonald* decisions, the Court did not state whether an individual has a Second Amendment right to possess a gun *outside the home*. Further, the Court did not specify if gun regulations should be subject to strict scrutiny or intermediate scrutiny. Nine years have passed since the Court's *McDonald* decision, and in that time Justice Thomas, joined in one instance by Justice Gorsuch, has complained repeatedly that the Second Amendment is being treated like a second class right based on the Court's refusal to accept certiorari in any new Second Amendment cases.[6] Court watchers speculated that the reason the Court repeatedly denied Second Amendment petitions was that nobody could predict how Justice Kennedy, the then-perennial swing Justice, would vote.[7]

Although the Supreme Court did not issue any Second Amendment decisions post-*McDonald*, then-Judge Kavanaugh wrote a dissent in a Second Amendment case before the D.C. Circuit which sheds some light on his views. That case, titled *Heller v. District of Columbia,* came in the wake of the Supreme Court's *Heller* decision and involved the District's new gun law. Specifically, after the Supreme Court held that the District's ban on handguns in the home was unconstitutional, the District passed a law banning possession of semi-automatic rifles and required registration of all guns possessed in the District.[8] The Circuit majority held the bans on assault weapons and large capacity magazines were constitutional under intermediate scrutiny, but remanded as to the question of registration as the record was insufficient on that front.[9] In his dissent, then-judge Kavanaugh indicated that in order to faithfully apply the Supreme Court's *Heller* decision, he would have concluded that the ban on semi-automatic rifles and the gun registration requirement were both unconstitutional. As he put it, "[t]here is no meaningful or persuasive constitutional distinction between semi-automatic handguns [at issue in the Supreme Court's *Heller* decision] and semi-automatic rifles."[10] Further, Judge Kavanaugh explained that he believed the Supreme Court rejected balancing tests for Second Amendment claims in the *Heller* decision and that instead, the proper inquiry is whether the regulation was within the text, history, and "longstanding" tradition of gun regulations in the United States.[11] In terms of the registration requirement, Judge Kavanaugh noted that D.C.'s law was "significantly more stringent than any other federal or state gun law in the United States" and such a strict registration requirement "has not traditionally been required in the United States" and was therefore unconstitutional in his view.[12]

Given the development of Justice Kennedy's retirement and Justice Kavanaugh's appointment to the Supreme Court bench, it came as no big surprise then, that shortly after Justice Kavanaugh was confirmed, the Court finally granted certiorari in a Second Amendment case: *New York State Rifle & Pistol Association Inc. v. City of New York*.[13] At issue in this case is a New York City administrative rule which allows residents to obtain a "carry" or "premises" handgun license. The "premises" license allows a licensee to "have and possess in his dwelling" a pistol or revolver. A licensee may only take his or her gun to specific shooting ranges located in the city, of which there are a total of seven.

Challengers to the law describe the law at issue as "one of a kind" with "no analog in any other jurisdiction." They want to bring their handgun to their second home and/or to target practice outside the city and claim the premises license violates their rights under the Second Amendment, First Amendment, the Commerce Clause, and the constitutional right to travel.[15]

The Second Circuit held the law is constitutional on all accounts.[16] Applying intermediate scrutiny on the Second Amendment claim, the Second Circuit held the rule was "substantially related to the achievement of an important governmental interest;"[17] Namely, it seeks to "protect public safety and prevent crime."[18] And the court agreed with the former Commander of the License Division that premises license holders "are just as susceptible as anyone else to stressful situations," including driving situations that can lead to road rage, "crowd situations, demonstrations, family disputes," and other situations "where it would be better to not have the presence of a firearm."[19] The Second Circuit concluded the rule does not discriminate against interstate commerce in violation of the Commerce Clause or violate a constitutional right to travel because nothing in the law prevents the plaintiffs from attending shooting tournaments outside the city (and renting a gun there) or purchasing a separate gun for a residence outside the city.[20]

The issue the Court will decide next term is whether New York City's ban on transporting a handgun to a home or shooting range outside city limits violates the Second Amendment, the Commerce Clause, or the constitutional right to travel. (Petitioners seem to have dropped their First Amendment claim). The Petitioners argue, perhaps attempting to catch Justice Thomas' attention, that the Second Circuit watered down intermediate scrutiny and courts are treating the Second Amendment like a second class right in a manner that they would not treat other fundamental rights.[21] To illustrate their argument on this latter point, they use the following example:

> More to the point, a restriction that is expressly designed to make it harder to exercise core Second Amendment rights cannot plausibly withstand any level of constitutional scrutiny. Courts would not countenance for one moment a prohibition on leaving city limits to get an abortion—and certainly not if there were only seven locations in a city of 8.5 million people at which to obtain one. A prohibition on leaving city limits to exercise core Second Amendment rights should fare no better.[22]

It also seems likely that the reference to the law being "one of a kind" will persuade Justice Kavanaugh that it does not fit within the longstanding tradition of this country's gun regulations, similar to his beliefs regarding Washington D.C.'s gun registration requirement.

As of this writing, merits briefs have not been filed and the case will not be argued until next term (likely sometime in the fall of 2019). This case has the potential to provide a significant ruling and is one that local governments should watch. Some questions to consider include: Will the Court lay our specifically what level of scrutiny is required for Second Amendment challenges or is Justice Kavanaugh right and are balancing tests entirely inappropriate in this context?; How sweeping or narrow of a ruling will the Court issue if it strikes down New York City's law? Because the Court has so little precedent in this area, it is writing on a blank canvas and what it says about New York City's law will likely have repercussions for other gun restrictions around the country, as well as for the owners of those 400 million guns. Because it is not too hard to predict where most of the Justices will stand on these issues, all eyes will likely be on Chief Justice Roberts to see how broad or narrow of a ruling we might get in this case.

Notes

1. Christopher Ingraham, *There are more guns than people in the United States, according to a new study of global firearm ownership*, Washington Post (June 19, 2018), available at: https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/?noredirect=on&utm_term=.ba3286ac3c49
2. 554 U.S. 570 (2008).
3. *Id.* at 628-29 (*internal quotations omitted*).
4. *Id.* at 628, fn. 27.
5. 561 U.S. 742 (2010).
6. *See Silvester v. Becerra,* 138 S.Ct. 935 (2018) (Thomas, J. dissenting from denial of certiorari) (noting that in his view, the lower court had applied a watered down version of intermediate scrutiny, which was "symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right" and that the Court's inaction in this area of the law evidenced that "the Second Amendment is a disfavored right in this Court:" Peruta v. California 137 S.Ct. 1995, 1999 (2017) (Thomas, J. dissenting from denial of certiorari) (accord).
7. *See e.g.,* Corey A. Ciocchetti, *The Next Big Gun Case: The Resurrection of the Second Amendment at the New Roberts Court*, 102 Marq. L. Rev. 311, 313 (2018).
8. *See Heller v. District of Columbia,* 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J. dissenting).
9. *Id.* at 1247-48.
10. *Id.* at 1269-70.
11. *Id.* at 1269-71.
12. *Id.* at 1270.
13. New York State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45 (2d Cir. 2018) *cert. granted*, 2019 WL 271961 (2019).
14. *See New York State Rifle & Pistol Ass'n. v. City of New York,* No. 18-280, Petition for Writ of Certiorari p. 9, 21.
15. The carry license is not at issue in the case.
16. *New York State Rifle & Pistol Ass'n, supra note 13, at* 64-68.
17. *Id.* at 61-62.
18. *Id.* at 62.
19. *Id.* at 63.
20. *Id.* at 64-67.
21. *Petition*, *supra note 14*, at 25.
22. *Id.* at 10-11.

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2019 Amicus Awards

Alison Turner – Partner at Greines, Martin, Stein & Richland LLP
Ryan v. Fabela -Ninth Circuit
Issue: Whether the law was clearly established that firing an attorney who created a Facebook page criticizing his own client after years of a contentious relationship with that client violated the First Amendment.

Allyson Ho – Partner at Gibson, Dunn & Crutcher
Kisor v. Wilkie-Supreme Court Merits
Issue: Whether the Supreme Court should overrule Auer v. Robbins and Bowles v. Seminole Rock & Sand Co., which direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.

Andre Monette – Partner at Best Best & Krieger LLP
County of Maui v. Hawaii Wildlife Fund-Supreme Court Petition
Issue: Whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

Ashley Johnson – Of Counsel at Gibson, Dunn & Crutcher
PDR Network LLC v. Carlton & Harris Chiropractic, Inc. -Supreme Court Merits
Issue: Whether the Hobbs Act required the district court in this case to accept the Federal Communication Commission's legal interpretation of the Telephone Consumer Protection Act.

Bennett Cohen -Of Counsel at Polsinelli and **Britton St. Onge** -Associate at Polsinelli
Nieves v. Bartlett - Supreme Court Merits
Issue: Whether probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law under 42 U.S.C. § 1983.

Brian Carter – Assistant City Attorney for Minneapolis, MN
Raines v. Burningham – Supreme Court Petition
Issue: Whether appellate courts have interlocutory appeal jurisdiction over a denial of qualified immunity where appellants challenge inferences made from factual disputes identified in the record.

Bryan Weir – Associate at Consovoy McCarthy Park PLLC
Weyerhaeuser Company v. United States Fish and Wildlife Service -Supreme Court Merits
Issue: Whether an agency decision not to exclude an area from critical habitat under the Endangered Species Act because of the economic impact of designation is subject to judicial review.

Christi Hogin – Of Counsel at Best Best & Krieger LLP
Home Away v. Santa Monica / La Park La Brea LLC v. Airbnb--Ninth Circuit
Issues: In Santa Monica, whether the City's regulation of short-term rentals is preempted by federal law. In La Brea, what is the breadth of immunity under the Communication Decency Act and whether it should be afforded to information content providers like Airbnb.

Christine Van Aken-Chief of the Appellate Litigation for the City of San Francisco, California at the time she authored the brief; now Judge for the Superior Court of California, County of San Francisco and
Rachel Horn-Law Student at Columbia Law School
Chamber of Commerce v. Seattle-Ninth Circuit
Issue: Whether Parker immunity applies to Seattle's Ordinance that regulates transportation networking companies like Uber / Lyft by authorizing collective bargaining for their independent contractors.

Collin Udell – Of Counsel at Jackson Lewis P.C.
Mount Lemmon Fire District v. Guido - Supreme Court Merits
Issue: Whether, under the Age Discrimination in Employment Act, the same 20-employee minimum that applies to private employers also applies to political subdivisions of a state.

Daniel P Barer – Partner at Pollak, Vida & Barer
Quigley v. Garden Valley Fire Protection District-California Supreme Court
Issue: Whether the governmental immunity set forth in Government Code section 850.4 may be raised for the first time at trial or if that immunity is waived if not set forth in the government's answer to the complaint.

Daniel R. Suvor-Partner at O'Melveny & Myers LLP and **Margaret Carter-** Partner at O'Melveny & Myers LLP
City of Los Angeles v. Whitaker - Ninth Circuit
Issue: Whether the DOJ's imposition of new immigration-related conditions on recipients of the Byrne Jag grant violates the Administrative Procedure Act and and/or the Constitution.

Diane Criswell – Senior Associate at Kelly PC
Lech v. Jackson-Tenth Circuit
Issue: Whether defendants violated the Takings Clause when they destroyed plaintiffs' property and did not provide just compensation where they did so pursuant to their police powers in attempting to apprehend a violent, dangerous suspect who shot at police and barricaded himself inside plaintiffs' home.

Elina Druker – Senior Counsel for New York Law Department
Mozilla Corp. v. Federal Communications Commission (FCC)-D.C. Circuit
Issue: Whether the FCC's enactment of the Restoring Internet Freedom Order, which repealed the net neutrality rules, was arbitrary and capricious and/or lacked statutory authority.

Elliot Spector – Of Counsel at Hassett & George, P.C.
McKinney v. Middletown-Supreme Court Petition Stage
Issues: Whether the Second Circuit improperly denied qualified immunity to the officers given that the defense was raised, briefed and argued before the Court and where, as recognized by the panel, the facts and circumstances surrounding the plaintiff's admittedly active resistance and corresponding use of force were largely undisputed.

Erek Barron – Partner at Whiteford Taylor Preston LLP
Bruni v. Pittsburgh-Third Circuit
Issue: Validity of the City of Pittsburgh's buffer zone ordinance in light of the Supreme Court's decision in McCullen v. Coakley and Reed v. Town of Gilbert.

Gordon Todd- Partner at Sidley Austin LLP and **Spencer Driscoll**-Associate at Sidley Austin LLP
Gamble v. United States-Supreme Court Merits Issue: Whether the Supreme Court should overrule the "separate sovereigns" exception to the Double Jeopardy Clause.

John Baker – Partner at Greene Espel PLLP
Palardy v. Township of Millburn - Supreme Court Petition Stage
Issue: Whether Connick's "public concern" inquiry applies to First Amendment associational claims by public employees or whether mere

membership in a union is always a matter of public concern. (John also drafted an amicus brief in *National Institute of Family Life Advocates v. Becerra*, which involved an important compelled speech issue before the Supreme Court).

John Murphy – John C. Murphy Law
Freedom from Religion Foundation v. Morris County Board of Chosen Freeholders - Supreme Court petition
Issue: Whether excluding churches from the county grant program that use the public money for historic preservation purposes in addition to improving active worship space violates the Free Exercise Clause of the U.S. Constitution?

Joseph Scott-Scott & Winters Law Firm LLC
Cleveland v. Ohio-Supreme Court of Ohio
Issue: Whether the State's attempt at pre-empting Cleveland's ordinance which required contractors to employ certain percentages of individuals from the City for public improvement projects is a proper exercise of authority under of the Ohio Constitution.

Justin Houppert – Assistant Corporation Counsel for City of Chicago, IL
Philadelphia v. Sessions-Third Circuit
Issue: Whether the DOJ's imposition of new immigration related conditions on recipients of the Byrne Jag grant violated the Administrative Procedure Act and and/or the Constitution.

Justin Steil – Assistant Professor of Law and Urban Planning at Massachusetts Institute of Technology
Bank of America v. Miami - Eleventh Circuit
Issue: Whether the City has proven causation under the Fair Housing Act where it alleges that large banks that engaged in a decade-long pattern of discriminatory lending practices caused the City economic harm as these loans resulted in foreclosures throughout the City, depriving the City of tax revenue and simultaneously requiring the City to spend more on municipal services.

Lawrence Rosenthal – Professor at Chapman University
Timbs v. Indiana-Supreme Court Merits
Issue: Whether the Eight Amendment's Excessive Fines Clause applies to the states and therefore local governments.

Lee Roistacher – Partner at Daley & Heft, LLP
City of Newport Beach v. Vos - Supreme Court Petition
Issue: Whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody. (Lee also drafted an amicus brief in a Ninth Circuit case, *Nehad v. Zimmerman*, involving qualified immunity where an officer shot a suspect who was advancing in a dark alley, appeared to be holding a knife, and refused repeated commands to "stop" and "drop it."

Margaret Sohagi-Managing Partner at The Sohagi Law Group
Phillip Seymour Seymour, of Counsel at The Sohagi Law Group
Building Industry Association v. City of Oakland-Ninth Circuit
Issue: Whether the City's public art ordinance, which requires certain multifamily residential and commercial development projects to devote a small percentage of project building costs to either install publicly accessible art onsite or in a nearby right-of-way, or make an in-lieu payment to the City's public-art fund, implicates the First and Fifth Amendments.

Mary Beth Naumann – Member at Jackson Kelly
Silva Jr. v. City and County of Honolulu-Supreme Court Petition
Issue: Whether, when police officers used force in their community caretaking rather than law enforcement role they should have been afforded qualified immunity where they allegedly Tased an individual who would not leave the middle of a busy roadway after numerous commands during rush hour.

Matthew Zinn – Partner at Shute, Mihaly & Weinberger LLP
Knick v. Scott Township-Supreme Court Merits
Issue: Whether the Supreme Court should reconsider the portion of Williamson County Regional Planning Commission v. Hamilton Bank that requires property owners to exhaust state court remedies to ripen federal takings claims.

Michael Burger – Executive Director for Sabin Center for Climate Change Law
NYC v. BP; City of Oakland v. BP; County of San Mateo v. Chevron-Second Circuit, Ninth Circuit
Issue: Whether cities and counties may bring state common law claims seeking damages or compensation for climate change impacts.

Paul Zidlicky -Partner at Sidley Austin LLP and **Michael Buschbacher**-Associate at Sidley Austin LLP
American Humanist Association v. Maryland-National Capital Park and Planning Commission-Supreme Court Petition and Supreme Court Merits
Issue: Whether the Establishment Clause requires the removal or destruction of a 93-year-old memorial to American servicemen who died in World War I solely because the memorial bears the shape of a cross. (Paul and Michael also drafted an amicus brief in *Pensacola v. Kondrat'yev,* a Supreme Court Petition Stage case which presents the following related issues: 1) Whether plaintiffs have standing to sue under the Establishment Clause when their only alleged injury consists of the feelings of "offense" produced by observing a passive religious display; and 2) Whether, under Town of Greece v. Galloway, passive religious displays with a long historical pedigree must be torn down because of claims that they have the purpose or effect of endorsing religion).

Peter Pierce - Shareholder at Richards Watson Gershon
Rodriguez v. City of San Jose-Ninth Circuit
Issues: Whether the Second Amendment protects an individual's right to possess specific firearms; and whether the City Defendants' confiscation of guns and decision not to return them based on a state law determination that confiscation was necessary under the state's welfare and institutions code, was an unreasonable seizure under the Fourth Amendment, and/or a Taking without just compensation under the Fifth Amendment.

Kraig Conn-General Counsel for Florida League of Cities and **Rebecca O'Hara-**Senior Legislative Advocate for Florida League of Cities
City of Miami Beach v. Florida Retail Federation, Inc.-Florida Supreme Court
Issue: Whether the Florida statute preempting local governments from adopting higher minimum wage laws was invalidated by the later Florida Constitution Amendment.

Richard Simpson – Partner at Wiley Rein LLP
Tennessee Wine & Spirits Retail Association v. Blair-Supreme Court Merits
Issue: Whether the 21st Amendment empowers states, consistent with the dormant commerce clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

Rusi Patel – Senior Associate General Counsel for Georgia Municipal Association
Stanford v. City of Albany -Georgia Intermediate Court of Appeal
Issue: Whether the City's failure to revoke a business's occupancy tax certificate where it was aware of criminal activity occurring at the business amounted to the maintenance of a nuisance.

Sarah Shalf – Professor of Practice at Emory University School of Law
Carpenter v. Murphy-Supreme Court Merits
Issue: Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

Shannon O'Connor -Partner at Goldberg Segalla, **Sarah Spencer**-Associate at Goldberg Segalla, and **Bradley Stevens**-Associate at Goldberg Segalla
Deferio v. Syracuse-Second Circuit
Issue: Whether the City's incurs liability under *Monell* for its decisions to issue certain parade permits in the way that it did and involves the intersection of sidewalk protesting and competing First Amendment principles.
Stuart Banner – Professor of Law at UCLA
Trump v. Hawaii-Supreme Court Merits
Issue: Whether the global injunction barring enforcement of the proclamation's entry suspensions worldwide is impermissibly overbroad.

Laura Wendell-Partner at Weiss Serota Helfman Cole & Bierman, P.L. and **Susan Trevarthen**-Member at Weiss Serota Helfman Cole & Bierman, P.L.
Aptive Environmental v. Town of Castle Rock - Tenth Circuit
Issue: Whether a 7:00 pm curfew on commercial solicitation is constitutional under the First Amendment and what evidentiary burden of proof is necessary to support a governmental interest in regulating door-to-door solicitation.

Timothy Coates – Managing Partner at Greines, Martin, Stein & Richland LLP
Franklin v. Peterson-Supreme Court Petition Stage
Issue: whether appellate courts have interlocutory appeal jurisdiction over a denial of qualified immunity where the appellants challenge the inferences made from fact disputes identified in the record.

IMLA's Mid Year Seminar in Washington D.C. from March 29 to April 1, 2019 was another success. We thank our excellent speakers, our sponsors, our attendees (particularly those of you who joined us for the first time), and our amicus award winners.

Amicus award winners

Photos courtesy of IMLA member Jim Lampke--complete collection may be viewed on IMLA's Facebook page.

FEDERAL

BY: GENE TANAKA
Partner, Best Best & Krieger, LLP, Walnut Creek, California

The New Federalism: Blue States v. United States

THE LEGAL BACKDROP

For years, red states pushed back on the United States arguing that the federal government's statutes and regulations interfered with states' rights under federalism. But now, that narrative is reversed.

In the topsy-turvy world of politics today, blue states — not red states — are asserting federalism to support their initiatives on sanctuary cities, car emissions and legalized marijuana, to name a few. As you may (or may not) recall from your law school classes, federalism in the United States recognizes that the national government and state governments share powers. Specifically, the Constitution provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1]

While the authority of the United States to legislate in the areas of immigration, environment and controlled substances is not seriously under challenge, whether federal laws and regulations overturn state statutes in these areas is much more complicated. Each dispute calls into question different areas of law. For sanctuary cities, the separation of powers and Congress' power of the purse is being litigated. With respect to car emissions, the courts are considering whether actions of the U.S. Environmental Protection Agency followed principles of administrative law. And for legalized marijuana, Congress' yearly budget authorization, a fraught process, will be determinative.

We cannot presume to answer who should prevail in these fights, but we can analyze the background of the federal-state disputes on sanctuary cities, car emissions and legalized marijuana and frame the issues to help us understand as we watch these battles play out in court and — in the court of public opinion.

Sanctuary Cities – a Hot Button Issue

Immigration is top-of-mind and very contentious these days. One issue is the decisions by states and municipalities to consider themselves sanctuary cities. There is no formal definition, but a sanctuary city (or county or state) is a locality that has decided to limit its cooperation with federal authorities enforcing immigration laws. This includes a wide range of actions, such as denying requests to detain individuals requested by U.S. Immigration and Customs Enforcement, prohibiting local police from stopping people solely to establish their immigration status, providing legal assistance to the immigrant community, or allowing undocumented immigrants to obtain driver's licenses.[2] In May 2018, the Federation for American Immigration Reform estimated that 564 U.S. cities, counties and states have adopted some type of sanctuary policy.[3]

In response, President Trump signed an Executive Order to defund jurisdictions that refuse to comply with federal immigration law.[4] California then sued the United States and, on Nov. 20, 2017, U.S. District Court Judge William Orrick, sitting in the Northern District of California, issued a nationwide permanent injunction stopping that Executive Order. Following an appeal, the U.S. Ninth Circuit Court of Appeals affirmed Orrick's injunction on behalf of the City and County of San Francisco and the County of Santa Clara because the Executive Order violates the Separation of Powers and, more specifically, the Appropriations Clause, which grants the power of the purse to Congress, not the President.[5] As the Ninth Circuit noted, the Executive Branch "may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals."[6] However, the appeals court vacated the nation-wide injunction, and returned it to the district court for further findings to justify a nationwide injunction,[7] where it is still pending.

Also in response, Attorney General Jeff Sessions and the U.S. Department of Justice (collectively, DOJ) required state and local jurisdictions that adopted sanctuary city statutes and ordinances to provide ICE access to their correctional facilities, give ICE notice of the release dates of detainees, and certify compliance with a statute that requires information sharing with the U.S. Department of Homeland Security in order to receive grants that support local law enforcement.[8] The reaction was swift. At least six lawsuits were filed around the country.[9] In each of the six cases, the DOJ lost, based in part on the same ground that tripped up President Trump's Executive Order: violation of the Separation of Powers and the Appropriations Clause. Also, courts in those cases found the DOJ action was arbitrary and capricious in violation of the Administrative Procedures Act. Some of the district courts issued nation-wide injunctions, but all of them were stayed to resolve procedural issues or appeals.

It is likely that the U.S. Supreme Court will have to be the final word on these issues.

Car Emissions – Local Efforts to Address Climate Change

With federal inaction on climate change, some states stepped up their efforts to address the problem at the local level. Reacting to the Trump administration's roll-back of emissions standards, California and 12 other states moved forward with stricter vehicle emissions standards. The Clean Air Act allows a waiver of federal preemption for states that adopt emissions standards that are at least as protective of the public health and welfare as applicable federal standards.[10] In January 2013, the EPA granted California a waiver for its Advanced Clean Cars Program, which included Low-Emissions Vehicle (LEV III) regulations.[11] The LEV III regulations set more rigorous standards to reduce greenhouse gas emissions than the federal standards. Twelve other states followed suit and adopted California's LEV III regulations.

In April and August 2018, the Trump administration's EPA announced that it was withdrawing current federal emissions standards since they may be too stringent, and proposed withdrawing the 2013 preemption waiver for California's Advanced Clean Cars Program.[12] On May 1, 2018, California and 17 other states filed suit directly in the U.S. Court of Appeals for the D.C. Circuit to overturn the EPA order withdrawing the current federal emissions standards.[13] The states assert that the withdrawal of the current standards is arbitrary and capricious, lacks factual support, and lacks a reasoned explanation for the change of course in violation of the Clean Air Act, the Administrative Procedures Act and EPA's regulations.[14] The matter is awaiting briefing and a hearing.

Legalized Marijuana - the Other Green Wave

It seems like every election, more states legalize marijuana. At last count, 33 states and the District of Columbia allow the medical use of cannabis. Ten states and the District of Columbia allow the recreational use of marijuana.[15] But federal law makes the use and possession of cannabis illegal under the Controlled Substances Act of 1970.[16] Under the Supremacy Clause of the U.S. Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."[17] Therefore, if Congress has legislated in the area, state law is preempted when they conflict. So how do the states continue to apply their marijuana laws in the face of federal law making cannabis illegal?

The answer lies in the budget process. In 2014 and 2015, Congress approved a budget amendment that prohibited the U.S. Justice Department from using funds to prevent states from implementing medical cannabis laws. This is known as the Rohrabacher-Farr, or CJS, amendment.[18] The courts have interpreted this budget appropriation or its successor to prohibit the United States from prosecuting cannabis users and providers.[19] While these cases only apply in their jurisdictions, the United States has not chosen to challenge other states.

Each year thereafter, Congress approved a similar budget amendment. Which takes us to today. The recently signed 2019 budget renews the CJS amendment yet again until September 30, 2019.[20]

Conclusion – More of the Same

These conflicts reflect the deep divisions and closely balanced forces at play within our country at large. While a more unified Congress could resolve many of these disagreements, it too reflects the national divide between red and blue. This has left the courts to fill the gap. But, as this discussion illustrates, they are ill-suited to deal with nation-wide policy issues. Until we can narrow the differences and/or one side gains a lasting advantage, we will continue to see these challenges unfold.

Notes

1. U.S. Const. amend. X.
2. Tal Kopan, *What are Sanctuary Cities, and Can They be Defunded?*, CNN, Mar. 26, 2018.
3. *Sanctuary Jurisdictions Nearly Double Since President Trump Promised to Enforce Our Immigration Laws*, FAIR, May 2018, at 1.
4. 82 Fed. Reg. 8799 (Exec. Order 13768, Jan. 25, 2017).
5. City and Cty. of San Francisco v. Trump, 897 F. 3d 1225, 1231 (2018).
6. *Id*. at 1235.
7. *Id*. at 1245.
8. 8 U.S.C. § 1373; City and County of San Francisco v. Sessions, 349 F.Supp.3d 924, 933-934 (N.D. Cal. 2018).
9. City of Philadelphia v. Sessions, E.D. Pa., No. 17-cv-03894; City of Chicago v. Sessions, N.D. Ill., No. 17-cv-05720; United States v. California, E.D. Cal., No. 18-cv-490-JAM; City of Los Angeles v. Sessions, C.D. Cal., No. 17-cv-07215-R; City and County of San Francisco v. Sessions, N.D. Cal., Nos. 17-cv-04701-WHO, 17-cv-04642-WHO.
10. 42 U.S.C. § 7543(b).
11. 13 Cal. Code Regs. tit. 13, §§ 1961 – 1961.2, 3.
12. 83 Fed. Reg. 16,077-01 (Apr. 13, 2018); 83 Fed Reg. 42,986-01 (Aug. 24, 2018).
13. California. v. U.S. Environmental Protection Agency, D.C. Cir., No. 18-1114 (and consol. Nos. 18-1118, 18-1139).
14. *Id*. at State Petitioners' Non-Binding Statement of Issues, filed June 4, 2018, ECF No. 18-1114.
15. Jeremy Berke & Skye Gould, *This Map Shows Every U.S. State Where Pot is Legal*, Business Insider, Jan. 4, 2019.
16. 21 U.S.C. §§ 811, 812(c).
17. U.S. Const. art. 6, cl. 2.
18. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-215, § 538, 2130, 2217 (2014).
19. United States of America v. Marin Alliance for Medical Marijuana, 139 F. Supp. 3d 1039, 1047-48 (N.D. Cal. 2015); United States v. McIntosh, 833 F. 3d 1163, 1177 (9th Cir. 2016).
20. Consolidated Appropriations Act, 2019, H.R 648, § 537 (2019). ML

Gene Tanaka is a partner in Best Best & Krieger's Walnut Creek, California office, focusing on environmental, land use and public agency litigation. With nearly 30 years of experience, Gene has successfully represented municipalities from across the state of California in numerous high-profile matters. He has taught trial advocacy and deposition skills for the National Institute of Trial Advocacy and others at various venues around the US and in Belfast, Ireland; Osaka, Japan and Hobart, Australia. He holds a B.A. and J.D. from Columbia University.

OP-ED

BY: RICHARD M. GARDELLA

Law Day: A Time to Remember IMLA's Founder

INTRODUCTION

The U.S Supreme Court's review of claimed partisan voter district gerrymandering brings to mind a municipal attorney who fifty-seven years ago opened the door to the redrawing of district lines by Federal courts to better achieve voter equality. However, that anti-gerrymandering victory is not the only accomplishment for which that lawyer should be remembered. Just four years before his U.S. Supreme Court voter fairness win, Charles S. Rhyne as president of the American Bar Association (ABA) had a major role in creating the central annual celebration for lawyers-Law Day.

Observed at the beginning of this month every year, Law Day focuses on the rule of law and its importance to a free society. Rhyne picked May 1st in response to the annual May Day parades of military might by Communist countries. Instead of tanks, artillery and rockets, we would parade our ideas and freedom. At the municipal lawyer's urging, Law Day was declared by President Dwight D. Eisenhower in 1958. Later backed by Congressional resolution, the day was codified in a section of the U.S. code which reads in part:

"Law Day, U.S.A., is a special day of celebration by the people of the United States-

(1) In appreciation of their liberties and the reaffirmation of their loyalty to the United States and of their rededication to the ideals of equality and justice under law in their relations with each other and with other countries, and

(2) For the cultivation of the respect for law that is so vital to the democratic way of life."

When I first attended a conference of the National Institute for Municipal Law Officers (NIMLO) in the early 1980s-now named the International Municipal Lawyers Association (IMLA)-I met Rhyne, who was serving as executive director of the Institute. In that role he was the administrative leader of the organization. He seemed a nice, amiable fellow, but I was unaware of his significant legal career and background.

It wasn't until I read his self-published autobiography years later that I grasped something of the man and his remarkable career. I also learned that the above-cited accomplishments were not the sum total of his achievement.

For starters, he was instrumental with Mayor Fiorello La Guardia of New York, Chicago Mayor Richard Daly and others in creating the forerunner of lMLA in 1935. Rhyne served as the organization's first executive director until his retirement in 1988, a few years after I first met him.

In addition, there were his international efforts to promote the rule of law and peace around the globe. As ABA president, he logged over 200,000 miles to push that effort. In 1966, he received the ABA's top gold medal award for his world efforts to support the rule of law.

The 1962 voter rights case, *Baker v. Carr,* involved a growing number of urban voters in Tennessee who were underrepresented because the state refused to redraw voter district lines to reflect the increased population. Rhyne's victory gave federal courts the power to mandate state legislative reapportionment. Chief Justice Earl Warren called *Baker v. Carr* "the most important case of my tenure on the Court."

Rhyne, who grew up on a cotton farm in Mechlenburg, North Carolina, died on July 27, 2003 at the age of 91 of an accidental drowning in the swimming pool at his McLean, Virginia home.

For me, Law Day's establishment in the middle of the Cold War was Charles Rhyne's greatest and most important accomplishment . People must be constantly reminded that their freedom depends on respect and obedience to the rule of law. It is our job as lawyers to enforce that reminder every chance we get.

For instance, how much driving freedom could we enjoy if traffic control devices and other rules of the road were generally ignored? Chaos and chaotic license would prevail.

As lawyers, Law Day should be a central observance for us and a day to be promoted. ML

Richard M. Gardella serves as counsel to Bertine, Hufnagel, Headley, Zeltner, Drummond & Dohn LLP and is Editor in Chief of *Westchester Lawyer,* the Westchester County Bar Association (WCBA) monthly magazine. He is a past president of the WCBA and the Westchester County Bar Foundation, and a former WCBA delegate to the American Bar Association and the New York State Bar Association.

A Future President's Lifelong Friend

When Charles Rhyne attended Duke Law School, he had to work construction to help support himself. A nail puncture on the job resulted in blood poisoning. A series of operations and hospital confinement followed, keeping him out of class.

A classmate from California came to the rescue by bringing daily class notes to the recuperating student. Rhyne found the notes very accurate and complete, allowing him to continue his path to a Bar degree-a degree he eventually obtained from George Washington University after transferring from Duke.

The fellow student, who shared his notes in an age where competition among law school students was often not friendly, also helped Rhyne recuperate by playing ping pong with him.

That helping hand led to a lifetime friendship with the California native who later became the only U.S. President to resign from office. The helpful student was Richard Nixon.

INSIDE CANADA

BY: MONICA CIRIELLO
Ontario 2015

Scofflaw Cyclists, Sacrilegious Footwear, and More

Cyclist Convicted of Strict Liability Offence
Toronto (City) v. Montemurro, 2019 ONCJ 238 (CanLII) http://canlii.ca/t/hzt69 As a result of neighbourhood complaints of improper/unsafe bicycle usage in a public park, the City of Toronto ("City") conducted a blitz. The Bylaw Enforcement Officer ("Officer") observed the Defendant riding his bicycle in front of a sign that stated "Caution- Cyclists please dismount and walk across the bridge." The Defendant was charged under s. 29(a) of the City Code Bylaw "while in a park no person shall ride or operate or be in possession of a bicycle where posted to prohibit bicycles."

HELD: Conviction registered.

DISCUSSION: The Court was satisfied that since this was a strict liability offence it was unnecessary for the City to prove *mens rea,* as the act of riding the bicycle where it was not permitted imports the offence (*R v. Sault Ste. Mari (City),* [1978] 2 S.C.R. 1299). As a result, the Defendant is afforded a due diligence defence. The Defendant argued that it was his interpretation that the sign in the park was a cautionary sign, not a sign prohibiting him from riding his bicycle in the park. As such, it was merely asking for those on a bicycle to assess their circumstances and dismount from the bicycle should they consider it necessary to do so for safety reasons. The Court disagreed concluding that a reasonable person reading the sign would read the language as affirmatively directing them to dismount and walk across the bridge. The Defendant, in riding his bicycle over the bridge in the park, chose to disobey the sign contrary to the Bylaw. The Court noted that at no point did the Defendant indicate that he had met the test available to him in a strict liability contest.

Paralegal Claims Racial Discrimination When Working Without a License
Sinclair v London (City), 2019 HRTO 647 http://canlii.ca/t/hzr8h

The Applicant, a paralegal in the City of London ("City"), was involved in an incident which resulted in his paralegal licence being suspended. Prior to the suspension, the Applicant had been representing a variety of clients at the Provincial Offences Court, which is operated by the City. The Applicant thereafter appeared at the Provincial Offences Court to obtain information on a matter. The clerk refused to provide such information as the Applicant was not a licensed paralegal. The Applicant filed an application under s. 34 of the *Human Rights Code,* R.S.O. 1990, c. H19 ("*Code*") alleging that he was discriminated against based on his race. The application was dismissed by the Human Rights Tribunal ("Tribunal"), and the Applicant sought reconsideration under s. 45.7 of the *Code*.

HELD: Reconsideration of the application denied.

DISCUSSION: Reconsideration by the Tribunal is a discretionary remedy which may be granted upon satisfaction of the elements set forth in Rule 26; the Applicant has no right absolute right to have his decision reconsidered. The Applicant relied on Rule 26.5(c) which applies where the decision issued by the Tribunal is in conflict with the established jurisprudence or tribunal procedure, and the proposed reconsideration involves a matter of general or public importance, namely a violation of the *Code*. The Applicant alleged the adjudicator had a reasonable apprehension of bias against him and was in alliance with the City. While the City was not required to, nor did it, respond to the Applicant's request for reconsideration, the Applicant argued that because he had previously appeared before the adjudicator on a different matter in 2016 and was denied reconsideration for that matter in 2017, there was a reasonable apprehension of bias.

However, the threshold for finding a reasonable apprehension of bias is high. The test set out in *Committee for Justice and Liberty et al v. National Energy Board et al*, 68 DLR (3d) 716, clarifies that it must ask: "what would an informed person, viewing the matter realistically and practically – and having through the matter through – conclude." The Applicant provided no evidence of bias beyond the fact that he had appeared before the adjudicator previously. The Tribunal concluded that this did not rise to the level of creating reasonable apprehension of bias, meaning the Applicant failed to meet his burden of justifying reconsideration.

Part-time Employment Only Contributes to Seniority Hours When at Work
Brosso v. Kingston (City), 2019 HRTO 654 (CanLII) http://canlii.ca/t/hzrkt

The Applicant, a part-time employee at the City of Kingston ("City") alleged he was discriminated against based on a disability when the City failed to provide him seniority hours while off on workplace safety and insurance board ("WSIB") approved leave, contrary to the *Human Rights Code*, RSO 1990, c. H.19 ("*Code*").

HELD: Application dismissed.

DISCUSSION: Section 5(1) of the *Code* provides that "every person has a right to equal treatment with respect to employment without discrimination because of…. Disability." Furthermore, a disability is defined to include an injury "for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act,* 1997, S.O. 1997, c. 16, Sched. A." There is no dispute that the Applicant suffered a disability. The Applicant submitted that as a part-time employee it was important to his career where he was on the seniority list and when the City failed to provide him with approximately 50 seniority hours, he received adverse treatment (*Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital,* 1999 CanLII 3687). The City argued that as indicated under the Collective Agreement, part-time employees are only credited with seniority hours that they work; therefore, the Applicant was not discriminated against based on having a disability.

The Tribunal determined that the Applicant established *prima facie* discrimination as his disability was at least a factor in the interruption of his seniority. The Tribunal reviewed the City's Collective Agreement and case law, particularity *Orillia Soldiers*, to determine if the City had established a *bona fide* occupation requirement. In *Orillia Soldiers*, the language in the Collective Agreement clearly distinguished between service time and seniority, and seniority was accumulated simply by the passage of time. In the City's Collective Agreement, the terms "service time" and "seniority" were used interchangeably which differed from the *Orillia Soldiers* Collective Agreement. As a result, for part-time employees, seniority at the City meant the number of hours worked. Therefore, the failure to accumulate seniority hours while not working, including being off on WSIB, did not amount to discrimination under the *Code*.

Procedurally Flawed Application Against Land Development Dismissed
Pearson et al v Winnipeg (City of) et al, 2019 MBCA 26 http://canlii.ca/t/hz7qv

The City of Winnipeg ("City") engaged in negotiations with a in a transit-oriented development area. The Applicant (previously the Appellant) passionately disagreed with how the lands should be utilized within the City, and in addition to protesting about the lands, filed an application for judicial review challenging the deal between the City and the land developer. The application was dismissed for being procedurally flawed- as it should have commenced via action, not application, and furthermore, it lacked factual foundation to support an extension of time under s. 14(1) or 15(2) of the *Limitations Actions Act*, CCSM c. L150 ("*Act*"). The Applicant appealed.

HELD: Application dismissed.

DISCUSSION: The Court stated that the standard was high for appellate court interference with a lower court's decision, which is appropriate only if there was misdirection or injustice (*Perth Services Ltd v. Quinton et al,* 2009 MBCA 81). The Applicant recognized that the application required an extension under the *Act* and submitted, among other things, that the lower court erred in determining that there was no support for an extension. The Court swiftly found that there was no merit to the appeal, as the lower court treated the application with fairness and dismissed it judicially. The Court held that the application filed was statute-barred under the *Act* and it was reasonable for the lower court to conclude that sufficient evidence had not been provided to meet an exemption. In particular, no evidence was provided that there was a public interest standing to challenge the land deal, nor was there evidence to commence a judicial review that was out of time. The Applicant's appeal was dismissed.

Worker Safety Trumps Religious Belief
Mississauga (City) v. Bhatnagar, 2019 ONCJ 194 http://canlii.ca/t/hzm87

The Applicants, property owners in the City of Mississauga ("City"), were charged for violating the *Fire Protection and Prevention Act,* 1997, S.O. 1997, c. 4. As a result of a complaint about the Applicants' basement, the City's Fire Inspector ("Inspector") made several attempts to schedule a home inspection. Finally, after multiple unsuccessful attempts the Inspector obtained a warrant to inspect the residence, whereupon, he was granted access to investigate. The Inspector conducted his investigation wearing protective equipment, which included work boots. As part of the inspection, the Inspector walked through the Applicants' Hindu place of worship in the basement where religious activity took place. The Applicants filed a *Charter of Rights and Freedoms* ("*Charter")* motion alleging that their rights under s. 2 ("everyone has… freedom of conscience and religion") were infringed.

HELD: Motion dismissed.

DISCUSSION: The question for the Court was whether the Applicants' *Charter* rights were infringed by the Inspector wearing his protective work boots. The Applicants maintain two holy rooms in their home where no shoes are to be worn. The Applicants allege that, when the Inspector failed to take off his protective work boots upon entering the basement holy room, they felt violated and have suffered sleepless

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LISTSERV

BY: BRAD CUNNINGHAM
Municipal Attorney, Lexington, South Carolina

Uber – is that you?

We live in such a mobile and fast-paced world these days. Cell phones are a "requirement." Land lines are, in many cases, a thing of the past. iPads are used in school, replacing textbooks. There are driverless cars. Homework can be done over a cell phone. Telecommuting is at an all-time high. There are tech jobs where you can live wherever you want in the Country. A ride home can be obtained via a wireless app, without speaking to anyone.

But there are risks with this mobile society as well.

Identity theft is at an all-time high. Computer hacking has become a profession, reaching ever more intrusive levels and instigation accusations about defense department breaches and election tampering. In our own local community we were recently hit square in the nose with a sobering and tragic reminder of some of the dangers of today's mobile society.

Early on the morning of Friday, March 29, University of South Carolina student Samantha Josephson called an Uber ride in Columbia. Surveillance video shows Josephson outside a bar standing by herself on the curb. She takes a few steps toward a black vehicle that approaches her, opens the door and gets inside.

That was the last time anyone saw Samantha Josephson alive as she rode away in the Chevrolet Impala.

Samantha and her friends had gotten separated that evening. When she did not return to her apartment, her roommates began to worry. They called police that same afternoon. They went around the city displaying her picture and asking people if they had seen her. A store located next to the bar where she had been the previous evening reportedly provided video. It didn't take long to find out what apparently happened.

Her body was found the next day about 90 miles away in Clarendon County, South Carolina. According to the coroner's report, her body showed several wounds on her foot, leg, upper body, neck face and head. Within the same day, police arrested a suspect in Samantha's death, after an officer stopped a vehicle that matched the description of the vehicle seen in the surveillance video. Her blood was reportedly found on the rider's side of the car, and her cell phone was located in the glove compartment, according to a police report.

The suspect faces charges of murder and kidnapping as a result of her death. He waived his right to a court appearance on Sunday, and his court-appointed attorney has declined public comment.

Varying reports indicate that shortly after Samantha got into the car, her Uber trip was canceled--odd behavior for a driver who would then not get paid after picking up his rider. The trouble is, the car Samantha mistakenly got into WAS NOT an Uber vehicle after all.

According to a CNN report, Uber officials are distraught over the situation. "Everyone at Uber is devastated to hear about this unspeakable crime," an Uber spokesman said. "Our hearts are with Samantha Josephson's family and loved ones. We remain focused on raising public awareness about this incredibly important issue." According to that same spokesman, Uber has been working with law enforcement and around college campuses to educate the public on how to avoid fake drivers.

Immediately during the ensuing week, the South Carolina General Assembly began to address the situation as well. My friend Seth Rose, a State Representative from Columbia, has introduced a bill in the S.C. House that would require Uber and Lyft drivers to display an illuminated sign on their vehicle window. Rose specifically said the bill was introduced as a result of Samantha Josephson's death, in an effort to avoid similar mistakes by future ridesharing customers.

The bill is called the "Samantha Josephson Ridesharing Safety Act," and it requires all "transportation network companies to possess and display certain illuminated signage at all times when the driver is active."

Having followed this story from the IMLA Mid-Year Seminar in Washington DC in late March, it struck a chord with me for a couple of reasons, in addition to the fact that a young life was lost. First, I probably rode Uber a dozen times while I was in DC. Secondly, and much closer to my heart, my own daughter attends the University of South Carolina. Understandably, this terrible event shook the students there very deeply.

I had no adverse issues on any of my Uber rides while in DC. But, my first call

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when I returned to the office was to Rep. Rose to tell him I fully supported his efforts. I also asked him to consider supporting adding a requirement that commercial vehicles for hire must display a front license plate. All of the rides I took in DC and Virginia had displayed front plates, and it was very easy to see them coming and identify them before they even reach you. I mean, how many people are going to walk around the back of the car and check the plate?

I am told the House passed the bill as uncontested. It now sits on the Senate calendar. I hope it works. I also hope young people out late can remember a few things. First, make every effort possible to stay together as a group. Make sure everyone gets their ride or gets home safely. Second, if you hire such a ride through any of the services, double check that the picture of the driver and the car you receive match the vehicle you are about to enter. Also, verify the license plate, even if it does mean walking around the back of the vehicle. A real driver won't mind waiting the extra few seconds. Also make sure the company logo is displayed somewhere on the vehicle. Lastly, make the driver verify who he is picking up. If he can't say your name, then don't get into the vehicle.

There is no way to immunize yourself One Hundred Percent from becoming the victim of a crime. But, you can certainly lessen the chances by remembering to take a few extra safety precautions before you get into any vehicle. We're all in this together. Let's try to help keep each other safe. (Factual info and account attributed to CNN and The State Newspaper.)

*****

It was great seeing everyone who attended the 2019 IMLA Mid-Year Seminar in DC. As usual, we had our informal Water Cooler gathering. This time we gathered around the table at Mayahuel Cocina Mexicana, a wonderful Mexican restaurant located on 24th Street in the former site of the legendary Murphy's Grand Irish Pub. It was a great location since it is only a stone's throw from the Omni Shoreham. A good time was had by all, and we experienced the usual banter and a few new things such as habanero margaritas. If you haven't attended one of these events yet, give it a try at our next Seminar or Annual Conference. And I would be remiss if I did not thank Chuck Thompson and the IMLA staff for yet another wonderful event. I look forward to these events every year. Thanks folks!

Occasionally, I share humorous experiences that occur in our Municipal Court. The most recent anecdote I shared at the IMLA Mid-Year Watercooler gathering. If you weren't there, here is the written version:

On one of our regular Municipal Court days, I was handling some pretrial conferences with several defendants. One defendant, who was charged with vandalism and disorderly conduct (intoxication) came in with her daughter. The lady sat down with one of those "igloo type" silver coffee mugs in her hand. It was 9 a.m., and I myself had a cup of coffee.

However, her cup of coffee smelled a little differently than mine. As I tried to figure out what it was during our conversation, the smell grew stronger. The dead giveaway was when she lifted it to take a drink and ice rattled. Well, iced coffee? No, the woman had a drink in her hand! The woman brought a drink to court with her!

I asked her what was in the cup and she replied "Water." I told it sure smelled good. As the woman rattled on and was obviously drunk, I gave the clerk a note to have the police officer come over and I told him what it was about. He asked the woman what was in the cup, and she said "water." He told her he didn't believe her and that she smelled like alcohol and asked why. She said she had a couple drinks before she came to court. Eventually, she fessed up that she had a drink with her as well.

The Judge was not at all amused. The defendant was cited for open container and contempt of court. We never finished addressing her original charge. I don't know weather this story is funny or sad, or really just both. But, to bring a drink to court at 9 a.m.? I left shaking my head that day.

The prosecution rests, your honor… ML

IMLA's Kitchen Sink Webinar Program

May 13 *Telecommunications: FCC Changes to Cable Franchising*
Speaker:
GERARD LEDERER

June 3 *Case Law Update: Post Reed v. Town of Gilbert*
Speaker:
SUSAN TREVARTHEN

June 4 *Health & Environment: Stormwater Update*
Speaker:
ANDRE MONETTE

June 6 *Telecommunications: Understanding the FCC's 2014 Order*
Implementing Section 6409(a)
Speakers:
JOHN PESTLE &
JONATHAN KRAMER

June 18 *Health & Environment: Disaster Recovery - Best Practices*
Speakers:
DWIGHT MERRIAM,
OTTO HETZEL &
ERNIE ABBOT

July 11 *Personnel: ADA - Reasonable Accommodations and Employment*
Speakers: JONATHAN MOOK & ROBIN CROSS

July 16 *Land Use: Fair Housing Ordinances and Local Governments*
Speaker:
BRIAN CONNOLLY

July 18 *Constitutional Law: SLLC Presents SCOTUS-Attack on Qualified Immunity*
Speaker:
LISA SORONEN

CASES

BY: ERICH EISELT
IMLA Assistant General Counsel

Parking Enforcement and Atheism at the Circuits

Two recent Circuit decisions illustrate the ever-vigorous debate over the parameters of the Bill of Rights. In one, a chalk mark on the tire of an automobile parked on a public street is found to be an unreasonable search. In the other, an atheist is denied the right to open proceedings at the House of Representatives, specifically because he does not espouse a "religious" viewpoint—despite the First Amendment's express admonition against Congressional establishment of religion.

Search: Chalking Vehicle Tire is Unreasonable Search
***Taylor v. City of Saginaw*, no. 17-2126 (6th Cir. Apr. 22, 2019).**

Reversing the district court, the Sixth Circuit has found that a city parking enforcement practice of chalking car tires to determine length of stay in a time-limited spot constitutes an unreasonable search which is not justified under the "community caretaker" exception.

Alison Taylor (Taylor) received 15 parking tickets over a three-year period from Saginaw, Michigan (City) parking enforcement officer Tabitha Hoskins (Hoskins)—each of which bore the date and time of her infraction. Taylor brought a Section 1983 action against the City and against Hoskins, alleging that chalking her vehicle's tires to determine length of stay in a time-limited parking spot, without her consent and without a warrant, violated her Fourth Amendment rights. The district court agreed with Taylor that the chalking process constitutes a warrantless "search" for constitutional purposes, but that the search was reasonable under the "community caretaker" exception to the warrant requirement, and that a lesser expectation of privacy applied to a vehicle parked on a public street. It dismissed the action.

In a decision which has inspired as much commentary from IMLA members as any in recent memory, the Sixth Circuit reversed. Its analysis is worth reviewing:

Chalking constitutes a search: The Circuit agree with the lower court that chalking is a search. It first referenced the most prevalent and widely-used search analysis, articulated in *Katz. v. United States*, 389 U.S. 347 (1967), which advises that a search occurs when a government official invades an area in which "a person has a constitutionally protected reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring). Under *Katz*, a search is analyzed in two parts: "first that a person exhibit an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361. As the Circuit pointed out, a "physical intrusion" is not necessary for a search to occur under *Katz*.

The Circuit found a useful comparator in the more recent Supreme Court decision in *United States v. Jones*, 565 U.S. 400 (2012), which found that that the unauthorized attachment of a GPS device to a vehicle in order to track its movement for evidentiary purposes violated the Fourth Amendment. In *Jones*, the Court applied a seldom used "property-based" approach to Fourth Amendment search inquiry, finding that when governmental invasions are accompanied by physical intrusions, a search occurs when the government: (1) trespasses upon a constitutionally protected area, (2) to obtain information. *Id.* at 404–405.

While conceding that "*Jones* does not provide clear boundaries for the meaning of common-law trespass," the court found language in the Restatement (Second) of Torts to conclude that "there has been a trespass in this case because the City made intentional physical contact with Taylor's vehicle." That trespass was further "conjoined with . . . an attempt to find something or to obtain information," constituting a search.

The search is unreasonable: The district court had found that the City's warrantless search of Taylor's vehicle was reasonable due to a lesser expectation of privacy with automobiles. The Circuit disagreed. Though an automobile enjoys a "reduced expectation[] of privacy" due to its "ready mobility," that reduced standard is encompassed in the "automobile exception" to the warrant requirement. That exception permits officers to search a vehicle without a warrant if they have probable cause to believe that the vehicle contains evidence of a crime—a factor not present in this case. Here, the Circuit held, "the City commences its search on vehicles that are parked legally, without probable cause or even so much as 'individualized suspicion of wrongdoing'—the touchstone of the reasonableness standard."

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The community caretaker exception doesn't apply: The community caretaker exception applies when government actors perform "caretaking" functions rather than traditional law-enforcement activities. To apply, the function in question must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The community caretaker exception "does not provide the government with refuge from the warrant requirement except when delay is reasonably likely to result in injury or ongoing harm to the community at large." While it has been applied to allow warrantless inventory searches of vehicles, those were situations where the vehicles were impeding traffic flow and had been towed to promote public safety and prevent hazards, or were abandoned in suspicious circumstances that triggered concerns about contraband or explosives. Here, the City could not demonstrate how its chalking-based search promoted public safety; to the contrary, at the time of the search, Taylor's vehicle was lawfully parked in a proper parking location, imposing no safety risk whatsoever. According to the Circuit, "Because the purpose of chalking is to raise revenue, and not to mitigate public hazard, "the City was not acting in its role as a community caretaker."

Opportunity for reconsideration? In the end, the Circuit appeared to allow room for a revised challenge to its determination:

The City does not demonstrate, in law or logic, that the need to deter drivers from exceeding the time permitted for parking—before they have even done so—is sufficient to justify a warrantless search under the community caretaker rationale. **This is not to say that this exception can never apply to the warrantless search of a lawfully parked vehicle. Nor does our holding suggest that no other exceptions to the warrant requirement might apply in this case.** However, on these facts and on the arguments the City proffers, the City fails to meet its burden in establishing an exception to the warrant requirement.

NOTE: On April 25, 2019, the Circuit issued an amended opinion, clarifying and limiting the scope of its original decision:

> Taking the allegations in Taylor's complaint as true, we hold that chalking is a search under the Fourth Amendment, specifically under the Supreme Court's decision in Jones. This does not mean, however, that chalking violates the Fourth Amendment. Rather, we hold, based on the pleading stage of this litigation, that two exceptions to the warrant requirement—the "community caretaking" exception and the motor-vehicle exception—do not apply here. Our holding extends no further than this. When the record in this case moves beyond the pleadings stage, the City is, of course, free to argue anew that one or both of those exceptions do apply, or that some other exception to the warrant requirement might apply.

IMLA will be providing amicus assistance to Saginaw in seeking *en banc* or other review of this decision.

http://www.opn.ca6.uscourts.gov/opinions.pdf/19a0076p-06.pdf

Religion: Congressional Authority to Bar Atheist Invocation
***Barker v. Conroy*, No. 17-5278 (D.C. Cir. Apr. 19, 2019).**

The D.C. Circuit has upheld a lower court decision which found that an atheist who requested the opportunity to deliver a "prayer" to the House which venerated "human wisdom" and was denied based upon House Rules which require such invocations to be "religious" had no standing to assert an Establishment Clause challenge.

Since 1789, the House of Representatives has begun each legislative day with a prayer, a practice the Supreme Court found compatible with the Establishment Clause in *Marsh v. Chambers*, 463 U.S. 783 (1983). That practice is currently codified in House of Representatives Rule II, clause 5, which provides that "[t]he Chaplain shall offer a prayer at the commencement of each day's sitting of the House." H.R. Doc. No. 114-192, Rule II, cl. 5 (2017).Although a House-appointed chaplain has traditionally fulfilled that role, members may nominate other individuals to give a prayer as "guest chaplain." In the past 15 years, approximately 40 percent of the opening invocations have been by guest officiants, including Jewish, Muslim and Hindu clerics.

In 2014, the House Chaplain, Father Patrick J. Conroy (Conroy), was asked by Daniel Barker (Barker)—a former Christian minister turned atheist—to serve as guest chaplain and deliver a secular invocation. When Barker's organization, the Freedom From Religion Foundation, inquired about the possibility, Conroy's office explained that, although the House program has no written rules, guest chaplains are permitted to give invocations only if they meet three requirements: "(1) they are sponsored by a member of the House, (2) they are ordained, and (3) they do not directly address House members and instead address a 'higher power.'"

Barker satisfied the first two requirements: his congressman, Wisconsin Representative Mark Pocan, agreed to sponsor him, and Barker provided the Chaplain's Office with his ordination certificate. In order to satisfy the third requirement, Barker sent the Chaplain's Office a copy of his draft secular invocation, which invoked "the 'higher power' of *human* wisdom," but no God or other religious higher power.

Conroy denied the request, explaining that as a "'Minister Turned Atheist'" and "author of several books that concern his parting with his religious beliefs," Barker did not meet a "long-standing requirement" that the ordination still be applicable: all guest chaplains must "be ordained by a recognized body in the faith in which [they] practice[]." Barker sued Conroy, the House of Representatives and Speaker Paul Ryan, alleging that the rules for guest chaplains created a preference for religion over nonreligion and discriminated against those "whose religious beliefs do not include a belief in a supernatural higher power

Inside Canada cont'd from page 33

nights since the occurrence. To determine whether "the person's right to freedom of religion is at issue" the Court must first consider "the sincerity of the person's belief that the religious practice must be observed" *S. L. Commission Scolaire des Chenes,* [2012] 1 SCR 235 and second, the Court must objectively analyze the event or act that interfered with the exercise of that freedom. As outlined in the Supreme Court of Canada decision, *R v. Collins* (1987), 33 C.C.C. 3(d) 1 (S.C.C.) the burden of proof is on the applicant to prove that a *Charter* right has been infringed.

It was undisputed that the Inspector did not remove his boots as they were a part of his protective equipment, and that he did enter the holy room. Furthermore, it was not disputed that the Applicants' believe that shoes must be removed in the holy room. What is disputed is whether the Inspector's actions constituted an infringement of Applicants' rights that were more than trivial if viewed from an objective view. The Applicants provided a variety of case law decisions including *Bhinder v. Canadian National Railway,* 1981 CanLII 4 (CHRT) where it was found that CN Rail engaged in discriminatory practice by requiring the party to wear a hard hat instead of his turban. The Court disagreed with applying this reasoning to the matter before it. The Court understood and agreed it was reasonable that an Inspector would wear protective equipment during investigations, as they are attending homes and do not know what to expect—this included the Applicants' home.

The freedom of religion is subject to such limitations as necessary to protect public safety. Here, if the Inspector were to remove his work boots during an investigation, he might not be able to do his job due to concerns for his own safety. The Court accepted that it was reasonable for the Inspector to wear work books for safety purposes, and there was no violation under s.2. ML

Finance cont'd from page 21

benchmark rate. For new contracts, the issuer and lender should agree on an appropriate spread for when the new benchmark rate goes into effect.

Become a Zombie LIBOR Fighter

The closer we get to 2021, the more likely it is that LIBOR will become a zombie interest rate. It won't reflect real-world interest rates and may wind up costing unwary municipalities a lot of money in interest rates that are substantially higher than the market rate.

However, municipalities and their counsel can fight back against the Zombie LIBOR infestation by taking the following steps:

- identify all of your bonds, loans, swap contracts and other financial commitments which have interest rates tied to LIBOR.

- Review the appropriate documents for each deal to see how they handle LIBOR unavailability triggers, new benchmark interest rate fallback provisions, adjustments to the margin and the other issues discussed above. If there is a fallback mechanism, try to figure out what your new interest rate might be using the new benchmark rate multiplied by the appropriate margin (either the existing margin or a new margin corresponding to the new benchmark rate). Is the LIBOR-based rate and the currently specified margin higher or lower than the alternate benchmark rate that would replace LIBOR?

- Communicate with your lender, swap counterparty or bond trustee. You may need to renegotiate terms, restructure the debt or consider a refunding or refinancing.

- Finally, seek the assistance of bond counsel, with up-to-date market experience, to help ward off Zombie LIBOR and guide you through the process of transitioning from LIBOR to the new interest rate benchmark. ML

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[and] those who practice a religion that does not have ordinations." He also alleged that Conroy's purported reasons for excluding him were pretextual and ultimately were based purely on the fact that Conroy is an atheist.

Barker sought broad declaratory and injunctive relief as well as a writ of mandamus requiring Conroy to allow him to deliver an invocation "as soon as possible."

The district court granted Conroy's motion to dismiss. Although it found Barker's suit barred by neither the political question doctrine nor the Constitution's Speech or Debate Clause (which immunizes Congressional actors when performing legislative functions) it concluded that Barker lacked Article III standing, because he failed to establish that Conroy caused his asserted injuries--he never alleged that the House Chaplain had authority to permit him to deliver a secular invocation. In the alternative, the district court concluded that Barker failed to state an Establishment Clause claim because his suit was effectively "a challenge to the ability of Congress to open with a prayer," a practice clearly permitted under *Marsh* and reaffirmed under *Town of Greece v. Galloway* in 2014.

As the litigation progressed to appeal, Conroy migrated to a slightly different argument: that Barker could not serve as guest chaplain because he sought to give a secular prayer. Counsel for the House represented to the court that the House interprets its rules to require "a *religious* invocation." "[W]hat the House is saying, and has authorized me to say . . . is, as explained in our briefs below and in this court, that persons who desire to deliver a secular invocation in lieu of a prayer, as the House interprets its prayer rule and has consistently applied it for 225 years, are not entitled to do so."

The D.C. Circuit affirmed, but it disagreed with the lower court's standing analysis. To satisfy the standing burden, Barker had to allege facts demonstrating that he "(1) suffered

an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." In concluding that Barker lacked Article III standing based on a failure to plausibly allege causation, the district court had relied on *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987). which addressed a challenge to the House and Senate Chaplains' refusal to allow a secular humanist to deliver nonreligious remarks as a "guest speaker" during the period for morning prayer. In *Kurtz*, the plaintiff had no intention of delivering a prayer, seeking instead to "address [the House and Senate] '[o]n behalf of the Council for Democratic and Secular Humanism.'" In that scenario, the plaintiff could not demonstrate the requisite conduct by the Chaplain which would justify standing.

Here, Barker was prepared to deliver a "prayer"—complying with wording of the House Rules at the time, which imposed no requirement that it be "religious." Although the House had subsequently modified its rules to require that a prayer be religious, the Circuit concluded it was at least plausible on the date Barker filed his complaint that Conroy had discretion and authority to grant his request to deliver a secular invocation. Barker satisfied the other two requirements for standing—he suffered injury, which could be remedied by the court.

The standards for Rule 12(b)(6) survival were less accommodating. Although at the time Barker filed his complaint it was plausible that the rules allowed for delivery of a secular invocation, the House has since definitively ruled out that possibility. As the Circuit put it, "Timing matters. When determining whether a complaint states a claim, we are not confined by the circumstances existing 'at the time of filing,' as we are when assessing Article III standing." Although the court would normally be disinclined to accept a defendant's post-complaint representation that contradicts a factual assertion made in the complaint, "this is no ordinary case. We deal here with Congress's interpretation of its rules—something no court can lightly disregard." The Circuit was compelled to accept the House's interpretation of its own rules as requiring a religious prayer.

The question therefore arose as to whether the House's decision to limit its opening invocation to religious prayer delivered by still-ordained clerics fit within the tradition long followed in Congress and the state legislatures. Assessing Supreme Court precedent, the Circuit concluded "The answer is yes."

In *Marsh*, the Court took as a given the religious nature of legislative prayer. In holding that opening the legislative day with a prayer amounted not to an establishment of religion the Court explained that "'[w]e are a religious people whose institutions presuppose a Supreme Being.'" Over the Justice Brennan's dissent that prayer is "fundamentally and necessarily religious," and the Court upheld the practice, describing it as having "coexisted with the principles of disestablishment and religious freedom… [f]rom colonial times through the founding of the Republic and ever since."

The prayer practice at issue in *Town of Greece* was, at least in theory, significantly more inclusive than the one in *Marsh;* the town maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But even in *Town of Greece*, the Supreme Court recognized legislative prayer's religious roots, describing *Marsh* as "conclud[ing] that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause."

For the D.C. Circuit, *Marsh* and *Town of Greece* left no doubt that the Supreme Court understands the nation's longstanding legislative-prayer tradition as one that, because of its "unique history," can be both religious and consistent with the Establishment Clause. And, as the Circuit explained, although the Court has warned against discriminating among religions or allowing prayers that overtly proselytize or disparage certain faiths or beliefs, it has never suggested that legislatures must allow secular as well as religious prayer. "In the *sui generis* context of legislative prayer, then, the House does not violate the Establishment Clause by limiting its opening prayer to religious prayer."

Therefore, even if the court accepted as true Barker's allegation that Conroy rejected him "because he is an atheist," that action was mandated by House Rules. "We could not order Conroy to allow Barker to deliver a secular invocation because the House permissibly limits the opening prayer to religious prayer."

https://www.cadc.uscourts.gov/internet/opinions.NSF/6DF98786C-32D5A24852583E1004D436F/$-file/17-5278.pdf ML

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