Act (ADA) and the Rehabilitation Act (RA), the Religious Land Use and Institutionalized Persons Act (RLUIPA) (i.e., that the City treated the church on less than equal terms with other, secular assemblies or institutions, and discriminated against it on the basis of religion), and the Free Exercise and Free Speech Clauses of the First Amendment (that the City discriminatorily targeted religion and religious worship). The City moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted.

The court granted the application. "None of the plaintiff's claims can succeed, and the Court will grant the motion to dismiss. The plaintiff lacks standing to assert either the ADA or RA claims. The plaintiff has not alleged that operating the school amounts to religious activity, and so the church's RLUIPA and Free Exercise claims fail. Finally, the Free Speech claim fails for several reasons: operating the school is not expressive conduct, the City's zoning ordinance is content neutral, and the zoning regulations are neither vague nor overbroad."

The church lacked standing to pursue an associational discrimination claim under the ADA or RA because it had not claimed any unlawful discriminatory effect that the church itself suffered as a result of its association with the Fairwinds students, and failed to demonstrate a hindrance to the students' ability to bringing suit on their own behalf to protect their own interests, as required to establish third-party standing under the ADA or RA. The court further held that the church had "not pled any facts demonstrating that the operation of the day school by a third party [was] a religious exercise. Talismanic assertions lacking factual support are insufficient to satisfy the pleading standard set" by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

On the First Amendment claims, the church argued that its "speech" was its ministry to disabled children. This, however, was insufficient to implicate the First Amendment: "[e]ven if Calvary intended to communicate a message through allowing a school to operate on its premises, the message is not 'particularized' as required," and allowing the school to operate on its premises was not speech. The zoning ordinance was content neutral because it did not regulate speech; it simply regulated *how* speech occurred, and not its content. The City's zoning laws clearly served a number of important governmental interests, and imposed, "at worst, an incidental inconvenience" on the church. According, the free speech claims failed. *Calvary Christian Center v. City of Fredericksburg*, No. 3:11-CV-342-JAG, 2011 U.S. Dist. LEXIS 134290 (E.D. Va. Nov. 21, 2011).

Search and Seizure

Arrest & The Right to Refuse to Answer Questions

Does a person have a First Amendment right to refuse to answer a law enforcement officer's questions during an investigatory visit? A federal appellate court recently considered this issue in *Koch v. City of Del City*, No. 10-6105, 2011 U.S. App. LEXIS 22095 (10th Cir. Nov. 02, 2011).

Vicki Koch and her parents were in some kind of relationship with an elderly woman, Gladys Lance. In 2004, Lance signed an affidavit purportedly revoking power of attorney from her niece, Patricia Loar, and appointing Koch and her parents: she later appointed them her guardians and the "conservators or guardians" of her property. She agreed to pay Koch $1,500 month for her care-giving services. Koch's father sold Lance's home, and several days later he placed her in a nursing home without notifying Loar or the Oklahoma Department of Human Services (DHS). When Loar and DHS could not locate Lance, Loar filed a court petition seeking to be appointed as "special guardian" to Lance and her property. The petition was granted, and the court authorized Loar to contact law enforcement to find the whereabouts of Lance, and ordered Koch and her family to disclose Lance's whereabouts. Both Koch and her attorney were notified of this order, but Koch apparently did nothing for several days.

As a result, police officer Beech was told during his shift that a "pick-up order" was in place for Lance, and that he should periodically check Koch's residence to see if anyone was there. Beech went to Koch's residence and found Koch standing outside. When he asked about Lance, Koch told him that he should not be on her property and that he should talk to her attorney. Beech replied that he had an emergency pickup order, and that if Koch did not tell him the whereabouts of Lance, he would arrest Koch for obstruction. She allegedly responded with "an expletive-laced excoriation" and punched him in the chest before he arrested her. She claimed that she didn't resist; that Beech used excessive force and threatened to get Lance's location, even if he had to "beat it out of her." Koch was charged with assault and battery upon a police officer and with obstruction, but the charges were dropped. She sued the City and Beech in a Section 1983 action, claiming a violation of her Fourth Amendment rights. The district court granted the defendants' motions to dismiss, concluding that Beech was entitled to qualified immunity on Koch's claims, and that her claims against Del City failed as a matter of law. Koch appealed, arguing that Beech could not have had probable cause to believe that she committed obstruction by failing to disclose where Lance was located.

On appeal, the U.S. Circuit Court of Appeals for the Tenth Circuit affirmed. An arrest without probable cause that a crime had been committed violated the Fourth Amendment. The encounter between Beech and Koch was an investigative detention under *Terry v. Ohio*, and Beech could reasonably believe that Koch had information concerning Lance's whereabouts. Reviewing the totality of the circumstances in assessing whether an officer had probable cause to arrest, the court concluded that neither of the statements Koch made (to get off her property and to speak to her attorney) could establish probable cause to arrest for obstruction in this case. However, in the qualified immunity/summary judgment context, a plaintiff was required to show both that the defendant violated a constitutional right and that the right was clearly established. At the time of Koch's arrest, it was not clearly established that, under the circumstances, she had a right to re-

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Second Look

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2. *See* U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y., 495 F. Supp.2d 375 (S.D.N.Y. 2007).
3. U.S. ex rel. Touhy v. Ragen, 340 U.S. 462, 467-69 (1951) (federal court cannot enforce a subpoena against an employee of the federal governmental agency when the agency has validly enacted a regulation that withdraws from employees the power to produce documents).
4. Of course, the court *could* order that the DOJ or an agency attorney be allowed to participate in the deposition. Non-parties do not have an absolute right to attend federal civil action depositions, but the court has discretion to permit such attendance. *See* Grand River Enter. Six Nations, Ltd. v. Pryor, No. 02 Civ. 5068(JFK)(DFE), 2008 WL 806530 *1 (S.D.N.Y. Mar. 24, 2008) (discussing relevant factors and citing cases). However, in our scenario, the United States is still technically the plaintiff, so the DOJ or the agency attorney might assert the right to attend as the party representative (potentially preventing the relator's attendance). Alternatively, the relator or the federal lawyers could try to attend as consulting experts with the ~~connivance~~ cooperation of the relator's lawyer—which they undoubtedly would receive. **ML**

Cases

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fuse to answer Officer Beech's questions. Thus, a reasonable officer could believe that her refusal to answer constituted obstruction. This was sufficient to establish Beech's qualified immunity defense as a matter of law; therefore, the district court did not err in granting summary judgment in his favor.

On whether, as a matter of law, an individual subject to a *Terry* stop had the right to refuse to answer an officer's questions, the Tenth Circuit found there was no authority "clearly establishing a right" under the First or Fourth Amendment to refuse to answer an officer's questions during a *Terry* stop; further, there appeared to be nothing under the Fifth Amendment that would allow a person to ignore police requests for general information. Under circuit precedent, the Fifth Amendment right to remain silent might be triggered during a *Terry* stop, but this was narrowly limited to pre-arrest custodial interrogations where incriminating questions are asked. At the time of Koch's arrest, there was neither Supreme Court nor Tenth Circuit precedent, nor clearly established weight of authority from other courts, recognizing a right to refuse to respond to an officer's questions during a *Terry* stop. A reasonable officer could believe that, under the circumstances of this case, Koch was required to answer questions regarding Lance's whereabouts, and that her refusal to do so constituted a willful delay or obstruction of an officer's duty. **ML**

Mootness and Federal Claims

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City of Miami, 770 F. Supp.2d 1269 (S.D. Fla. 2011). This case is currently pending on appeal.
22. 455 U.S. 283 (1982).
23. *Covenant Christian Ministries, Inc.*, 654 F.3d at 1234 (the plaintiff church argued that its right to a building permit vested before the enactment of a 2008 ordinance, and thus, subsequent changes to a 2004 ordinance did not affect its entitlement to a building permit).
24. *Id.* (analyzing Georgia law and determining that the plaintiff did not have any vested rights under the prior ordinance).
25. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 608-09 (2001) ("[F]or so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case.").
26. *Covenant Christian Ministries, Inc.*, 654 F.3d 1231.
27. The district court severed the original ordinance by striking private parks, playgrounds and recreation centers. The Eleventh Circuit upheld this ruling, reasoning that the severance was consistent with the purpose of the residential zoning restriction which was intended for "low density single-family detached housing and residentially compatible uses requiring large amounts of open space." *Id.*
28. *See, e.g.*, Lewis v. Cont'l Bank Corp., 494 U.S. 472, 482 (1990) ("Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss. ... However, in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.").
29. *See, e.g., Buckhannon Bd. & Care Home, Inc.*, 532 U.S. 598, 605 (2001) ("prevailing party" refers only to a party who or that has achieved a "judicially sanctioned change in the legal relationship of the parties");Truesdell v. Philadelphia Hous. Auth., 290 F.3d 159, 163 (3d Cir. 2002); City of Morris v. Nationalist Movement, 273 F.3d 527, 535 (3d Cir. 2001) (events which occurred subsequent to the contested orders rendered appeal moot as to the Nationalist Movement's claim of right to use the courthouse steps and lawn, though not as to the question of attorney's fees).
30. *Buckhannon Bd. & Care Home, Inc.* at 608-09.
31. *Id.* at 601.
32. *Id.* at 605. *But see* NRA of Am., Inc. v. City of Chicago, 646 F.3d 992 (7th Cir. 2011) (remanding for award of attorney's fees in spite of mootness, where plaintiff prevailed on issue before the U.S. Supreme Court); People Against Police Violence v. City of Pittsburgh, 520 F.3d 226 (3d Cir. 2008) (plaintiff entitled to attorney's fees for obtaining preliminary injunction even though the case ultimately became moot through a revised ordinance). **ML**

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