**Recent U.S. Supreme Court Decisions and Other Current Issues for Local Governments**

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## 1. BEFORE THE COURT

Practice before the Supreme Court has become specialized over the past twenty or so years. A party seeking review by the Court, opposing its review, or participating in a case where the Court has granted certiorari should recognize that the Court is not a court of error. The Court receives almost 10,000 petitions each year. Of these, it grants certiorari in about 75-80 cases and schedules oral argument for about 65-70 cases. Because prisoners (and other *in forma pauperis* petitioners) file the largest number of petitions with the Court, statistics suggest that only about 1% of the petitions filed are granted. If only paid cases filed with the Court are considered, the number increases to about 4%. In other words, the chances of getting the Court to take your case are slim.

While rudimentary, counsel should review Rule 10 of the Supreme Court Rules as part of any consideration as to whether to seek certiorari. The Rule provides a guide to how counsel might structure a petition and ought to provide insight into whether to file a petition at all. The Rule provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Justice Alito pointed this out in his concurrence in the denial of certiorari in *Salazar-Limon v. City of Houston.*

Framing the issue in a petition for certiorari ought to be the second step after reviewing the Rule. As noted, the Court must weed through several thousand requests to find the very few cases it wants to decide. Four Justices must vote to grant certiorari and each of their votes is precious and well considered. A Justice may believe that an issue ought to be decided, but will withhold the



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vote to grant certiorari for many reasons. These can include fear that the issue will be decided adversely to the Justice's views for a variety of reasons including that the arguments advancing the issue in the petition seem leaden and unlikely to attract a majority; or a belief that another case frames the issue better.

The petitions in *Lane v. Franks* and *Integrity Staffing Solutions v. Busk* offer two different approaches to framing an issue. The Court granted both petitions. In *Lane,* the issue was framed succinctly and without prelude; counsel couched the issue in viscerally and intellectually compelling language. In *Integrity Staffing Solutions* counsel offered a prelude to the similarly succinct issue offering a bit of important background to what might have otherwise appeared a very dull question. Each of these attorneys is a respected Supreme Court counsel who is a sought-after advocate for a reason.

While the Court denies certiorari to many similarly succinct and well phrased issues, many of the petitions it denies are garbled and include far too many issues for the Court's consideration. A case generally has one compelling reason that can attract the Court's attention and as with *Lane* a corollary issue attendant to it. Petitions that offer the Court an opportunity to decide more than two issues are rarely granted and framing the petition to include myriad issues may enjoy client approval, but will rarely find success.

Because the Court receives so many petitions, finding amicus support can often help get the Court's attention and show that the case has a broader impact. Hearing the Petitioner make that argument can certainly be persuasive, but proof that the issue affects more than just the litigants says much more. Finding an amicus can often be difficult as where there is a circuit split, there will be many potential amici who don't want to see the law changed in their circuit, or their state court has adopted a rule with which they are happy. The more diverse the group the amicus represents the more likely the Court will recognize the need for deciding the issue.

The Court's rules do not limit the amici to arguing the record and in large measure the Court's practice encourages the amici to bring to the Court's attention relevant facts, treatises and studies both at the petition and merits stage. In *Comptroller v. Wynne*, IMLA filed an amicus brief at the petition stage in support of the State of Maryland and several Maryland counties and the Court sought the views of the Solicitor General. The Solicitor General filed his views in early April 2014, suggesting that the Court grant certiorari and reverse the Maryland court; he cited to facts offered by IMLA in its amicus brief that were not part of the record. The Court granted certiorari and decided the case as a part of its 2014 Term. Similarly, in *Murr v. Wisconsin*, Justice Kennedy cited to the IMLA amicus brief, which listed over 100 examples of merger provisions from around the country in rejecting the petitioner's argument. And in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), Justice Alito in deciding an important government speech case referred several times to the IMLA amicus brief and to a survey IMLA conducted of its members to support his decision. IMLA completed a similar survey for a government speech case more recently in *Shurtleff v. Boston*.



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As a Respondent, when the Petitioner files with the Supreme Court, counsel first must consider whether to file a response or waive doing so. Advice on this topic varies, with some counseling to file a response and others counseling against filing. Filing a response draws attention to the issue and for that reason alone, many counsel against it. On the other hand, the Court will ask for a response in cases it considers might merit certiorari. Because it only takes one justice to ask for a response, the request may not indicate that certiorari will be granted, but certiorari will not be granted where there is not a response and the request draws attention to the issue. So, in cases where counsel believes a response will be requested, it is best to be proactive and file and not waive the response. The response needs to recognize that the question for the Court at this stage is whether to grant certiorari, not whether the lower court was wrong in its decision. Going back to Rule 10, counsel for the Respondent should describe why the case does not fit. In *Plumhoff v Rickard*, the Court asked the Respondent to file a response. That response provided little help to the Court and may be a model of how not to write a Respondent's brief at the petition stage. In contrast, the City of Chicago filed a model response in *Hillman v. City of Chicago* and the Court denied certiorari.

Unlike a Petitioner seeking certiorari and trying to draw attention to the issue, the Respondent tries to cover itself in anonymity. So, in addition to the reasons for filing or not filing a response already discussed, because the goal of the Respondent is to have the Court deny certiorari, it is an extremely rare case that a Respondent should consider obtaining amicus support at the certiorari stage as doing so only draws attention to the case and increases the chances that the Justices will take a closer look at the case. Additionally, the Respondent may want to look at the Court's schedule. Timing a response can reap some rewards. For example, timing a response or waiver to get into the "long conference" could make a difference in the quest for anonymity.

During its term, the Court holds private conferences to discuss whether to grant certiorari. The long conference is the first conference of the term and is usually held the Friday before the Court's first oral arguments in the term. At the long conference, the Court reviews thousands of petitions that have stacked up during the summer recess. At other conferences during the year the numbers are about a hundred or so, which makes anonymity at the long conference statistically more likely. When the Court conferences, the Chief Justice circulates a list of cases for discussion and each Justice may add to that list. If a case scheduled for that conference is not on the discussion list, certiorari will be denied.

If the Court grants certiorari, the first thing counsel should do is contact the Georgetown Supreme Court Institute and ask for a moot court. The Institute provides this service free of charge and to the first party to contact it; although, its new policy is to toss a coin in those cases where each party contacts it within 24 hours, so contacting them quickly cannot be over emphasized. (If you would like to schedule a moot in your case, call or email the Director, Debbie Shrager (202-662-9350 or des113@georgetown.edu). Merits briefs can be due in very short order. This means that counsel should be prepared by having lined up amici and possibly engaging Supreme Court counsel. Getting Supreme Court counsel and amici for the merits stage will be much easier than at the petition stage. Attorneys practicing before the Court often want to increase the number of arguments on their resume and may be willing to handle a case pro bono. Amici will often line up



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unbidden to file either for or against an issue. Coordinating the amicus effort for the client should be an important part of the advocacy. Rather than each amicus writing on the same subpart of an argument, each can take an argument, support it and expand it, avoiding repetition. Counsel for a party cannot write an amicus brief in the case, so while discussion and coordination are important, those discussions and coordination cannot direct the amicus brief in detail.

In the last several years, the Ninth Circuit generated the most merits cases of any circuit and its reversal rate has been high. In the 2018 term, the Ninth Circuit generated both the highest number of cases on the Court's docket (19%) and was reversed at the highest rate (86%). Similarly in the 2019 term, cases from the Ninth Circuit made up 14% of the Court's docket, though the Second Circuit was close behind at 12%. The Ninth Circuit was reversed 90% of the time that year. In the 2020 term the trend continued and decisions from the Ninth Circuit comprised 23% of the Court's docket and it was reversed 94% of the time. For context, the Fifth Circuit generated the second highest share of the Court's docket in 2020 at 10%, and it was reversed 71% of the time. And in the 2021 term, the Ninth Circuit again generated the most merits cases at 18% and was reversed 100% of the time. In fairness, most cases the Court accepts are reversed. The 2021 term saw a 82% reversal rate overall, which is fairly consistent to other years. So, the odds are, if you were victorious below and the Court accepts certiorari, you may be in for a reversal. Scotusblog.com (from which these statistics are derived) provides a great resource on the Court and provides statistical reports for much of its activity that can be vital to understanding the Court.

The Scotusblog.com statistics shows who has argued cases before the Court and their experience. Many of the premier practitioners before the Court have experience in the Office of Solicitor General, some having been Solicitor General at one time. As noted, practice before the Court has become more specialized, and in the 2021 term, 72% of the oral advocates were considered "experts" (defined as having argued at least five cases before the Court).

**2.** OCTOBER **TERM 2021**

***City of Austin, Texas v. Reagan National Advertising of Austin, LLC*** **.– First Amendment / Signs**

At issue in this case is the City of Austin's sign code (before it was amended) which defined an "off-premise[s] sign" as "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." Beginning in 1983, Austin began prohibiting new off-premises signs. Existing off-premises signs could stay, but they could not change the degree of non-conformity. At some point, Austin permitted "on-premise[s] signs" to be digitized. Because digitization did not exist in 1983, the result was that on-premises signs could be digitized, but off-premises signs could not. When outdoor advertising companies sought to digitize their billboards, Austin denied their request and they sued, claiming the distinctions violated the First Amendment.

The Fifth Circuit concluded that the distinction between on-premises and off-premises is content based and therefore "presumptively unconstitutional" under *Reed* and subject to strict



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scrutiny. The Fifth Circuit reasoned that to determine if a sign is on or off-premises, "one must read the sign and ask: does it advertise 'a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site'?" The court concluded that the inquiry is more than the otherwise content-neutral question about the sign's location, because you must also ask who the speaker is and what the speaker is saying, which are both hallmarks of content-based inquiries. The Fifth Circuit then concluded that the City failed to meet strict scrutiny.

In a 5-1-3 opinion authored by Justice Sotomayor, the Supreme Court reversed, concluding that distinctions between on/off-premises signs in sign codes are content neutral and therefore not subject to strict scrutiny. The Court explained these distinctions are "location-based and content-agnostic…" and they are "therefore similar to ordinary time, place, or manner restrictions." Instead of overruling *Reed* or explaining why *Reed* does not apply, the majority examined *Reed* and fit its holding into its interpretation of *Reed*, in the process rejecting an overly broad reading of the decision. In doing so, the majority expressly rejected the Fifth Circuit's conclusion that a "regulation is automatically content based…if it requires reading the sign" as "too extreme an interpretation" of *Reed*. (The Sixth Circuit had similarly adopted a "need to read test" in *Thomas v. Bright*, 937 F.3d 721, 729 (6th Cir. 2019)).

Reagan did not latch on to the "need to read" reasoning, and instead it argued that language from *Reed* indicating a regulation that makes distinctions based on "function or purpose" is content based and here, Reagan argued, the City's sign code defined off-premises signs by their function or purpose. The Supreme Court rejected this application of *Reed*, explaining that it "stretches *Reed's* 'function or purpose' language too far." Instead, the Court explained *Reed's* test for content-based regulations is more "straightforward." If the regulation discriminates based on subject matter (as it did in *Reed*) it is content based, but *Reed's* "function or purpose" language meant that "subtler forms of discrimination that achieve identical results based on function or purpose" are also content based. The Court explains that the "function or purpose" language from *Reed* was meant to encompass situations where the regulation merely swaps obvious subject matter distinctions for a "function or purpose proxy that achieves the same result." For example, the Court explains a regulation of a sign that is "designed to influence the outcome of an election" (function or purpose) is a proxy for a political sign (subject matter). But the Court emphasizes that *Reed* did not mean that "any classification that considers function or purpose is always content based" because that would "contravene numerous precedents… and Reed did not purport to cast doubt on these cases." In this case, the majority noted "a location-based and content-agnostic on-/off-premises distinction does not, on its face, "singl[e] out specific subject matter for differential treatment."

The Court ultimately remanded the case for further analysis, given that the Fifth Circuit had not reviewed the ordinance under intermediate scrutiny.

Justice Breyer wrote a concurrence that was significantly more critical of *Reed* and also cites IMLA's amicus brief when discussing the traffic safety implications of digital billboards.



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Justice Alito concurred in the judgment only and would have issued a significantly narrower ruling in Austin's favor based solely on the fact that the "distinction between a digitized and non-digitized sign is not based on content, topic, or subject matter."

Justice Thomas, joined by Justices Gorsuch and Barret dissented. Justice Thomas authored *Reed v. Town of Gilbert* and he accuses the majority of "misinterpret[ing] *Reed's* clear rule for content-based restrictions and replac[ing] it with an incoherent and malleable standard." The dissent argues that the distinction is not location based because the official must not only know where the sign is to enforce the sign code, but must also know what the sign says. Further, the dissent argues that the majority's rule cannot be applied in a principled way as it does not "explain how courts should draw the line between a sufficiently substantive or specific content-based classification and one that is insufficiently substantive or specific."

***Shurtleff v. City of Boston* – Government Speech**

Boston owns three flagpoles in front of City Hall. Boston flies the United States and the POW/MIA flag on one flagpole, the Commonwealth of Massachusetts flag on the second flagpole, and its own flag on the third flagpole. Third parties may request to fly their flag instead of the City's flag in connection with an event taking place near the flagpoles. Over a 12-year period, the City approved 284 flag-raising events and until the Camp Constitution request, never rejected one.

Camp Constitution asked the City to fly its Christian flag while it held an event near the flag. The City refused its requests, explaining that "the City's policy was to refrain respectfully from flying non-secular third-party flags in accordance with the First Amendment's prohibition of government establishment of religion."

Although the Camp Constitution request was the first it ever rejected, it was also the first request made by a religious organization to fly a flag at City Hall. Broadly speaking, the third-party flags that the City approved were for "the flags of other countries, civic organizations, or secular causes." Shortly after litigation commenced, Boston memorialized its policy to comport with its past practices.

Camp Constitution sued the City and the First Circuit held that the City was engaging in government speech when it flew third-party flags in front of City Hall and it therefore did not violate the First Amendment.

In an opinion authored by Justice Breyer, the Supreme Court reversed, concluding that after balancing several factors, Boston was not engaging in government speech, and it therefore abridged Camp Constitution's freedom of speech by refusing to let it fly its flag based on religious viewpoint. The majority underscored the importance of the government speech doctrine: that a government is free to speak for itself, to formulate policies, and implement programs. And when it does so, "the First Amendment does not demand airtime for all views"



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as government would be unable to function otherwise. The crucial question then, was whether this was government speech.

The majority explained whether a government is engaged in its own speech can be difficult to determine where "a government invites the people to participate in a program." In these circumstances to determine if a message is government speech, the majority provided a "holistic inquiry," which looks to "the history of the expression at issue; the public's likely perception as to who (the government or private person) is speaking; and the extent to which the government has actively shaped or controlled the expression."

Although the first factor (history) favored Boston, the Court found that the second factor, whether the public would tend to view the speech as Boston's as being inconclusive. However, on the issue of whether Boston controlled the message, the Court found the answer was "not at all" and ultimately concluded this factor was "the most salient feature of the case." Here the Court pointed to the fact that although Boston may have endorsed some messages associated with certain flags like the Pride Flag, a local credit union flag's connection to the city was "more difficult to discern." Furthermore, the Court found the City had no policy (until after litigation commenced) on how to decide which flags it would fly and the City exercised no control over the flag raisings.

The Court also explained that if a local government wishes to speak for itself when it creates a program like Boston did here that involves third party speech they can "easily" do so. The Court helpfully pointed to the City of San Jose as an example, which provides in writing that its "'flagpoles are not intended to serve as a forum for free expression by the public,'" and lists approved flags that may be flown "'as an expression of the City's official sentiments.'" While the Court ultimately found Boston had not engaged in government speech in this case, it concluded by noting that nothing prevents the City from changing its policies going forward.

Chief Justice Roberts, Justice Sotomayor, Justice Kagan, Justice Kavanaugh, and Justice Barrett joined Justice Breyer's opinion. Justice Kavanaugh authored a concurrence to note that the Court has "repeatedly made clear" that," a government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations…"

Justice Alito authored a concurrence in the judgment only, which Justices Thomas and Gorsuch joined. Justice Alito agreed that Boston should lose the case, but did not agree with the majority's rationale to rely on factors to determine if a message is government speech. Under his approach, "government speech occurs if – but only if – a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech."

***Kennedy v. Bremerton School District* – Establishment Clause / Free Speech / *Lemon***



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Though the majority and dissent disagree on the facts (just as the parties did), they do agree that Joseph Kennedy lost his job as an assistant football coach after engaging in prayer activity during high school football games. That's about where their agreement ends.

The majority characterizes Mr. Kennedy as offering a "quiet prayer of thanks" at midfield and that when students asked if they could join him, he indicated it was a "free country." Eventually, most of the team would join the prayer and some of the opposing players might join as well. Mr. Kennedy would also offer motivational speeches with prayer and would also pray in the locker game pre- and post-game with the players. (The dissent includes pictures of what the prayer activity looked like and paints a different picture of the facts through those pictures).
The prayer activity went on for seven years until someone informed the School District (the "District"), at which point the District, wary of an Establishment Clause violation, told Mr. Kennedy that the inspirational talks with prayer, prayer with students at mid-field, and the locker room prayer practice would all need to cease. Mr. Kennedy stopped the locker room prayer and inspirational speeches involving prayer, but wished to continue praying at midfield and told the District he planned to continue his "private religious expression" at mid-field. The District offered alternative accommodations as it did not want him praying with students, but Mr. Kennedy insisted on praying at mid-field. At three subsequent games, Mr. Kennedy prayed at mid-field with students and other members of the community joining him (and as the dissent pointed out, Mr. Kennedy had informed the media about his prayer activity which created significant challenges for the school, including the community members rushing the field and knocking over other students in the process and a Satanist group requesting access to the field for religious purposes). The District ultimately did not renew Mr. Kennedy's contract, citing concerns of the Establishment Clause and his continued prayer activity while on duty instead of supervising students.

Mr. Kennedy sued, claiming a Free Exercise and Free Speech violation. The District responded that his speech was not private speech under *Garcetti* and *Pickering*, and it therefore could subject him to discipline. The District also argued that it was risking an Establishment Clause violation if it did not terminate his contract given his refusal to curtail his prayer activity on the field with students.

In a 6-3 decision divided on ideological lines authored by Justice Gorsuch, the Supreme Court concluded that the District violated both the Free Speech and Free Exercise Clauses of the First Amendment when it terminated Mr. Kennedy's contract based on his religious conduct / speech. In dismissing the employer's Establishment Clause concerns, the majority explained "in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights."

In terms of the Free Exercise claim, the Court explained that in "forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule." Here, the rule was not generally applicable given that the religious conduct was prohibited while secular conduct that was comparable was not subject to discipline, including staff being allowed to make personal calls and visit with friends after the game. Nor was the rule neutral, given that it was



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specifically singling out religious conduct as the prohibited practice. Thus, the District's decision was subject to strict scrutiny, a standard which it could not survive (discussed more fully below).

As this is a public employment case, the Court analyzed the Free Speech claim under *Pickering v. Board of Ed*. and *Garcetti v. Ceballos*. The first step in the inquiry is to determine the nature of the speech at issue and whether the public employee is speaking "pursuant to [his or her] official duties." If so, an employer is generally allowed to control and discipline the public employee and the speech at issue is generally not protected under the Free Speech clause as it is considered the government's own speech.

The Court's focus was whether Mr. Kennedy's prayer occurred as a private citizen or whether it was government speech attributable to the District. The Court concluded Mr. Kennedy was speaking as a private citizen when he was engaged in the prayer that resulted in his suspension and that "he was not engaged in speech 'ordinarily within the scope' of his duties as a coach." On this point, the Court underscored: "He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach." The fact that coaches were free to engage in other secular conduct during this time including checking their phones underscored that this was private speech. The Court rejected an overly broad reading of *Garcetti*, explaining employers cannot utilize "excessively broad job description[s] and treat "everything [employees] say in the workplace as government speech subject to government control."

Once the majority concluded that Mr. Kennedy was speaking as a private citizen, it indicated that strict scrutiny would apply (citing *Reed v. Town of Gilbert*, because this would be a content-based regulation of speech), again, a standard that the District could not meet. Though the Court noted that the District also could not meet a more lenient standard under *Pickering-Garcetti*. The District argued that it could meet the strict scrutiny standard under both the Free Speech and Free Exercise Clause because it had a compelling interest in avoiding an Establishment Clause violation, relying on *Lemon's* "reasonable observer" standard. The majority flatly rejected this argument, explaining that the Free Speech, Free Exercise, and Establishment Clauses should be read as "complementary" and are not at "warring" purposes.

Moreover, the majority held that the Supreme Court "long ago abandoned *Lemon* and its endorsement test offshoot." The Court explained that "[a]n Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech… Nor does the Clause 'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'" Instead of *Lemon*, the majority explains that the Establishment Clause must be interpreted "by reference to historical practices and understandings," which will allow courts to "faithfully reflect the understanding of the Founding Fathers." (This was the test endorsed in *Town of Greece* and *American Legion* in the context of legislative prayer and monuments).



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Justice Sotomayor, joined by Justices Breyer and Kagan dissented. As noted above, the dissent disagreed with the majority on not just the law, but the facts as well, arguing that the majority had "misconstrue[d] the facts." The dissent explains that:

> Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.

The dissent accuses the majority of "paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion." The dissent also accuses the majority of overruling Lemon and calling into question "decades of subsequent precedents." On this point, the dissent explains: "The Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in *Lemon*… Both of these moves are erroneous and, despite the Court's assurances, novel."

***Vega v. Tekoh* – Miranda / Section 1983**

This case involves a deputy sheriff's investigation of sexual assault allegations. Deputy Vega believed his questioning was non-custodial and he did not Mirandize the suspect—Terence Tekoh—prior to asking questions about what had happened. Tekoh ultimately agreed to write down what happened, confessing to the crime both in writing and in conversation (Tekoh claims this was a coerced confession). Tekoh was arrested and charged in state court for the sexual assault.

The prosecutor introduced the confession against him at trial as evidence of his guilt, and the judge admitted the confession—holding that Tekoh was not in custody when the statement was taken and there was therefore no *Miranda* violation. The jury nonetheless returned a verdict of not guilty.

After his acquittal, Tekoh sued Deputy Vega under 42 U.S.C. § 1983 for violating his Fifth Amendment right against self-incrimination.

In a 6-3 decision authored by Justice Alito, the Supreme Court held that a *Miranda* violation does not provide a basis for a claim under Section 1983. The Court reasoned that *Miranda* is a prophylactic rule, meant to provide procedural safeguards to ensure that police do not violate the Fifth Amendment rights of those in custody. The rule, the Court explained, is "constitutionally based" but it remains prophylactic. And, the Court reasons, at no point in the *Miranda* decision or any subsequent decision, did the Court say a violation of the *Miranda* rule was tantamount to a violation of the Fifth Amendment. Instead, the Court explained, *Miranda* and subsequent cases



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demonstrate that the *Miranda* warnings are "needed to safeguard [the Fifth Amendment] right during custodial interrogation." The remedy for a violation of *Miranda* is suppression of evidence at the criminal trial, not a Section 1983 lawsuit.

The Court rejected Tekoh's argument that *Dickerson*, which held that Congress could not abrogate the *Miranda* decision by statute, required a finding that a *Miranda* violation should be equated to a Fifth Amendment violation. Instead, the Court emphasized that while *Miranda* is "constitutionally based" and has "constitutional underpinnings" it is necessary to protect the Fifth Amendment right. But, according to the Court, "the obvious point of these formulations was to avoid saying that a *Miranda* violation is the same as a violation of the Fifth Amendment right."

Finally, the Court noted that the fact that *Miranda* is a prophylactic rule does not necessarily doom Tekoh's claim because Section 1983 claims may be brought based on "the deprivation of any right, privileges, or immunities secured by the… laws." (emphasis in the original). However, the Court explained that "a judicially crafted prophylactic rule should apply only where its benefits outweigh its costs." (cleaned up). And in this case, the Court concluded the benefits of allowing a Section 1983 claim based on the introduction of an unMirandized statement would be "slight" and the costs of judicial economy and federalism concerns would be "substantial." Thus, the Court concluded that exclusion of the unwarned statements is a "complete and sufficient remedy" except in "unusual circumstances."

***Rivas-Villegas v. Cortesluna* – Qualified Immunity**

In Rivas-Villegas, police officers responded to a domestic disturbance 911 call made by a woman and two children who indicated the mother's boyfriend was threatening them with a chainsaw. They indicated they had locked themselves in a bedroom. When the officers arrived, they saw the boyfriend, Cortesluna, through a window but did not see or hear a chainsaw. The officers formulated a plan, which included using less lethal force and went and knocked on the door to ask Cortesluna to come outside and speak with them. They announced themselves and when Cortesluna came to the door, he was holding a large metal object that appeared to be a crowbar. The officers ordered him to drop the weapon and come outside.

The plaintiff dropped the metal object, put his hands up and came outside. The officers ordered him to his knees at which point, the officers noticed a knife in his pocket. They ordered him not to put his hands down (toward the knife) but to put his hands up. Cortesluna lowered his head and hands (toward the knife) and one of the officers, Officer Leon, immediately shot him with two rounds from a bean bag shotgun. He then put his hands up and they ordered him to get down on the ground, and he complied. Officer Rivas-Villegas then put his knee on Cortesluna's back for no more than eight seconds in order to get him restrained in handcuffs.

Cortesluna sued the officers, claiming excessive force for both the use of the bean bag shotgun and for the knee on his back for eight seconds. The Ninth Circuit concluded that the officer who fired the beanbag gun did not violate the Fourth Amendment given the rapidly unfolding events



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and the threat to the officers when Cortesluna was reaching toward the knife in his pocket. As to officer Rivas-Villegas, however, the Ninth Circuit concluded that he violated the Fourth Amendment right to be free from excessive force "by leaning too hard" on Cortesluna's back, allegedly causing injury because by the time he did so, the threat had passed. The Ninth Circuit also denied qualified immunity, concluding it was clearly established that "police may not kneel on a prone and nonresisting person's back so hard as to cause injury."

The Supreme Court issued a per curiam reversal. In its decision, the Court noted *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000), the circuit court case which the Ninth Circuit had claimed clearly established the law for the purposes of denying qualified immunity, diverged from the situation in this case in several respects. *LaLonde* involved a response to a noise complaint, whereas this case involved a response to a serious domestic violence situation, possibly involving a chainsaw. Additionally, the individual in *LaLonde* was armed only with a sandwich, whereas in this case, it was undisputed that Cortesluna had a knife in his pocket. Finally, and again relying on the video evidence, the Court concluded that the officer in this case put his knee on the suspect's back for no more than eight seconds, whereas in the *LaLonde* case the plaintiff had claimed the officer "deliberately dug his knee into his back when he had no weapon and had made no threat when he approached the police." In granting qualified immunity, the Court concluded LaLonde did not "give fair notice" to the officer.

IMLA participated as an amicus petitioning the Supreme Court for certiorari.

***City of Tahlequah v. Austin -Qualified Immunity***

This case involved a situation where officers were called to a possible domestic violence situation where an intoxicated individual would not leave his ex-wife's garage. When she called 911, she explained to the dispatcher that she needed police assistance or "it's going to get ugly real quick." Relying on body camera footage, the Supreme Court describes the following facts. When the officers arrived, they stayed about six to eight feet back from the ex-husband who proceeded to walk to the back of the garage where his tools were. He grabbed a harmer and turned around to face the officers, bringing it up with both hands as if he was going to swing a baseball bat. The officers can be heard yelling at him to drop the hammer. Instead of heeding their orders, the ex-husband raised the hammer as if he planned to throw it or charge at one of the officers. Two officers then fired their weapons and killed him.

The Tenth Circuit denied the officers qualified immunity, concluding they had recklessly or deliberately created the situation requiring deadly force by cornering the decedent in the back of the garage. The Tenth Circuit concluded the law was clearly established for the purposes of qualified immunity in that circuit.

The Supreme Court reversed the Tenth Circuit on the issue of clearly established law, without deciding whether an officer can violate the Fourth Amendment by "recklessly creating a situation that requires deadly force." In concluding the officers were entitled to qualified immunity, the Supreme Court explained "[n]ot one of the decisions relied upon by the Court of



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Appeals…comes close to establishing that the officers' conduct was unlawful." For example, *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997) involved a situation where officers were responding to a possible suicide situation by running toward the individual in his parked car and screaming at him while attempting to wrestle the gun from his hands, which was readily distinguishable from the facts in this case. In concluding that the law was not clearly established, the Court noted that it has repeatedly told lower courts "not to define clearly established law at too high a level of generality" and that "it is not enough that a rule be suggested by then-existing precedent."

***Houston Community College System v. Wilson*** – **First Amendment / Legislative Censure**

Houston Community College System (HCC) is a public community college district. Its board (Board) is comprised of nine trustees, each of whom is elected from a single member district. Mr. Wilson was elected to the Board. He voiced concerns that other trustees were violating the Board's bylaws. He made his concerns public and, among other things, arranged for robocalls regarding the Board's actions and hired a private investigator to confirm if a trustee resided in the district she was elected for.

The Board voted to adopt a resolution publicly censuring Wilson for acting in a manner "not consistent with the best interests of the College or Board." The Board directed him to "immediately cease and desist from all inappropriate conduct" and warned that failure to do so, could result in further disciplinary action by the Board. The Board had no ability to remove Mr. Wilson. But, they also imposed additional measures including rendering him ineligible for an officer position, ineligible for reimbursement for travel expenses, and ineligible to access funds for community affairs.

Mr. Wilson sued, arguing that the censure violates his First Amendment rights. The issue before the Court was whether the First Amendment restricts the authority of an elected body to issue a censure resolution in response to a member's speech.

In a unanimous opinion authored by Justice Gorsuch, the Supreme Court held that a public censure, without more, does not amount to a First Amendment violation. The Court indicated the long history of public censures by elected bodies in this country, dating back as early as colonial times supports the holding, as does the Court's own precedent. In concluding that Mr. Wilson suffered no adverse action, the Court noted "we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers – and to continue exercising their free speech rights when criticism comes." The Court also explained that while the First Amendment "surely" protected Mr. Wilson's speech, it likewise "cannot be used as a weapon to silence other representatives seeking to do the same."

The Court did note that there may be some circumstances in which a verbal reprimand or censure might give rise to a First Amendment retaliation claim, listing possible examples in the context of students, employees, or licensees. The Court also stressed that it was not addressing other punishments, or a censure aimed at a private individual.



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***New York State Rifle & Pistol Association Inc. v. Bruen,*** **- Second Amendment**

New York and six other states had discretionary permit laws for firearms, meaning that a prospective licensee had to show a "special need" to carry a handgun outside the home in that state, beyond just a generalized need of self-defense. The case raised several important issues, including: whether New York's license regime is unconstitutional under the Second Amendment; whether there is a Second Amendment right to carry a firearm outside the home for self-defense; and how challenges to firearm should regulations be analyzed.

In a 6-3 opinion authored by Justice Thomas, the Supreme Court held that New York's proper-cause requirement for obtaining an unrestricted license to carry a concealed firearm violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms. Even though every circuit court had implemented a means-end scrutiny analysis (strict or intermediate) to analyze these claims, the Supreme Court rejected means-end scrutiny in favor of text, history, and tradition analysis.

The Court announced that to survive a challenge under the Second Amendment, if the plain text covers the individual's conduct, the government "must demonstrate that regulation is consistent with this Nation's historical tradition of firearm regulation." We look to history, per the Court, because: "[t]he Amendment was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors."

In reaching its conclusion, the Court did not call into question the "shall issue" permitting regimes in place in 43 states. The Court also underscored that governments may still prohibit firearms from sensitive places, such as schools, government buildings, polling places, courthouses, and legislative assemblies, noting it was not providing an exhaustive list. The Court did note, however, that New York could not classify the entire island of Manhattan as a sensitive place. Instead, to determine if another location was a "sensitive place," the Court explained that lower courts need only use "analogies to those historical regulations of 'sensitive places…"

***National Federation of Independent Businesses v. Department of Labor*** **– Administrative Law / Agency Authority**

The Court in a per curiam decision concluded that those challenging the vaccine mandate for large employers are likely to succeed in their claim that Congress failed to clearly authorize the Secretary of Labor to impose such a mandate. The Act that created OSHA allows for temporary emergency standards when it is "necessary" to protect employees exposed to "grave danger" from "exposure to substances or agents determined to be toxic or physically harmful or from new hazards."

According to the Court, the Act allows the Secretary of Labor to "set workplace safety standards, not broad public health measures," and the vaccine mandate is a broad public health measure.



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"Although COVID– 19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather." "Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization."

Justices Breyer, Sotomayor, and Kagan dissented.

***Biden v. Missouri* - Administrative Law / Agency Authority**

The Court in a per curiam decision concluded that the Secretary of Health and Human Services did not exceed his statutory authority in requiring facilities that receive Medicare and Medicaid funding to ensure their employees are vaccinated. Congress authorized the Secretary to promulgate "requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution," as a condition of allowing health care facilities to participate in Medicare and Medicaid.

The Court reasoned: "The rule . . . fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It would be the 'very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID–19.'"

Justices Thomas, Alito, Gorsuch, and Barrett dissented.

***West Virginia v. EPA* – Major Questions Doctrine / Administrative Law**

Per the Clean Air Act, for new and existing powerplants EPA may come up with airpollution standards which reflect "the best system of emission reduction" (BSER). Prior to the Clean Power Plan (CPP), when EPA regulated under this provision of the Clean Air Act it required existing powerplants to make technological changes—like adding a scrubber—to reduce pollution.

In the 2015 EPA released the CPP which determined that the BSER to reduce carbon emissions from existing powerplants was "generation-shifting." This entailed shifting electricity production from coal-fired power plants to natural-gas-fired plants and wind and solar energy. Operators could generation shift by reducing coal-fired production, buying or investing in wind farms or solar installations, or purchasing emission credits as part of a cap-and-trade regime. The goal of the CPP was to have coal provide 27% of national electricity generation by 2030, down from 38% in 2014.

The Supreme Court held 6-3 that the EPA lacked the statutory authority to issue the CPP. The Court, in an opinion written by Chief Justice Roberts, held that generation shifting exceeds EPA's authority under the Clean Air Act because Congress didn't give EPA "clear congressional



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authorization" to regulate in this matter. "As a matter of 'definitional possibilities,' generation shifting can be described as a 'system'—'an aggregation or assemblage of objects united by some form of regular interaction' capable of reducing emissions. But of course almost anything could constitute such a 'system'; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents."

EPA had to show it had "clear congressional authorization" to adopt the CPP because the Court applied the major questions doctrine. This doctrine applies, according to the Court, in "extraordinary cases"—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.

The Court opined this is a major questions doctrine case because "[i]n arguing that [the relevant provision of the Clean Air Act] empowers it to substantially restructure the American energy market, EPA 'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.' It located that newfound power in the vague language of an 'ancillary provision[]' of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."

Justices Kagan, Breyer, and Sotomayor dissented. They disagreed with the Court's conclusion that this is a major questions case. They argue that "best system"— "full stop—no ifs, ands, or buts of any kind relevant here" is a broad Congressional authorization. "The parties do not dispute that generation shifting is indeed the 'best system'—the most effective and efficient way to reduce power plants' car[1]bon dioxide emissions." "A key reason Congress makes broad delegations like Section 111 [of the Clean Air Act] is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise."

***Thompson v. Clark* – Malicious Prosecution/ Section 1983**

Holding: Thompson's showing that his criminal prosecution ended without a conviction satisfies the requirement to demonstrate a favorable termination of a criminal prosecution in a Fourth Amendment claim under Section 1983 for malicious prosecution; an affirmative indication of innocence is not needed.

***Cummings v. Premier Rehab Keller, P.L.L.C.,* - Emotional Distress Damages**

Holding: Emotional distress damages are not recoverable in a private action to enforce either the Rehabilitation Act or the Affordable Care Act.

**3. Supreme Court 2022 Term**



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***303 Creative v. Elenis*** **- Free Speech / Anti-Discrimination Laws**

Lorie Smith designs websites for her company 303 Creative. She wants to start creating wedding websites, but she does not want to create websites that celebrate same-sex marriage due to her religious beliefs. She also wants to publish a statement on her website that she will not create wedding websites for same-sex couples as doing so would compromise her religious beliefs.

Colorado's Anti-Discrimination Act's (CADA) "accommodation clause" prohibits public accommodations from refusing to provide services based on a number of protected characteristics, including sexual orientation. CADA's "communication clause" prevents public accommodations from communicating that someone's patronage is unwelcome because of sexual orientation.

The Tenth Circuit ruled that Colorado's statute that requires Smith to create websites for same-sex marriages and prohibits her from publishing a statement explaining why doing so violates her religious beliefs does not violate the First Amendment's free speech or free exercise clauses.

Regarding free speech and the "accommodations clause" of CADA, the Tenth Circuit concluded the clause compels speech and is a content-based restriction, but that it is nevertheless constitutional and survives strict scrutiny. The court reasoned that the "accommodation clause" is "narrowly tailored to Colorado's interest in ensuring 'equal access to publicly available goods and services.'" The Tenth Circuit also concluded the "communication clause" did not violate Smith's free speech rights because, the court reasoned, the State could "prohibit speech that promotes unlawful activity, including discrimination."

The Tenth Circuit also concluded that CADA did not violate the free exercise clause, but the Supreme Court did not grant certiorari on this issue and that issue is therefore not before the Court.

The issue in this case is whether applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment.

***National Pork Producers Council v. Ross*** **–Dormant Commerce Clause**

This case involves a dormant commerce clause challenge to a state law that has broad implications for local governments due to the federalism principles at stake.

California's Proposition 12 prevents the sale of "[w]hole pork meat" in the state unless the meat was produced in compliance with "specified sow confinement restrictions." Proposition 12 is intended to "prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California." The



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National Pork Producers Council claims that Proposition 12 violates the dormant Commerce Clause.

The plaintiffs allege that the pork industry is highly interconnected and that "[t]o ensure they are not barred from selling their pork products into California, all the producers and the end-of-chain supplier will require assurances that the cuts and pork products come from hogs confined in a manner compliant with Proposition 12." The result, they claim, is that all suppliers will either have to comply with California's law or incur additional costs to segregate their products. The plaintiffs claim the law will result in a 9.2 % increase in production cost for pork. In their suit, the plaintiffs allege that the California law violated the dormant commerce clause by impermissibly regulating extraterritorial conduct outside of the State and imposes an undue burden on interstate commerce.

The Ninth Circuit held Proposition 12 does not violate the dormant Commerce Clause. According to the Ninth Circuit, citing to *South Dakota v. Wayfair* (2018), there are "two primary principles that mark the boundaries of a State's authority to regulate interstate commerce." "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." The Supreme Court in *Wayfair* also reiterated the holding of a previous case that state law may violate the dormant Commerce Clause when it has "extraterritorial effects."

Regarding "extraterritorial effects" the National Pork Producers argued that Proposition 12 impermissibly regulates the price of pork in other states. The Ninth Circuit acknowledged that the Supreme Court cases cited by the plaintiffs "used broad language." But the Ninth Circuit has interpreted those cases narrowly holding that the extraterritoriality principle is "not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices." According to the Ninth Circuit: "[i]t is undisputed that Proposition 12 is neither a price-control nor price-affirmation statute, as it neither dictates the price of pork products nor ties the price of pork products sold in California to out-of-state prices."

The National Pork Producers next argued that Proposition 12 imposes a burden on interstate commerce which is "clearly excessive in relation to the putative local benefits" in violation of the dormant Commerce Clause. According to the Ninth Circuit "the crux of the allegations supporting the Council's substantial burden claim is that the cost of compliance with Proposition 12 makes pork production more expensive nationwide." But, the Ninth Circuit reasoned, "alleged cost increases to market participants and customers do not qualify as a substantial burden to interstate commerce for purposes of the dormant Commerce Clause." Per the Ninth Circuit:

> "[A] loss to [some specific market participants] does not, without more, suggest that the [state] statute impedes substantially the free flow of commerce from state to state." Even if producers will need to adopt a more costly method of production to comply with Proposition 12, such increased costs do not constitute a substantial burden on interstate



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> commerce. Nor do higher costs to consumers qualify as a substantial burden on interstate commerce.

The issues in this case are: (1) Whether allegations that a state law has dramatic economic effects largely outside of the state and requires pervasive changes to an integrated nationwide industry state a violation of the dormant commerce clause, or whether the extraterritoriality principle described in the Supreme Court's decisions is now a dead letter; and (2) whether such allegations, concerning a law that is based solely on preferences regarding out-of-state housing of farm animals, state a claim under *Pike v. Bruce Church, Inc.*

***Moore v. Harper* – Partisan Gerrymandering / Independent State Legislature Doctrine**

The gist of this case is that the North Carolina Legislature argues that the Federal Elections Clause in the U.S. Constitution forbids state courts from reviewing federal election related decisions made by the legislature and that the only body in the state that can make election law pertaining to federal elections is the state legislature.

Following the 2020 census the North Carolina legislature redistricted. A group of voters and non-profits challenged the map, claiming they reflected an unconstitutional partisan gerrymander under the North Carolina constitution. At trial a redistricting expert testified that for Congressional maps, state house maps, and state senate maps the legislature enacted were more favorable to Republicans than at least 99.999% of comparison maps generated by an algorithm.

The North Carolina Supreme Court held that the state legislature engaged in partisan gerrymandering by cracking and packing democratic voters, which violated numerous provisions of the North Carolina constitution. One of those provisions is the "Free elections" clause of the North Carolina constitution. It simply states: "All elections shall be free." According to the North Carolina Supreme Court, this clause has long been interpreted by North Carolina courts (dating back to 1875) to promise that "every vote must count equally." The North Carolina Supreme Court had also previously held that judicial review is appropriate in legislative redistricting cases to enforce the state constitution. The North Carolina Supreme Court explained:

> In North Carolina, a state without a citizen referendum process and where only a supermajority of the legislature can propose constitutional amendments, it is no answer to say that responsibility for addressing partisan gerrymandering is in the hands of the people, when they are represented by legislators who are able to entrench themselves by manipulating the very democratic process from which they derive their constitutional authority. Accordingly, the only way that partisan gerrymandering can be addressed is through the courts, the branch which has been tasked with authoritatively interpreting and enforcing the North Carolina Constitution.

The court rejected the argument that partisan gerrymandering claims are nonjusticiable political questions, explaining that not only is such an argument contrary to the Supreme Court's holding in *Rucho* which expressly left open this avenue for redress in state courts, but that the North



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Carolina state constitution is "more detailed and specific than the federal Constitution in the protection of the rights of its citizens."

The North Carolina Supreme Court ultimately concluded that "although the task of redistricting is primarily delegated to the legislature, it must be performed in conformity with the State Constitution," and in this case, the maps violated several provisions of the state constitution. The court then directed the North Carolina legislature to "submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution."

The North Carolina Legislature petitioned the U.S. Supreme Court for certiorari, arguing that the U.S. Constitution's Federal Elections Clause vests sole authority with the state legislatures to set rules for governing federal elections and forbids state courts from reviewing those rules. Article I, Section 4 of the US Constitution states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." The North Carolina Supreme Court called this argument "inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015." The court also explained that the argument is "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences." The court further explained that the "legislature must comply with all of the conditions which attach to the making of state laws, including restrictions imposed by state Constitutions upon state Legislatures when exercising the lawmaking power." (cleaned up).

The issue, as framed by the state legislature / petitioners, is whether a state's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives ... prescribed ... by the Legislature thereof," and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.

***Tyler v. Hennepin County* - Takings / Excessive Fines**

Under Minnesota law, property taxes become a lien against the property once they are assessed. Minn. Stat. § 272.31. If property taxes are not paid during the year in which they are due, they become delinquent the following year, at which point, a county may obtain a judgment against the property. Minn. Stat. § 279.03 subd. 1. As a matter of notice and procedure, each year, the county auditor creates a delinquent tax list, which identifies the properties on which taxes are owed, the taxpayer(s), and the amount of taxes/penalties owed. The delinquent tax list is published twice and mailed to all delinquent taxpayers. A lawsuit is commenced against delinquent taxpayers and if there is no answer, the court enters a judgment against the property.

Delinquent taxpayers have several avenues to avoid forfeiture. First, while title in the property vests in the state after judgment is entered, that title is subject to the right of redemption, which is



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a 3-year period during which the taxpayer may redeem the property for the amount of delinquent taxes, penalties, costs, and interest. Minn. Stat. §§ 281.01–281.02, 281.17. Second, a property owner seeking to avoid forfeiture who cannot afford to redeem the property, can make a "confession of judgment," which then allows the property owner to consolidate the debt /tax delinquency and pay in installments over five to ten years. If a property owner fails to pursue either of these avenues, absolute title vests in the state and all outstanding taxes, penalties, interest, etc. are canceled. Even after absolute title vests, the state still provides additional procedures for the property owner to repurchase his/her property. Under Minnesota's tax foreclosure scheme, former property owners have no way to claim any proceeds from the sale of the property in excess of the tax debt.

The Plaintiff in this case owned a condominium in Minneapolis and stopped paying taxes in 2010. At the time the County sought judgment under the aforementioned statutory scheme, the Plaintiff owed $15,000 in unpaid state property taxes, penalties, costs, and interest. The Plaintiff received the statutorily prescribed notice of foreclosure, failed to answer, and then never tried to redeem the property during the three-year period. She also did not seek to repurchase the property. Thereafter, Hennepin County sold the property for $40,000, and kept the surplus and distributed it in a manner pursuant to state statute.

Tyler sued, claiming the County violated the Fifth Amendment's Takings Clause and the Eighth Amendment's Excessive Fines Clause by keeping the value of her property in excess of the tax debt that she owed. As to the Taking's inquiry, the Eighth Circuit explained that for Tyler to succeed, she "must show that she had a property interest [under Minnesota law] in the surplus equity after the county acquired the condominium." The Eighth Circuit found that under Minnesota law, there is no right to surplus equity in a property and "where state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no constitutional taking."

The Eighth Circuit affirmed the district court's holding that the County's retention of her surplus equity did not constitute an excessive fine under the Eighth Amendment. The district court explained that whether the forfeiture is a "fine" turns on the question of whether it is a form of punishment. The district court agreed with the County that the forfeiture at issue here was remedial as it related to helping the government recoup its costs associated with non-payment of property taxes and was therefore not a fine under the Eighth Amendment. The court rejected the argument that the forfeiture was punitive simply because the County received more than what was needed to make it whole.

The issues in this case are: (1) Whether taking and selling a home to satisfy a debt to the government, and keeping the surplus value as a windfall, violates the Fifth Amendment's takings clause; and (2) whether the forfeiture of property worth far more than needed to satisfy a debt, plus interest, penalties, and costs, is a fine within the meaning of the Eighth Amendment.

***Groff v. DeJoy*** **–Title VII / Religious Accommodation**



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Groff was hired by USPS as a Rural Carrier Associate, which is a non-career employee who provides coverage for absent employees. They work for a RCA is as needed and the job requires flexibility. RCAs do not accrue leave and any absences are unpaid. During Groff's employment, there was a shortage of RCAs in his region. Also, during this time, USPS contracted with Amazon to deliver packages, including on Sundays. USPS indicated that the success of the Amazon Sunday delivery was critical to USPS.

Plaintiff's sincere religious beliefs dictate that Sunday is meant for a day of worship and rest. He therefore informed USPS that he was unable to work on Sundays. USPS told him that during peak season (November – January) he would have to work Sundays or find another job. But they offered other accommodations, including that he could start later on Sunday after attending services and work after. USPS also offered to find employees to swap shifts with him. USPS was able to find other employees to cover his Sunday shifts for some of the time, but there were at least 20 Sundays where no co-workers could swap, and Groff did not work (there were only 2 other individuals who could cover his shifts for some of time time). Groff was disciplined for failing to work on those days and ultimately left USPS.

Groff sued alleging violations of Title VII for failing to accommodate his religion.

Title VII makes it unlawful "to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's…religion." To establish a prima facie case of religious discrimination, Groff must show he has 1) a sincere religious belief that would prohibit work on Sunday; 2) informed his employer of the conflict; and 3) was disciplined for failing to comply with the conflicting job requirement. The burden then shifts to the employer to demonstrate either that "it made a good-faith effort to reasonably accommodate the religious belief, or such accommodation would work an undue hardship upon the employer and its business."

The first issue is whether the employer offered a reasonable accommodation. If the employer did, the statutory inquiry ends. In the Third Circuit, to demonstrate a legally sufficient accommodation, it must eliminate the conflict between the job duty and the sincerely held religious belief. The Third Circuit concluded that "even though shift swapping can be a reasonable means of accommodating a conflicting religious practice, here it did not constitute an "accommodation" as contemplated by Title VII because it did not successfully eliminate the conflict."

If the good faith attempts to accommodate the religious practice are unsuccessful, the next step in the analysis under Title VII asks whether providing the accommodation would work an undue hardship on the employer. "An undue hardship is one that results in more than a de minimis cost to the employer." USPS provided evidence that Groff's absences created more work for the postmaster and Groff's superiors, created burdens for his co-workers who had to do extra work, and created a tense atmosphere amongst other employees and hostility toward management. The Third Circuit concluded that Groff's requested accommodation to be exempt from working



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Sundays caused "more than a de minimis cost on USPS because it actually imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale…"

The Supreme Court granted certiorari on the following issues: (1) Whether the court should disapprove the more-than-de-minimis-cost test for refusing religious accommodations under Title VII of the Civil Rights Act of 1964 stated in *Trans World Airlines, Inc. v. Hardison*; and (2) whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's coworkers rather than the business itself.

***Sackett v. EPA* – Supreme Court Merits – WOTUS**

The Supreme Court has agreed to take up a case pertaining to the definition of "waters of the U.S." (WOTUS) under the Clean Water Act (CWA). The case will allow the Court to address the question of the proper test for determining whether wetlands are considered WOTUS under the CWA. Baked into that question is whether the Court should adopt the Scalia test or the Kennedy test from the *Rapanos* decision.

The facts involve a landowner that purchased a "soggy residential lot" near Idaho's Priest Lake. To the north of their lot, with a road in between, is a wetland that drains to a tributary that feed into a creek that flows southwest of the Sacketts' property and empties into Priest Lake. The Sackett's property is 300 feet from the lake.

After obtaining permits from the county the Sacketts began backfilling the property with sand and gravel to create a stable grade. EPA ultimately issued the Sacketts a "formal administrative compliance order" explaining that "the Sacketts' placement of fill material onto half an acre of their property without a discharge permit constituted a violation of the CWA."

By way of background, the CWA extends to all "navigable waters," defined as "waters of the United States, including the territorial seas," and it prohibits any person who lacks a permit from discharging pollutants, including rocks and sand, into those waters. The CWA regulations define "waters of the United States" to include "wetlands" that are "adjacent" to traditional navigable waters and their tributaries.

*Rapanos v. United States* concerned the "governing standard for determining CWA jurisdiction over wetlands." There was no majority opinion in *Rapanos.* Justice Scalia, writing for four Justices, stated that "waters of the United States" extends only to "relatively permanent, standing or flowing bodies of water" and to wetlands with a "continuous surface connection" to such permanent waters. According to Justice Kennedy, who concurred in the judgment only, "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." This "significant nexus" inquiry would turn on whether the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"



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The Ninth Circuit held that Justice Kennedy's definition of WOTUS from *Rapanos v. United States* (2006) is controlling. According to the Ninth Circuit, while the Scalia plurality did not entirely reject the concept of a "significant nexus," it opined that only wetlands with a "physical connection" to traditional navigable waters had the requisite nexus to qualify as "waters of the United States."

The issue in this case is whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U. S. C. §1362(7).

***United States v. Hansen* – Supreme Court Merits – First Amendment / Immigration**

In this case, the Ninth Circuit found a portion of a criminal statute, 8 USC 1324, unconstitutional in violation of the First Amendment. This same statute was used by ICE under the prior administration to threaten local governments and local government officials with prosecution. Local governments were also forced to certify compliance with the statute (among others) in their Byrne Jag grant applications or forego millions of dollars, which resulted in significant litigation between local governments and the federal government. The concern with this case is that a broad reading of the statute could implicate health and welfare programs that local governments offer their residents regardless of citizenship status. Three years ago, the Supreme Court heard oral argument in a case involving the precise issue raised in this case (the constitutionality of this statute), but the Court did not decide the issue on technical grounds.

In this case, Hansen was convicted of encouraging or inducing illegal immigration for private financial gain in violation of 8 USC § 1324(a)(1)(A)(iv). That statute provides: that any person who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." Hansen argued that 1324(a)(1)(A)(iv) is overly broad in violation of her First Amendment free speech rights.

The Ninth Circuit previously decided that the statute was overly broad in violation of the First Amendment in *United States v. Sineng-Smith,* 910 F.3d 461 (9th Cir. 2018). The Supreme Court granted certiorari in that case, but vacated and remanded the case instead of deciding the question because the Ninth Circuit "departed so drastically from the principle of party presentation as to constitute an abuse of discretion" by deciding the case on arguments originally raised by amici instead of the parties.

Now, three years later in this case, the Ninth Circuit once again held that 1324(a) is overly broad in violation of the First Amendment as it "criminalizes a substantial amount of protected expressive activity." (Presumably this time the parties made these arguments). The Ninth Circuit pointed out numerous examples of protected speech that would be prosecutable under the statute, including "encouraging an undocumented immigrant to take shelter during a natural disaster [and] advising an undocumented immigrant about available social services…"



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The issue in this case is whether the federal criminal prohibition against encouraging or inducing unlawful immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional on First Amendment overbreadth grounds.

***Allen v. Milligan*** **- Voting Rights Act**

Issue(s): Whether the state of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated Section 2 of the Voting Rights Act.

***Biden v. Nebraska*** **– Separation of Powers / Major Questions Doctrine / Standing**

Issue(s): (1) Whether six states have Article III standing to challenge the Department of Education's student-debt relief plan; and (2) whether the plan exceeds the secretary of education's statutory authority or is arbitrary and capricious.

***Students for Fair Admissions v. University of North Carolina*** / ***Students for Fair Admissions Inc. v. President & Fellows of Harvard College*** – **Affirmative Action**

Issue(s): (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; and (2) whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.

***U.S. ex rel. Schutte v. SuperValu Inc*** **– False Claims Act**

Issue(s): Whether and when a defendant's contemporaneous subjective understanding or beliefs about the lawfulness of its conduct are relevant to whether it "knowingly" violated the False Claims Act.

***Counterman v. Colorado*** **– First Amendment**

Issue(s): Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would regard the statement as a threat of violence.

***Health and Hospital Corporation of Marion County, Indiana v. Talevski*** **– Spending Clause**

Issue(s): (1) Whether, in light of compelling historical evidence to the contrary, the Supreme Court should reexamine its holding that spending clause legislation gives rise to privately enforceable rights under 42 U.S.C. § 1983; and (2) whether, assuming spending clause statutes



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ever give rise to private rights enforceable via Section 1983, the Federal Nursing Home Amendments Act of 1987's transfer and medication rules do so.

***Haaland v. Brackeen*** **- Tribal Law / Tenth Amendment**

Issue(s): (1) Whether various provisions of the Indian Child Welfare Act of 1978 — namely, the minimum standards of Section 1912(a), (d), (e), and (f); the placement-preference provisions of Section 1915(a) and (b); and the recordkeeping provisions of Sections 1915(e) and 1951(a) — violate the anticommandeering doctrine of the 10th Amendment; (2) whether the individual plaintiffs have Article III standing to challenge ICWA's placement preferences for "other Indian families" and for "Indian foster home[s]"; and (3) whether Section 1915(a)(3) and (b)(iii) are rationally related to legitimate governmental interests and therefore consistent with equal protection.

***Wilkins v. U.S.*** **– Quiet Title Act**

Issue(s): Whether the Quiet Title Act's statute of limitations is a jurisdictional requirement or a claim-processing rule.

***Dupree v. Younger*** **- Summary Judgment / Issue Preservation**

Issue(s): Whether to preserve the issue for appellate review a party must reassert in a post-trial motion a purely legal issue rejected at summary judgment.

**4. Other Cases of Interest**

**A. Pending Supreme Court Certiorari Cases in Which IMLA Participated as an Amicus**

***Los Angeles County v. Ray*** **– Supreme Court Petition – FLSA / Joint Employer**

California has an in-home supportive services (IHSS) program, and the County provides administrative services and represents the domestic care workers for collective bargaining services, under legislative mandate. The State sets the rules for the program and delegates the day-to-day administration of the program to the Counties. Under the program, the State is responsible for collecting timecards, maintaining time keeping records and issuing paychecks. The actual recipients of the services retain hiring and firing ability and also are responsible for setting the IHSS worker's schedule.

In 2013, the DOL rule enacted a rule that entitled domestic care workers to overtime pay under the FLSA. The rule was challenged in the courts and was ultimately upheld by the D.C. circuit in 2015. The State of California elected not to implement the new rule while it was being challenged and did not begin paying overtime until February 2016.



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Plaintiffs later sued the County for overtime wages for the January 2015 to February 2016 period. The State was not named a party, as it was immune under the Eleventh Amendment. It is undisputed that the County had no power or ability to pay overtime wages in 2015. The State had both the decisionmaking power and controlled the purse strings. The County argued that it was an arm of the state for Eleventh Amendment purposes, but the Ninth Circuit rejected that argument in *Ray v. County of Los Angeles*, 935 F.3d 703 (9th Cir. 2019).

After the case was sent back down, the district court determined that the County was not a joint employer of the domestic care workers for purposes of the FLSA and therefore overtime liability. But the Ninth Circuit reversed, based on its conclusion that the County exercised economic and structural control over the employment relationship, thereby finding the County liable for the unpaid overtime payments. The Ninth Circuit reasoned that because the County contributes substantial funding to the IHSS program in general and because it represents the workers in the collective bargaining unit, it exercised economic control over the workers. The Ninth Circuit also reasoned that because the providers view the County as the public face of the employer as a result of the training it provides (where they are provided with state provided training materials and state issued forms), the County exercised sufficient structural control over the workers.

***Celcog v. Perkins* – Supreme Court Petition Stage – Section 1988 Attorney's Fees**

Responding to the COVID-19 pandemic, the mayor of Shreveport, Louisiana issued an executive order requiring citizens to wear masks when inside business establishments in the City ( Order). In response, local businesses filed a petition for declaratory and injunctive relief alleging that the Order violated the Louisiana Constitution, Louisiana state law, and that the Mayor lacked the authority under state law to make the Order. Every allegation in their complaint specifically referenced Louisiana law and there was no mention of any violation of federal law.

The trial court concluded that the Mayor lacked the authority to issue the Oorder and that it was "unconstitutional in that it violates separation of powers and plaintiffs' constitutional rights to due process of law." The businesses then filed a motion for attorney's fees pursuant to 42 U.S.C. §1988. The businesses argued that because Louisiana is a fact-pleading state (i.e., a plaintiff need only plead facts that would support recovery), and because their allegations were sufficient to allege violations of both the Louisiana Constitution and the U.S. Constitution, they were entitled to attorney's fees under §1988. They claimed that the Louisiana Due Process Clause, for example, is a mere codification of the Due Process Clause of the U.S. Constitution. The City argued that the businesses' failure to allege any violations of the U.S. Constitution or a federal statute rendered §1988 inapplicable. Moreover, the City argued that the complaint's sole focus on state law violations would have precluded the City from removing the case to federal court and if there is no basis for federal jurisdiction there should be no basis for the award of attorney's fees under §1988.



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42 U.S.C. § 1988(b) provides for an award of attorney fees only in actions to enforce enumerated provisions of federal law, as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 12361 of Title 34.

The intermediate appellate court in Louisiana held that the complaint "clearly contains material facts sufficient to support a demand for recovery under § 1983. The claims made against Mayor Perkins in the original petition were factually based on the Due Process Clause of the Louisiana Constitution which confers "rights, privileges or immunities" within the meaning of 42 U.S.C. § 1983." The court therefore concluded that because the complaint established a Due Process Clause violation, the businesses were entitled to recovery of attorney's fees under § 1988.

The Louisiana Supreme Court denied a petition for review in a 4-3 order (3 judges would have heard the petition). The City is now petitioning the Supreme Court for certiorari.

### B. Pending State Appellate Cases and United States Courts of Appeals Cases in which IMLA Participated as an Amicus

***Von Wandruszka v. City of Moscow* – Idaho Supreme Court – Local Government Authority**

The city of Moscow, Idaho (City) operates a public water system. Historically, the City held property owners responsible for non-payment of water bills by tenants at their properties. But the Idaho Supreme Court held in *City of Grangeville v. Haskin*, 116 Idaho 535, 777 P.2d 1208 (1989), that due to lack of privity, owners had no implied obligation to pay the water bills of a tenant. Since then, the City faced pushback from property owners when trying to collect unpaid balances where tenants failed to pay, and incurred increasing delinquencies.

As a solution, in February 2021 the City Council passed resolution 2021-01, requiring property owners to complete a "Moscow Utility Billing Application for Use of City Utility Services" (Application). On the Application, property owners request services at a specific address and acknowledge their legal responsibility for balances assessed there, regardless of who uses the service.

The City gave property owners more than nine months' notice to comply, requiring Applications to be submitted by December 15, 2021; water would thereafter be shut off to all addresses for which no Application had been received, regardless of whether the subject properties were in arrears. The plaintiffs, who own their residence as well as other properties which they lease to various tenants, none of whom were in arrears, filed the Applications "under duress" on December 14, 2021.



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The plaintiffs sought summary judgment to invalidate the Application program because (1) it is "unreasonable and coercive" by empowering the City to place a lien on non-paying properties; and (2) "Idaho law does not authorize the City to hold a non-user responsible for unpaid utility bills" (citing *Haskin*). The City also moved for summary judgment, based on its authority to provide public utilities and implement payment mechanisms as granted by the Idaho Constitution, Idaho Code, and the City Code. The City further argued that the Applications resolve the *Haskin* prohibition against implied payment duties by creating property owners' express contractual commitments.

The District Court denied the City's Summary Judgment motion and partially granted the property owners' motion, limited to properties where the owner is not consuming the water:

> IC §§ 50-323 and 50-1030(f) do not give the City implied power to collect from the owner for charges incurred by the tenants. As such, the City is prohibited from requiring the owners of property to enter into a contract under duress if the property owner is not the consumer of the water.

***Texas v. United States* – district court, Texas - DACA**

The Fifth Circuit affirmed a Texas district court order striking down the Obama-era memo which created the Deferred Action for Childhood Arrivals program (DACA). In that appeal, IMLA signed onto an amicus effort in defense of DACA headed by the City and County of Los Angeles and joining 65 local governments.

That Fifth Circuit affirmance did not rule on the Biden administration's new administrative DACA rule, which took effect on October 31, 2022, after a notice and comment period. That new rule is now challenged by Texas and the other plaintiff states seeking to undo DACA. The Fifth Circuit remanded Texas's challenge back to the originating district court for further proceedings, where the plaintiff states have filed a motion for summary judgment to invalidate DACA once and for all, which would create an immediate risk of deportation for hundreds of thousands of residents.

***Columbus Monument Corp. v. City of Syracuse* – New York Appellate Court - Government Speech**

In 1934, a group of Italian-Americans bestowed a Christopher Columbus statue on Syracuse, which accepted it and placed it in St. Mary's Circle—a prominent City property. In 1990, New York State agreed to contribute funds to restore the statue, conditional on the City raising private funds and granting the State a Protective Covenant to apply the funds towards maintenance of the statue for 23 years or the useful life of the improvements, "whichever is longer." An Italian-American organization contributed funds based on the City's commitment to use the money to maintain the statue, augmenting contributions by the City and the State.



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As time passed, objections to the Columbus statue by the Onondaga Tribe and other groups have increased. The City now wants to reconfigure the elements in St. Mary's Circle to represent a more diverse City population and heritage, including moving the statue to a different location. To that end, in 2021, the Mayor obtained the State's signature on a "Termination of Protective Covenant," which the City claims abrogated its continuing responsibility to maintain the statue and further freed the City to exert its authority over the statue.

The Columbus Monument Corporation, other contributors of maintenance funds, and descendants of the original grantors of the statue, objected. They focused on specifics in the Termination agreement, asserting that, because a "Whereas" clause did not recite the phrase "whichever is longer," the State had erroneously believed that the useful life of the paid-for statue improvements had ended.

The plaintiffs were successful in getting the lower court to focus on that issue. The court declared the Termination null and void and ordered that the statue cannot be moved by the City. That decision contained no analysis of government speech.

***Huntington v. Amerisource Bergin*– Fourth Circuit - Opioid Litigation / Public Nuisance**

Local governments around the country have sought to hold drug manufacturers, distributors, and pharmacies accountable for their role in fueling the opioid crisis, bringing claims under public nuisance laws, among other things. Most states and their local governments were included in the $26 billion settlement by the "Big Three" distributors (Amerisource Bergin, McKesson, and Cardinal Health) and J&J, and other local governments joined in subsequent settlements with the Big Three. Huntington and Cabell County, West Virginia did not join, and continued to pursue their claims. Earlier this year, Judge Faber delivered his long-awaited decision in the Track Three opioid bellwether case in the Southern District of West Virginia, finding that none of the Big Three distributors bore responsibility for contributing to the opioid crisis in Huntington (case no. 3:17-01362) and Cabell County (case no. 3:17-01665). Judge Faber found insufficient evidence of wrongdoing by the distributors and held that West Virginia's public nuisance law did not apply to an otherwise legally-manufactured product.

Huntington is now appealing that outcome to the Fourth Circuit. As of 2017, more than 10% of the population of the City of Huntington, Cabell County, and neighboring Wayne County were, or had been, addicted to opioids; in 2012, one-third of Cabell and Huntington Hospital NICU patients were babies withdrawing from opioids. The opioid epidemic has cost local governments collectively billions of dollars in seeking to remediate the public health consequences of the epidemic and has devastated whole communities.

***El Papel v. City of Seattle* - Ninth Circuit - Physical Takings**

This case arises out of the State of Washington and the City of Seattle's eviction moratoria that were enacted in response to the COVID-19 pandemic. Both moratoria prohibited evicting tenants for failure to pay rent for a period of time unless the tenant presented an imminent threat



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to the health or safety of neighbors or the landlord. Additionally, such unpaid rent could not be treated as a currently owing or collectable enforceable debt until the landlord and tenant were provided with an opportunity to resolve the nonpayment of rent through a rental assistance program and landlords could not collect late fees.

Plaintiffs are landlords who sued the City for violating the Contracts Clause and the Takings Clause of the U.S. Constitution. They claim that the tenants owe thousands of dollars of unpaid rent and (for one tenant) against whom, "[b]ut for the Defendants' eviction moratoria," they would have initiated eviction proceedings.
The district court found in favor of the City and State on both claims. In terms of the Contracts Clause claim, the district court agreed with the City and State that the moratoria did not forgive any debt obligations, instead it delayed the ability on the part of the landlords to collect the unpaid rent or evict tenants for a period of time. The district court reasoned:

> Allowing defaulted tenants additional time to repay amounts due is adequately tailored to the City's goal of preventing evictions and homelessness, as well as corresponding potential to cause a spike in the COVID-19 pandemic. And for similar reasons as discussed above in the context of the eviction moratoria, this defense does not violate the Contracts Clause, either.

In terms of their Takings claim, plaintiffs argue that the eviction restrictions constitute a physical taking "by compelling landlords to house tenants who no longer satisfy lease terms, including tenants whose leases have already expired." The district court rejected this argument, concluding that Supreme Court precedent forecloses this argument. *See Yee v. City of Escondido,* 503 U.S. 519, 522 (1992). In foreclosing the physical taking argument in *Yee,* the Supreme Court held:

> [The park owners] voluntarily rented their land to mobile homeowners.... Put bluntly, no government has required any physical invasion of petitioners' property. [The] tenants were invited by [the owners], not forced upon them by the government....
>
> On their face, the state and local laws at issue here merely regulate [the owners'] *use* of their land by regulating the relationship between landlord and tenant. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.

*Id.* at 528–29 (internal citations and quotation marks omitted).

The plaintiffs argued that the Supreme Court's recent decision in *Cedar Point Nursery v. Hassid* supports their arguments that the City's actions constituted a physical taking of their property. The district court rejected this argument, concluding that *Cedar Point* was readily distinguishable given that the regulation in that case required the property owners to allow access to union activity by third parties, whereas in this case, the landlords had voluntarily invited the



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tenants to rent their property. And while the landlords temporarily lost the ability to evict the tenants, the City and State did not forgive the unpaid rent.

The issue in this case is whether the City's eviction moratorium violated the Takings Clause or Contracts Clause of the US Constitution.

***Baker v. City of McKinney* - Fifth Circuit – Taking**

Vicki Baker (Baker) seeks recovery for damage caused by McKinney Texas (City) police as they attempted to arrest a criminal suspect hiding in her home with a 15-year-old female hostage. Baker's adult daughter had answered the door, recognized the suspect, and allowed the two to enter. The daughter then left the home to call Baker; they both summoned local police for help.

Police surrounded the home and the suspect released the hostage. She informed them that the suspect had several guns and did not intend to come out alive. Officers followed standard procedures to compel the suspect to vacate, pushing open the front door, forcibly removing the garage door, knocking down part of the backyard fence, and firing gas canisters through windows and other areas. While the police actions were lawful and proper, they caused damage to the home. The suspect took his own life in a bedroom at some point during the police activities.

Baker filed a claim with the City which was handled by the Texas Municipal League Intergovernmental Risk Pool. It denied the claim based on a determination that the City and its officers were immune from suit under the Texas Tort Claims Act. Baker then filed suit to recover approximately $50,000, in the meantime making repairs to the home using homeowner's insurance payments, donations of money and items from friends and a GoFundMe account, and some of her own money. Counsel estimates that Baker's insurance and monetary and in-kind donations covered all but $8,000 of her costs. She sold the home to an arms-length buyer after the repairs were completed.

Baker's suit against the City alleges only takings claims under the Fifth Amendment and under article I, § 17 of the Texas Constitution. Prior to trial, the district court denied the City's dismissal motion and granted Baker partial summary judgment as to takings liability:

> Regarding the existence of a constitutional violation, the City contends that "a legitimate exercise of the police power does not constitute a taking under the Fifth Amendment" (Dkt. #6 at p. 22). The City further alleges that "Baker's alleged takings claim under the Fifth Amendment fails to state a cognizable claim of constitutional harm[] and should be dismissed under Rule 12(b)(6)" (Dkt. #6 at p. 23). Baker does not contest that the Department's actions were valid exercises of the State's police power (see Dkt. #9 at p. 17). Instead, Baker responds that "[e]xercises of the police power are susceptible to a [t]akings analysis" and that a takings analysis applies to a broader ambit of situations than just the traditional eminent domain power. . . .



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> The City asks this Court to adopt what would constitute a per se rule—that destruction to private property resulting from the exercise of valid police power cannot constitute a Fifth Amendment Taking. Neither the Supreme Court nor the Fifth Circuit have directly found a taking that requires just compensation when destruction of property results from the exercise of valid police power. The City correctly points out that other circuits have foreclosed recovery under similar circumstances. See Manitowoc Cty., 635 F.3d 331; Lech, 791 F. App'x. 711; AmeriSource Corp., 525 F.3d 1149. However, both the Fifth Circuit and the Supreme Court have suggested such action could amount to a taking . . . The Court finds the Fifth Circuit and Supreme Court reasoning persuasive, particularly at this stage of litigation where it construes allegations in the light most favorable to Baker.

*Baker v. City of McKinney,* 4:21-CV-0176-ALM (E.D. Tex. June 22, 2022), 2022 WL 2298974.

During trial, the court allowed an un-pled § 1983 *Monell* claim to go the jury in addition to the takings claims and granted a motion in limine to prohibit evidence of Baker's financial sources of repairs as violative of the "collateral source rule," thus allowing her to recover more than just compensation. On June 22, 2022, district judge Amos Mazzant issued the following order:

> The jury found Defendant City of McKinney, Texas acted under color of state law when it violated Plaintiff Vicki Baker's constitutional rights under the Fifth Amendment of the United States Constitution by depriving her of her property without providing just compensation, and that this proximately caused Plaintiff Vicki Baker's damages. The jury awarded Plaintiff Vicki Baker $44,555.76 in just compensation for the cost of repairs to her real property, and $15,100.83 in just compensation for the loss in market value to her personal property. . . .
>
> It is therefore CONSIDERED, ORDERED, AND ADJUDGED that Plaintiff Vicki Baker recovers from Defendant City of McKinney, Texas a total judgment of $59,656.59 plus pre- and post-judgment interest thereon at the rate provided by law.

*Id.*

***Association of Club Executives of Dallas, Inc. v. City of Dallas* – Fifth Circuit - First Amendment / SOBs**

On January 26, 2022, following a public hearing, the Dallas City Council (Council) unanimously adopted Ordinance No. 32125 (Ordinance) prohibiting sexually oriented businesses (SOBs) from operating between 2 a.m. and 6 a.m. in Dallas (City). The Ordinance cites the Council's findings that operation of SOBs during those hours is "detrimental to public health, safety, and general welfare," and includes data purporting to show that during those hours there is an increase in violent crime and drug and gun arrests at or near SOBs and an increased number of calls from SOBs for City EMT assistance. In support, the Council cites various studies associating SOBs with higher crime and a report from the cities of Beaumont and Amarillo showing that SOBs promote certain criminal activity and have a deleterious effect on adjacent areas.



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The Ordinance also references the Dallas Police Department (DPD) task force (Task Force) created in March 2021 at the Council's request following shootings and other violent crimes that occurred at or near SOBs. The Council had received a DPD presentation on January 5, 2022, delivering the Task Force's conclusions and its recommendation that SOB hours of operation be reduced to decrease criminal activity, improve safety, and reduce demand on City resources. DPD had subsequently submitted to Council a "detailed analysis" listing licensed SOBs in the City and graphs displaying data related to all offenses, arrests, and calls for service at SOBs.

The day the Ordinance was adopted, four adult cabaret businesses and one adult bookstore that qualify as SOBs under the City Code, and a non-for-profit trade association whose members are SOBs and include adult bookstores, arcades, and cabarets located in the City (Plaintiffs) moved for a temporary restraining order and preliminary injunction, asserting that the Ordinance violates their First Amendment right to freedom of expression. Plaintiffs allege that the Ordinance is an unconstitutional content-based restriction of protected expression, does not withstand strict or intermediary scrutiny, and that the data and information relied on by the City in passing the Ordinance is invalid, flawed, and shoddy.

The Northern District of Texas denied the City's motion to dismiss and granted Plaintiffs injunctive relief. The court's primary focus was on Plaintiffs' likelihood of success on the merits. It found in their favor, despite the City's argument that under the longstanding tests applicable to sexually explicit expression derived in *Renton*, the Ordinance was a content neutral, secondary-effects based measure, applying appropriate time, manner, and place restrictions. The district court did not find it necessary to evaluate which level of scrutiny applied: "Here, the Court concludes that it need not determine as a final matter which level of scrutiny applies, because regardless of the standard under which the Ordinance is evaluated, it does not pass muster, and therefore must be enjoined."

Despite this conclusion, the court proceeded to analyze whether strict or intermediate scrutiny would apply. It started with the obvious—citing *Reed* and its application of strict scrutiny to content-based regulation of speech. It acknowledged the City's argument contra: "Here, the City acknowledges that the Ordinance restricting SOBs is content based, but argues that under *Renton*, regulations addressing SOBs fall into an exception to the normal content-based approach, and are not subject to strict scrutiny." In contrast, "Plaintiffs contend that the secondary effects doctrine no longer applies, citing the Supreme Court's decision in *Reed* and the Fifth Circuit's subsequent abrogation of at least some secondary effects doctrine cases."

The Fifth Circuit's "subsequent abrogation" occurred in *City of Austin v. Reagan Outdoor Advertising of Austin*, where the Circuit's application of *Reed* to prohibit on-premise versus off-premise sign distinctions would be reversed by the Supreme Court. The district court queried the continuing viability of the secondary effects doctrine given the Fifth Circuit's discussion of the issue in *Reagan*:



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> In footnote 3 of *Reagan*, the Fifth Circuit specifically identified a number of cases it was abrogating based on *Reed*, including four cases that had upheld ordinances relating to SOBs under the secondary effects doctrine. *Id.* at 703 n.3 … By abrogating these SOB cases in footnote 3 of its opinion in *Reagan*, the Fifth Circuit implicitly applied *Reed*'s holding that a content-based law is subject to strict scrutiny regardless of the government's content-neutral justification, so as to abrogate the secondary effects doctrine in the SOB context. In doing so, however, the Fifth Circuit in *Reagan* did not name the secondary effects doctrine, nor expressly discuss the impact of *Reed* on *Renton* or the Supreme Court's more recent secondary effects case, *Alameda Books.*

As we know, Supreme Court reversal of *Reagan* did not touch on the subliminal secondary effects issues raised by the Fifth Circuit. And the district court in this case, having raised the question, merely stated that it need not decide the intermediate versus strict scrutiny question, again stating that irrespective of the standard, the Ordinance failed: "Fortunately, the Court concludes that it need not resolve the question of the continued viability of the secondary effects doctrine in the Fifth Circuit because, as discussed below, the Ordinance does not survive regardless of the scrutiny applied."

The court concluded that even the less demanding standards of intermediate scrutiny had not been met by the City's data—there was only a minor increase in crime in the 2 a.m. to 6 a.m. period. And the inclusion of bookstores, which had far less criminal activity than the other establishments, made the Ordinance overbroad and not in keeping with the *Renton* standards, in which the regulation had distinguished among various types of SOBs based on their specific secondary effects.

The court concluded that "the City's evidence does not fairly support its stated rationale for the Ordinance. Because the City could not reasonably believe that the evidence shows the requisite connection between the protected speech and harmful secondary effects, the Ordinance is not narrowly tailored."

***City of Grants Pass v. Johnson* – Ninth Circuit Petition for En Banc Review – Eighth Amendment / Homelessness**

Grants Pass is a small city in Oregon with a population of about 38,000, of whom at least fifty are homeless (though the number may be as many as 600). Regardless, the number of homeless persons outnumber the available shelter beds. The City passed several ordinances related to the regulation of sleeping outside, which taken together made it nearly impossible to sleep outside with any form of bedding or shelter on public land in the City. *See* GPMC 5.61.020; GPMC 5.61.030; GPMC 6.46.090.

A violation of these ordinances resulted in fines, which would escalate if left unpaid. The "park exclusion" ordinance allowed police officers to bar someone from a city park for 30 days if they received two more citations for violating park ordinances within one year. GPMC 6.46.350(A). If someone had received a park exclusion ordinance and was later found in a park,



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that could result in criminal trespass. The City amended its camping ordinance after *Martin* (discussed below) to make it clear that the involuntary act of sleeping without shelter in a park was not prohibited, rather what was prohibited was "camping" – i.e., sleeping with any bedding / shelter.

The City had four temporary shelters, but two were explicitly religious and required residents to attend Christian worship services. Another was a "sobering center," which was just a place for intoxicated people to sober up and did not have beds. The fourth was a youth shelter. It was undisputed that the City did not have enough beds for its homeless population and really did not have any shelter for adults that did not wish to stay somewhere that was overtly religious.

In September 2018, a three-judge panel issued *Martin v. City of Boise,* 902 F.3d 1031 (9th Cir. 2018), holding "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Id*. at 1048. Although the decision was both novel and sweeping, the opinion did offer a modicum of comfort to local governments that they could still regulate camping on public property by way of a footnote where it stated:

> Naturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible… So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the "universal and unavoidable consequences of being human" in the way the ordinance prescribes.

Shortly after the *Martin* decision was issued, three homeless individuals in Grants Pass filed a class action lawsuit on behalf of those that are "involuntarily homeless" against the City, arguing its ordinances are unconstitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause and Excessive Fines Clause (among other arguments). The Ninth Circuit held that the district court did not abuse its discretion by certifying a class action in the case despite *Martin* appearing to require an individualized inquiry into whether the person was involuntarily homeless. The Ninth Circuit reasoned that the class was defined as only those that were "involuntarily homeless" and therefore, no individualized inquiry was necessary as the City did not claim to have adequate shelter for all 600 homeless individuals in Grants Pass.

The Ninth Circuit also concluded that the City's ordinances violated the Cruel and Unusual Punishment Clause and a "local government cannot avoid this ruling by issuing civil citations that, later, become criminal offenses." The court did not address ordinances that solely provided civil infractions. The Ninth Circuit affirmed the district court's holding that "the anti-camping



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ordinances violated the Cruel and Unusual Punishment Clause to the extent they prohibited homeless persons from 'taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.'"

The dissent points out that the class certification was inappropriate under *Martin's* requirement for an individualized inquiry into whether adequate shelter was available to the homeless person. Per the dissent:

> the mere fact that a city's shelters are full does *not* by itself establish, without more, that any particular person who is sleeping in public does "not have a single place where [he or she] can lawfully be." *Id*. The logic of *Martin*, and of the opinions in *Powell* on which it is based, requires an assessment of a person's individual situation before it can be said that the Eighth Amendment would be violated by applying a particular provision against that person… Under *Martin*, the answer to the question whether the City's enforcement of each of the anti-camping ordinances violates the Eighth Amendment turns on the individual circumstances of each person to whom the ordinance is being applied on a given occasion. That question is simply not one that can be resolved, on a common basis, "in one stroke."

***180 Land Co., LLC v. City of Las Vegas, et. al* - Nevada Supreme Court – Inverse Condemnation**

This case involves a $35,000,000 judgment in an inverse condemnation case against the City of Las Vegas, which threatens to upend local governments' regulatory land use authority in the State.

In 1990 the City approved a 1,539 acre planned development known as the Peccole Ranch Master Plan (PRMP) on the condition that the developer set aside more than 200 acres for open space. The developer chose to use the open space for a 211-acre golf course that later expanded to 250 acres. In 1992, the City approved a new General Plan that designated the residential portion of the remaining portion of the PRMP as R-PD7 (residential planned development) and the open space as PR-OS. PR-OS does not permit housing. The City repeatedly confirmed the PR-OS designation in subsequent ordinances approving updates to the General Plan, most recently in 2018. The City Council would be required to exercise its discretion to change the PR-OS designation to permit construction of housing.

In 2015, the original developer of the PRMP sold the golf course to a new developer (Developer) for $4.5 million. The Developer shut down the golf course and segmented the 250 acres into 4 development sites. In 2017, the City approved the Developer's application to build 435 luxury housing units on a 17-Acre portion of the original golf course. However, the City denied the Developer's application to develop 61 units on the 35-Acre portion of the golf course. The City never ruled on the Developer's applications for the other two parcels because the application was incomplete.



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The Developer sued in 4 separate lawsuits, one for each parcel, demanding $386 million in damages and claiming an absolute right to build residential units on the property because the zoning ordinance permits residential use. The Developer argues that the zoning ordinance which permits residential use trumps the City's General Plan, which had designated the property at issue as open space. NRS 278.250 provides that "zoning regulations must be adopted in accordance with the master plan for land use…"

At issue in this case is the 35-Acre parcel. In this case, the Nevada district court concluded that the City was liable for a regulatory taking, agreeing with the Developer's arguments that because housing is a permitted use under the zoning ordinance, the City violated the Takings Clause by denying the use, notwithstanding the General Plan to the contrary. The district court concluded that zoning "trumps" a General Plan. The court concluded there was no market to sell the property and that due to the government's actions, the value of the property was zero.

***Kirola v. City & County of San Francisco* – Ninth Circuit - Title II of the ADA**

Kirola, a mobility-impaired individual, brought a class action lawsuit against San Francisco, alleging the City discriminates against mobility-impaired persons by failing to eliminate access barriers or ensure accessibility to the City's libraries, swimming pools, and parks, and to public rights-of-way such as sidewalks, curb ramps, and crosswalks in violation of the ADA and related state civil rights statues. The district court certified the class and the case proceeded to a bench trial.

At trial, the City presented detailed evidence of its comprehensive efforts to ensure that disabled persons have meaningful access to its services and programs consistent with the ADA and state law through both proactive and reactive measures – i.e., undertaking significant accessibility planning across numerous City departments and proactively seeking input from the disability community in the course of such planning, while also responding to requests and complaints from the public through a grievance procedure. In contrast, Kirola testified only to a very limited number of access barriers she encountered within the City including: a limited number of cracked sidewalks or missing curb ramps (that did not necessarily require her to alter her route); encountering step stools in aisles at the public library allegedly impeding her access to the facility; a steep slope at the entrance to a city park, making it difficult for her to enter that particular park; and that some of the city's pools did not have accessibility features, though she did testify that she regularly swam at multiple city pools, including the one closest to her house.

Following trial, the court held that Kirola lacked constitutional standing to pursue her claims and that her claims lacked substantive merit. Regarding the merits, the court held that the ADA does not require that each particular facility be fully accessible, rather, the court noted, the program/service must be reviewed in its entirety to determine if it is accessible.
The Ninth Circuit agreed with the district court's rejection of the plaintiff's program access claims which apply to existing facilities. However, it remanded the case back to the district court on the narrower issue to reevaluate the extent of noncompliance with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), which provides



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that the alteration of facilities commenced after January 26, 1992 should to the maximum extent feasible be altered in a manner that makes the facility accessible/usable to individuals with disabilities. The Ninth Circuit also remanded to the district court to determine if injunctive relief should be granted to the class of plaintiffs.

After the City's motion for judgment as a matter of law, the district court found in favor of the City. The district court did find a few scattered violations of the ADAAG (an inaccessible route to a playground, a missing grab bar in a restroom at Golden Gate Park, and a couple of non-compliant features in certain restrooms in libraries). However, the court concluded that the plaintiff never personally encountered any of these violations and therefore could not show she was actually injured for the purposes of seeking class-wide injunctive relief. Even if she had, the court concluded that she did not demonstrate the "violations are widespread or 'are attributable to policies or practices pervading the whole system.'" Instead, the court concluded the "City has implemented a robust, multi-faceted infrastructure to access the needs of its disabled, including the mobility-impaired population." The court emphasized the violations it found should be "considered in context" given that there are "hundreds, if not thousands, or measurements specified in the ADAAG that govern restrooms and buildings" and just because the court had found a few ADAAG violations at three facilities does not support a finding that the violations are pervasive or systemic.

***Crawford v. Commonwealth of Pennsylvania* – Pennsylvania Supreme Court – Preemption**

Philadelphia is directly challenging the Pennsylvania Firearms Act, which has been held to preempt nearly all gun restrictions enacted by local governments in the state. Philadelphia argues that the Firearms Act restricts its ability to protect the health and safety of its citizens as it has been interpreted to preempt enforcement of the nearly all of the City's firearm-related ordinances. The City alleges that but for the preemptive reach of the Firearms Act, it would pass safety ordinances that would mitigate gun violence for its residents such as ordinances that would permit extreme risk protection orders, limit purchases of firearms to once per month, and impose permit requirements on potential purchasers with stricter background check requirements. The City argues, among other things, that the Commonwealth has delegated a portion of its obligation to preserve the safety and welfare of all citizens to the City and the Firearms Act prevents Philadelphia from fulfilling its obligation to do so.

In a 2-1-2 decision, a five-judge panel of the Commonwealth Court of Pennsylvania dismissed the case. In a plurality opinion, the Court claimed that dismissing the case was required under precedent from previous cases that did not find Pennsylvania Firearm Preemption Laws to be unconstitutional. A concurring opinion noted that the Court felt constrained to follow Pennsylvania Supreme Court precedent finding Pennsylvania's Firearm Preemption Laws to be constitutional, but recognized that "local conditions may well justify more severe restrictions than are necessary statewide." The opinion also stated that the petitioners raised constitutional arguments that may allow the Pennsylvania Supreme Court to reconsider precedent on firearm preemption. Two judges joined a dissenting opinion. "Pennsylvania's municipalities have an



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important duty to protect the health, welfare, and safety of their citizens," the opinion reads. "In my view, protecting citizens against the threat of gun violence lies at the heart of this duty."

***City of South Miami v. DeSantis* – Eleventh Circuit - Preemption**

Several immigrants' rights organizations challenged Florida's SB 168 (2019). Among other things, SB 168 affirmatively requires local governments to use "best efforts to support the enforcement of federal immigration law" and prohibits local governments from adopting sanctuary policies of any kind (for example, policies against complying with ICE's civil detainers, sharing information with ICE about the impending release of detainees, or participating in 287(g) agreements under which DHS deputizes local law enforcement officers to directly enforce immigration laws). After a six-day bench trial, the district court agreed with the plaintiffs that the Florida Legislature enacted these portions of SB 168 with discriminatory motive, that they had foreseeable disproportionate impacts on racial and ethnic minorities, and that the provisions therefore violate the Equal Protection Clause. *See* 561 F.Supp.3d 1211 (S.D. Fla. 2021).

***Myrick v. City of Hoover* – Eleventh Circuit - USERRA**

The plaintiffs in this case are four police officers who work for the City of Hoover, Alabama. They also serve in the United States armed forces as reserve officers. Throughout their employment with the City, they have been called to military duty and taken military leave from their jobs. Under the City's policies, they are afforded 168 hours of military leave and remain in active status for those hours, including for the purposes of accruing benefits. If their leave is longer than 168 hours, they request a leave of absence and go into unpaid status but remain eligible for their jobs when they return. They do not accrue employee benefits while they are in unpaid status. The plaintiffs allege that their employment benefits should have accrued while they were on leave and under non-pay status because military leave should be treated as comparable to administrative leave for the purposes of the Uniformed Services Employment and Reemployment Rights Act (USERRA). If, as they allege, administrative leave were applicable they would be entitled to earn annual leave, sick leave and holiday leave all of which have monetary value associated with the type of leave. The City asserts that the terms of its administrative leave policy differentiates it significantly and substantially to be used as a comparable leave for USERRA purposes.

USERRA provides that a person who is a member of a uniformed service "shall not be denied . . . any benefit of employment by an employer on the basis of that membership . . . performance of service . . . or obligation." 38 U.S.C. § 4311(a). While away from their civilian jobs, servicemembers are "entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service." 38 U.S.C. § 4316(b)(1)(B); *see* 20 C.F.R. § 1002.150(a).



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The officers argue that administrative leave and military leave are comparable. Courts look to three factors to determine if leave is comparable for the purposes of benefits under USERRA: duration, control, and the purpose of the leave, with duration being the "most significant factor to consider."

Under the City's policies, an employee is eligible for paid administrative leave for inclement weather, jury duty, voting, court hearings, and participation in job-related training. These types of leave are typically for shorter duration and on average, short periods of military leave for training last longer than short periods of administrative leave by a 3:1 margin. Paid administrative leave also is available under the City's policy when the City removes an employee from service during an internal investigation. This type of leave was rare, but in the last 30 years, the City placed 3 employees on administrative leave pending an internal investigation. Like other local governments, this form of leave is designed to protect against claims of due process violation as a local government investigates claims against employees. The average length of paid administrative leave for an investigation is 16 months and the court found the average deployed military leave is generally comparable. (Though one of the officers was deployed for nearly 5 years during different tours).

The court found that the duration factor favored the city. However, the court found that the purpose and control factors both favored the employees and ultimately found in favor of the employees that the administrative leave was comparable to the military leave. The City argued that due process considerations compelled it to provide paid administrative leave to employees under investigation, and the court found that purpose was similar to military leave as both enable the employer to meet its obligations under law. Finally, the court rejected the City's arguments that the control factor favored the City because its policies require those on administrative leave to be available to work and report to the Mayor whereas officers on military leave are unavailable to work / report to the Mayor. The court concluded that officers voluntarily participate in the military reserves and similarly, officers "voluntarily place themselves in a position in which they will have to take administrative leave if their wrongdoing is discovered." (Of course such a finding ignores the fact that some employees who are investigated for misconduct are innocent).

The court found that on balance, even though duration of the leave is the most important factor and favored the City, the duration wasn't so dissimilar to tip the scales in favor of the City.

***Philadelphia v. Armstrong* - Petition for Allocatur (review) Supreme Court of Pennsylvania – Preemption**

Philadelphia Code §10-838a imposes a fine on individuals who fail to report a lost or stolen firearm within 24 hours after the theft/loss is discovered. The City filed a complaint alleging Rashad Armstrong failed to report a firearm missing or stolen, in violation of the ordinance. Armstrong admitted in his criminal sentencing to being a straw purchaser of guns on six different occasions (which is why he did not report the guns lost/stolen) and pled guilty to various firearm violations under state and federal law.



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With regard to the City's ordinance in this case, however, Armstrong argues the ordinance is preempted by 18 Pa.C.S. §6120(a), which states "No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth."

Philadelphia argues that Section 6120(a) only preempts "municipal laws that regulate the lawful ownership, possession, transfer, or transportation of firearms, but does not preempt municipal laws that regulate the unlawful ownership, possession, transfer, or transportation of firearms." The City also argues that State law does not preempt the ordinance because it does not directly concern the ownership, possession, transfer, or transportation of firearms. The City also argues that the balance of harms tips in its favor given the public health and safety implications of the increase in gun violence in the City.

By way of background, in *Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996), the Supreme Court of Pennsylvania concluded the assault weapon bans by Philadelphia and Pittsburgh were preempted by Section 6120(a). The intermediate appellate court in this case interpreted *Ortiz* to mean that "the regulation of firearms is an area where legislative activity is vested singularly and absolutely in the General Assembly of the Commonwealth." The court then concluded that the Ordinance at issue in this case was therefore preempted by Section 6120(a).

One of the judges on the panel concurred in the decision, indicating that the court is bound by *Ortiz* but she believes the Supreme Court of Pennsylvania should reconsider the case to allow for local restrictions which are narrowly tailored to local necessities.

***Knight v. Metropolitan Government of Nashville & Davidson County* – Sixth Circuit - Land Use/ Takings / Unconstitutional Conditions**

Nashville passed a "Sidewalk Ordinance" which applies to the construction of all new single-family and two-family homes and to the substantial renovation/expansion of such homes within a certain district. Under the ordinance, any owner pursing construction outlined in the ordinance would need to agree to construct a city sidewalk on the owner's property frontage in order to receive a building permit unless they receive a waiver or unless under "unique situations" they make an "in-lieu contribution" to the City's pedestrian benefit fund. The "in-lieu-fee" is based on $186 per linear foot and capped at no more than 3% of the total construction value of the permit. The ordinance also requires the dedication of a public easement for the sidewalk (regardless of whether it is built or not).

When the plaintiffs sought to build a new single-family home, as a condition of doing so, Nashville required them to either construct a sidewalk or pay an in-lieu fee (ranging between $7,600 and $9,000) to get their building permit. The Zoning Administrator and Board of Zoning Appeals denied the plaintiff's request for a waiver. The plaintiff refused to grant the easement



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for the sidewalk to the City and the building permit expired and they were unable to build the new homes.

The plaintiffs sued, claiming the ordinance violated the Takings Clause. They argued that the ordinance amounted to an unconstitutional condition under *Nollan* while the City argued the court should analyze the ordinance under *Penn Central* as a regulatory taking. The district court framed the question as follows: "whether a legislative, generally applicable development condition that applies to all new development within a certain geographic zone, as opposed to an adjudicative land-use exaction, should be addressed under the *Nollan/Dolan* framework." The district court concluded that the *Nollan/Dolan* test did not apply to legislative land use ordinances and instead analyzed the issue under *Penn Central* as a regulatory taking. The court reasoned that the discretionary / ad hoc nature of the individualized decisions in *Nollan* and *Dolan* were key distinguishing factors from the generally applicable legislation in question. Under *Penn Central,* the court concluded that no regulatory taking had occurred, and the plaintiffs were not entitled to damages.

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