tion" was available and the City accepted payment from anyone, but without a requirement that the payor have either an interest in the property or responsibility for the arrears. This fell far short of establishing that the City's practice was an "irrational" or "arbitrary" method of collecting payment for water services, or constituted "a gross abuse of governmental authority." Lastly, the City's ordinance did not violate the Equal Protection Clause under rational basis review. *Brown v. City of Barre*, No. 5:10-cv-81, 2012 U.S. Dist. LEXIS 96738 (D. Vt. July 12, 2012).

Retaining Seized Firearms

The opinion in a case previously discusseed in the Cases column of the March/April 2012 issue of *Municipal Lawyer*, *Houston v. City of New Orleans*, No. 11-30198, 2012 U.S. App. LEXIS 5370 (5th Cir. Mar. 15, 2012), has been withdrawn. On May 22, 2012, an en banc panel of the U.S. Court of Appeal for the Fifth Circuit vacated that ruling, substituted a new opinion, and remanded the matter without argument in a ruling reported at *Houston v. City of New Orleans*, 682 F.3d 361 (5th Cir. 2012).

In this action, brought pursuant to 42 U.S.C. § 1983, Errol Houston, Jr., had claimed that the City of New Orleans, the District Attorney, and other defendants had violated his Fourteenth Amendment rights (to keep and bear arms, incorporated from the Second Amendment, and to due process) by retaining his lawfully-seized firearm after the district attorney had entered nolle prosequi (an abandonment of prosecution) on the charges brought against Houston. Almost a year after his arrest, and following his requests for the return of his firearm being denied by the district attorney's office and the police department, Houston filed his action. In an amended complaint, Houston added claims for retaliation and unlawful arrest, claiming he had been again arrested by New Orleans police officers (those charges also "nolle prossed") after he filed suit.

The en banc panel turned to the well-established maxim that federal courts did not decide constitutional issues where there was an adequate state-law basis to resolve the dispute. In this case, two state statutes addressed the ability to retain lawfully seized property – La. Rev. Stat. 40:1798 ("Firearms; disposal by law enforcement agencies") and La. Rev. Stat. 15:41 ("Disposition of property in connection with criminal proceedings"). The first required the law enforcement agency to return the seized or forfeited firearm to the owner unless it was contraband, was used to violate the law, or was one that the owner could not lawfully possess. The second statute provided that, in default of any specific provision, property seized in connection with a criminal proceeding which was not needed as evidence (or no longer needed as evidence) was to be returned to the owner, unless it was contraband. "There is no authority for the government to hold the property when, by its own act, it has ceased active 'use' or 'need' for the 'evidence'. Accepting, as we must, the truth of the well-pleaded allegations in Houston's complaint, the government's refusal to restore the firearm to Houston following the second nolle prosequi (if not earlier) arguably placed it in violation of these state-law provisions..." The matter was remanded for determinations of, among other things, whether the government had active "use" or "need" for Houston's firearm. (Thank you to Christopher A. Conte, Legislative Counsel, NRA/ILA, for his note about this case.)

Constitutional Law

Commerce Clause—Market Participant

"The basic question before us is whether the State of Michigan acts in a proprietary capacity as a 'market participant' rather than as a government regulator when it contracts with a private bridge company to divide up the work of building new ramps and roads that will connect various interstates with the Ambassador Bridge," located between the United States and Canada. In this case, the State, through its Department of Transportation (MDOT), entered into a contract with the Detroit International Bridge Company (DIBC), to construct new and improved approaches to the Ambassador Bridge, privately owned by the DIBC, from interstate roads in Michigan. The project was called the "Gateway Project," and the contract specified that the State and DIBC had separate construction jobs to perform. The State used State and federal highway funds to complete its share of the work. The State had subsequently sued DIBC over parts of the work, which meant that the newly-constructed freeway ramps leading up to the bridge remained closed because, the State alleged, to open them prior to completing the Gateway Project construction would be unsafe, jeopardize federal funding, and interfere with the ongoing construction.

The plaintiffs were trucking companies that shipped goods across the border between the United States and Canada. They sued the State, characterizing the MDOT's refusal to open the ramps as a "Closure Order," and claiming that this refusal-closure order violated the Commerce Clause because it blocked the free flow of travel between the interstate highways and the Ambassador Bridge. (In fact, however, the ramps had never been open.) The district court granted the State's motion to dismiss the claims, and the plaintiffs appealed.

The U.S. Court of Appeals for the Sixth Circuit affirmed. "We hold that, for purposes of the Commerce Clause and the plaintiffs' statutory claims, the State is acting in a proprietary capacity here and, like the private bridge company, takes the role of a market participant." The State was participating in the road construction market in order to improve transportation across a privately-owned river crossing. It was not protecting local commerce by discriminating against out-of-state or foreign commercial interests. "To the contrary, it is ensuring the completion of a contract, financed in part by State funds and federal funds that the State has the authority to administer, that will actually *encourage* the flow of commerce across state and international lines." *Mason & Dixon Lines Inc. v. Steudle*, 683 F.3d 289 (6th Cir. 2012).

Personnel & Employment

Employee Speech Rights

James Griffin was a 26-year veteran of the New York City Police Department (NYPD), and a former Detective First Grade. In 2005, another Detective First Grade, O'Keefe, failed to follow standard NYPD operating procedures in investigating a homicide. The Investigation Unit (IU) scheduled a hearing to

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decide whether to formally discipline O'Keefe. Another detective, McCarthy, told Griffin to take responsibility for the botched investigation and say it was his fault. McCarthy was not Griffin's partner, and neither officer was assigned to the case. Griffin told the NYPD Internal Affairs Bureau (IAB) about McCarthy's instructions to lie in an official investigation. The NYPD Patrol Guide provided, in relevant part: "All members of the service have an absolute duty to report any corruption or serious misconduct, or allegation of corruption or serious misconduct...". When word got out that it was Griffin who had reported McCarthy's corrupt overture, colleagues and other police officers allegedly started retaliating against him (e.g., writing "RAT" on his locker, and by refusing to speak or make eye contact with him). McCarthy denied making the demand to Griffin, and the charges against McCarthy were dismissed as unsubstantiated.

Because of the level of animosity towards him by fellow officers, Griffin was transferred to another squad. He claimed that the Deputy Chief there, Reznick, and those under his command, treated him less favorably than other officers. Griffin filed grievances over this, but his workday experiences continued to include anonymous retaliatory actions (threats, vandalism, "poison pen" notes) along with retaliation at more official levels: denials of overtime, delays in approvals of expenses, a greater workload, and other actions apparently designed to drive Griffin to resign or retire. By 2009, Griffin had had enough, and resigned.

He sued under 42 U.S.C. § 1983, claiming that the retaliation he faced as a result of reporting his colleague's misconduct violated his right to free speech as guaranteed by the First Amendment and his rights to procedural and substantive due process under the Fifth and Fourteenth Amendments, and that the City, the NYPD, Reznick, and other individual defendants conspired to deprive him of his civil rights in violation of 42 U.S.C. § 1985. He also asserted claims for intentional infliction of emotional distress and "whistleblower" retaliation under New York State law. The defendants move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim upon which relief can be granted).

As an initial matter, all claims brought solely against the NYPD were dismissed with prejudice, as the NYPD was a non-suable agency of the City. The claim for First Amendment retaliation was "the pivotal issue in this case." There was no dispute that plaintiff had sufficiently alleged that adverse employment action was taken against him, and that a causal connection existed between his speech and such action. The only issue was whether his complaint to IAB constituted protected speech under the First Amendment, pursuant to *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (First Amendment protects a public employee's right to speak as a citizen addressing matters of public concern, rather than statements pursuant to his official duties). The court ruled that it did: the plaintiff did speak as a citizen addressing matters of public concern. Considering the "class of cases where no clear 'official duty' to speak is present on the record, this Circuit focuses on the subject, manner, and context of the speech to determine whether it relates to topics that are 'indispensable prerequisites to effective' performance of the speaker's 'primary employment responsibility,' and thus not entitled to First Amendment protection."

Addressing the "speech as a citizen" component, the court found McCarthy's alleged misconduct did not directly interfere with the plaintiff's ability to perform his assigned duties. The court was "not at all persuaded that the existence" of the Patrol Guide foreclosed the plaintiff's claim to First Amendment protection. This ignored the fact that, although the plaintiff's reporting may have been required by some broader written policy applicable to all police officers, it had no bearing on whether such reporting was actually expected or permitted, much less tolerated, in practice. Moreover, the defendants' argument "would create an impermissibly broad definition of a public employee's job responsibilities." The fact that the plaintiff directed his alleged speech only to NYPD officials was also not conclusive: the IAB could not be considered as part of the chain of command at the NYPD, and any citizen could report wrongdoing to the IAB. On the "public concern" element, speech relating to the functioning of government was of "particularly great import to the public," and of "greatest significance" was speech related to corruption in the police force. Lastly, the court held dismissal of the claims against the individually named defendants on qualified immunity grounds was inappropriate. *Griffin v. City of New York*, No. 10 CV 2592 (RJD) (MDG), 2012 U.S. Dist. LEXIS 106208 (E.D.N.Y. July 31, 2102).

Employee Speech: Police & Immigration Policies

Joslyn Johnson was a Sergeant in the City of Houston Police Department (HPD) and the widow of a former HPD officer, Rodney Johnson, who was tragically shot and killed in 2006 by an illegal alien during a routine traffic stop. She brought a 42 U.S.C. § 1983 challenge to certain policies (General Order 500-05, passed in 1992, and HPD Circular 06-1010-298, issued in 2006) maintained by the HPD, which she alleged substantially restricted, if not prohibited, her from communicating with U.S. Immigration and Customs Enforcement (ICE) about matters concerning the status of undocumented aliens and those who were criminally present in the United States as undocumented aliens. Very briefly, these provided that officers would not make inquires as to the citizenship status of any person, nor would they detain or arrest persons solely on the belief that they were in the country illegally; officers had the discretion to check the "wanted" status of any person legally detained, and were required to check the "wanted" status of any person ticketed, arrested, or jailed.

The plaintiff alleged that under these policies, officers were barred from contacting ICE directly unless an officer's "wanted" check produced a National Crime Information Center (NCIC) "Immigration Hit," indicating that a detained person was the subject of an outstanding ICE-issued warrant. By limiting checks