alleged preferential treatment that Brown gave to gays and lesbians in hiring and promotions. Brown knew of this complaint. When Brown was investigating another employee, his e-mails turned up a copy of a diary prepared by Scott that contained discriminatory comments and excerpts of other employees' work documents. This prompted Brown to order an investigation of Scott. This was done by another employee, and his report, recommending that all of the charges against Scott be sustained, went to Fuller. Fuller decided to fire Scott, ostensibly for her improper use of DCJ's computers and e-mail system. Scott sued, claiming that her termination was actually in retaliation for her engaging in speech – the complaints to supervisors and the BOLI complaint – protected under the First Amendment and by the state's whistleblower protection statute. Fuller maintained that, while Brown played a role in the investigation leading to the termination, Brown had no say in the decision to fire Scott. Scott did not produce any evidence to the contrary, but claimed that Brown wanted to retaliate against her and, thus, unlawfully influenced Fuller's decision. For her part, Brown argued that Scott's protected conduct was not a "substantial or motivating factor" in her termination, which would have occurred even in the absence of the conduct. After Brown moved unsuccessfully for summary judgment, a jury found in Scott's favor and awarded her economic damages of $140,000, non-economic damages of $10,000, and punitive damages of $500,000.

On appeal, the Ninth Circuit reversed and remanded. Fuller's legitimate and independent reasons for her decision to terminate Scott eliminated any causal link to Brown's alleged retaliatory bias. Causation was the dispositive issue. Even taking into account Brown's role in bringing the diary or journal to Fuller's attention, the evidence negated any inference that Fuller would not have taken any action against Scott but for Brown's retaliatory motivation. Brown was engaged in activities that were "typical and appropriate" for her position when she became aware of the diary, which was itself accidentally discovered during an investigation of another employee. Scott did not allege that Brown had targeted her for investigation or had selectively reported her misconduct. The record showed that Brown played a very limited role in the investigation and was, at most, "part of a process." Moreover, given the "numerous potential rules violations revealed" by the diary and the actions taken by the human resources department, it was unreasonable to conclude that Fuller (who had already initiated the inquiry into another employee's misuse of e-mails) would not have been informed of or reacted to the diary "but for" Brown's animus against Scott. "To say that the County's investigative process was fatally and irrevocably tainted by Brown's overall limited involvement would stymie legitimate corporate management and discipline, which must necessarily involve and rely upon supervisory staff."

Accordingly, the court declined to impute the subordinate's unlawful motivation "upstream" to the final decision-maker. *Lakeside-Scott v. Multnomah County*, 556 F. 3d 797 (9th Cir. 2009).

Search and Seizure

Warrants – Probable Cause

A law enforcement officer applied for, and was granted, a search warrant to authorize the aerial use of a thermal imaging device for a home owned by Mohammed Kattaria, based on, among other things, a cooperating defendant (CD) with first-hand knowledge of the facts reporting that Kattaria had been an indoor marijuana grower some year earlier, and current utility records showing an unusual and excessive consumption of electricity at the residence. The officer's affidavit stated that the search would be for a single type of "property," namely the "excess amount of heat emitting from the residence and garage relative to comparable structure[s] in the same neighborhood," and would be conducted at night in a specified manner. When the search resulted in thermal imaging consistent with an indoor marijuana grow operation, police obtained and executed three warrants to enter and search homes owned by Kattaria. The searches uncovered 548 marijuana plants, bags of harvested marijuana, and other incriminating evidence. Kattaria attacked all four warrants, but focused on the thermal imaging warrant (the later three warrants were supported by considerably greater probable cause, including the results of the thermal imaging). The district court upheld the warrants, and a panel of the U.S. Court of Appeals for the Eighth Circuit affirmed. Kattaria petitioned for rehearing en banc, which was granted. He claimed that the district court erred in concluding that the first warrant was supported by probable cause because the affidavit contained no statement as to the CD's reliability, the CD's observation of a grow operation in Kattaria's basement was uncorroborated and stale, and other reasons.

The en banc court concluded first, that the initial thermal imaging search was supported by traditional probable cause, being a "fair probability that contraband or evidence of a crime will be found in a particular place;" alternatively, that the evidence obtained by executing those warrants could not be suppressed under the good-faith exception to the exclusionary rule adopted in *United States v. Leon*, 468 U.S. 897 (1984). Although the CD's information was "quite dated," it provided the impetus for further investigation, and the recent, abnormally high power consumption provided a "substantial basis" to conclude that probable cause existed to issue the warrant. In any event, evidence seized pursuant to a warrant that was later determined to be invalid would not be suppressed if the officers executing the warrant acted in good faith reliance on its validity. *U.S. v. Kattaria*, 553 F. 3d 1171 (8th Cir. 2009).

Section 1983 – Credibility and Evidence

Two Town of Townsend police officers found LaFrenier sitting in his car by the side of the road. When questioned, he appeared disoriented, confused, unresponsive, and uncooperative. This was due to the medications he had been taking, but was not clear at the time. When the officers asked LaFrenier to get out of the car, he resisted and fought, leading to his being charged with assault and battery, resisting arrest, and disorderly conduct. These charges were eventually dismissed. LaFrenier then sued the Town and the officers in a Section 1983 suit, alleging excessive force, a failure to provide medical treatment, and false arrest. The defendants moved for summary judgment, relying on evidence of the officers' version of the events. LaFrenier said he had no memory of the key events and offered no contradictory evidence,

but sought to forestall summary judgment on the basis that the officers' accounts of the events were not believable: that there were such inherent inconsistencies in the officers' testimony and their testimony was so inherently unbelievable as to allow him to get to a jury. The district court granted judgment on the merits, without reaching the qualified immunity issue, as it was undisputed that LaFrenier actively resisted arrest and attempted to flee; there was no evidence the officers were deliberately indifferent to LaFrenier's medical needs; and the officers had probable cause for the arrest, with no evidence of an improper motive. LaFrenier appealed.

The First Circuit affirmed. The appeal raised "a single key theme: that summary judgment could not be granted because LaFrenier [was] entitled to attack the credibility of the officers' testimony. As a matter of law this is incorrect." LaFrenier offered no affirmative evidence contrary to the defendants' evidence; his claims were not supported by the record; and there was nothing inherently unbelievable about either officer's testimony. Summary judgment could not be defeated on an argument of "mere disbelief" of the moving party's evidence. *LaFrenier v. Kinirey*, 550 F.3d 166 (1st Cir. 2008).

Voting Rights

Photo ID Requirement

Does a state law that requires every voter who casts a ballot to provide photo identification unduly burden the right to vote? In 2005, the Georgia General Assembly enacted a statute that required all registered voters to present government-issued photo identification (ID) before voting in person. Those without acceptable ID could purchase a voter ID card for no more than a $35 fee. The National Association for the Advancement of Colored People (NAACP) and others challenged the law, claiming that this precondition to voting unconstitutionally interfered with the right to vote in violation of the Fourteenth Amendment. The district court granted a preliminary injunction, but, in the meantime, the Georgia legislature repealed the 2005 statute and replaced it with a new law. This retained the ID requirement, but eliminated the fee for the card and required state officials to issue, free of charge, a photo ID card to any registered voter who did not have the acceptable form of ID. The plaintiffs amended their complaint to include the new law. Ultimately, the district court dismissed a challenge for lack of standing and alternatively, ruled on the merits and denied a permanent injunction, finding that the State's interest in preventing voter fraud outweighed the burden on voters' rights.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit addressed whether the NAACP had standing, and second, whether the district court abused its discretion when it refused to enjoin the enforcement of the statute. It found that the court below erred on the question of standing, as "an organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts." In this case, the NAACP spent thousands of dollars towards voter empowerment initiatives, and trial testimony indicated that the NAACP would have to divert its volunteers and resources from "getting voters to the polls" to "helping them obtain acceptable photo identification." The court, therefore, concluded that the NAACP had standing on its own behalf, and did not address associational standing. On the second issue, the Eleventh Circuit ruled that the court below had not abused its discretion in refusing to permanently enjoin the photo ID requirement. In *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610 (2008), the Supreme Court ruled in favor of a "flexible standard" in cases where courts were required, with respect to a state's election laws, to balance interests of the state against the burden imposed by such laws. In *Crawford*, the Court ruled that a statute requiring voters to present photo ID was "amply justified by the valid interest in protecting the integrity and reliability of the electoral process." Here, the court reached a similar conclusion. The district court did not err when it determined that "the legitimate interest of Georgia in preventing voter fraud justified the insignificant burden of requiring voters to present photo identification before they vote in person." *Common Cause/Georgia v. NAACP*, 554 F. 3d 1340 (11th Cir. 2009).

Voting Rights Act – Redistricting

The plaintiffs, members of the Oglala Sioux Tribe, brought a challenge to a redistricting ordinance enacted by the City of Martin, claiming that the new boundaries set by the ordinance "intentionally and effectively dilut[ed] the voting strength of Native Americans." The district court held, based on the totality of the circumstances, that the ordinance impermissibly diluted the Native American vote and violated the Voting Rights Act of 1964 (VRA). The City of Martin appealed.

In order to establish a VRA violation, a plaintiff was required to show, by a preponderance of the evidence, that: the racial group was sufficiently large and geographically compact to constitute a majority in a single-member district; the racial group was politically cohesive; and the majority voted sufficiently as a bloc to enable it to defeat the minority's preferred candidate. The VRA provided that a denial of the right to vote occurred when, based on the totality of circumstances, it was shown that the political processes leading to nomination or election in the State or political subdivision were not equally open to participation by members of a class of citizens protected by the VRA, in that its members had "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." In this case, the City had a voting-age population of 737 persons, with Native Americans constituting 36% of this population. The City was divided into three wards. The new redistricting resulted in a situation where, even if every Native American resident voted for the same candidate, they would not be able to elect that person on the strength of their vote alone. This proved true in reality, as no Native American-preferred candidate had succeeded in being elected since the adoption of the ordinance. The court agreed with the district court's finding that the ordinance impermissibly diluted the Native American vote, and affirmed a redistricting remedial plan proposed by the plaintiffs. *Cottier v. City of Martin*, 551 F.3d 733 (8th Cir. 2008). ML