reflected the composition of the religious institutions in the County. The district court denied the taxpayers' request for an injunction. It upheld the invocation practices of the County Commission, but ruled that the Planning Commission violated the Establishment Clause because of its selection procedure. Lastly, the court held that the taxpayers had standing to challenge the selection procedures used by the Planning Commission in 2003/2004 and awarded them nominal damages ($1 each to the seven plaintiffs). Both parties appealed.

In a 2-1 decision, the U.S. Court of Appeals for the Eleventh Circuit affirmed, declining "to embark on a sensitive evaluation or to parse the content of a particular prayer." The decision in *Marsh v. Chambers*, 463 U.S. 783 (1983) made it clear that "[t]he content of the prayer is not of concern to judges where...there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." The district court had correctly applied this standard in finding that the County Commission's prayer selection process had not been exploitive, and that the practice of the Planning Commission had been exploitive and unconstitutional during 2003-2004. In the absence of a clear error in either finding by the district court, the appellate court determined that the issue of whether invocations of "Lord of Lords" or "the God of Abraham, Issac, and Mohammed" were sectarian was something "best left to theologians, not courts of law." *Pelphrey v. Cobb County*, No. 0713611, 2008 WL 4710693 (11th Cir. Oct. 28, 2008).

Land Use

Takings

The plaintiffs sought to develop a parcel of land they owned in the City of Sumner. When applying for the proper development permits, they learned that an underground storm drain pipe did not meet an ordinance that required new developments to include pipes of a minimum diameter of 12 inches. (The reason for the ordinance was "considerable flooding" in the City previously.) The City Engineer, in order to help offset the costly improvement, offered to waive certain development fees if the plaintiffs agreed to install a 24-inch, instead of a 12-inch, pipe as a condition of development. The plaintiffs agreed and made the change without objection, but later filed suit against the City, claiming the pipe-size requirement was a taking in violation of the Fifth Amendment.

The issue, one of first impression in the U.S. Court of Appeals for the Ninth Circuit, was whether a legislative, generally-applicable development condition that did not require the owner to relinquish rights in his real property, as opposed to an adjudicative land-use exaction, should be reviewed pursuant to the ad hoc standards of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), or the nexus and proportionality standards of *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Ninth Circuit held that the City's requirement was subject to review under the *Penn* analysis. In *Penn*, the City of New York denied, by relying on a local landmarks preservation law, a permit to build an office tower above Grand Central Terminal. In *Nollan* and *Dolan*, the cases dealt with a scenario where the government demanded an easement allowing public access to private property in exchange for the granting of a development permit. Here, the Ninth Circuit determined that the City's ordinance was similar to the ordinance in *Penn*, in that the law did not involve an individual, adjudicative decision, nor did the plaintiffs relinquish any rights in their real property. Although the plaintiffs claimed that the request by the City to install a 24-inch pipe was an individualized request, the court found that this was not a land-use exaction, but rather, a contract that waived certain fees in return for the increased costs of installing a larger pipe than the mandatory minimum. "[W]e conclude that the McClungs voluntarily contracted with the City to install the 24-inch pipe and thus the installation of that pipe was not a 'taking' by the City." The district court's grant of summary judgment in favor of the City was affirmed. IMLA participated in this case as an *amicus*. *McClung v. City of Sumner*, No. 07-35231, 2008 WL 4349848 (9th Cir. Sept. 25, 2008).

Litigation and Liability

City Not Liable for Mayor's Misconduct

Philip Giordano was elected the mayor of the City of Waterbury in 1995. He had previously met Jones, a prostitute and crack addict, who provided him with sexual favors in exchange for money. In 2000, Giordano requested that Jones introduce younger women to him, and she brought him her ten-year-old niece ("Jane Doe, Jr.") and her eight-year-old biological daughter ("Susan Roe, Jr."). From late 2000 until July 2001, Giordano—who was aware of the children's age—solicited sexual acts from Roe and Doe through encounters arranged through Jones, using cell phones paid for and issued by the City. The encounters took place in Giordano's office, his home, and in his City-issued police cruiser. (Ironically, the court in this case noted "Giordano promulgated the City's Sexual Harassment Policy".) In 2001, Giordano was arrested, charged with, and convicted of acting under the color of law to deprive the Roe and Doe of their constitutionally protected right to be free from unwanted sexual abuse under 18 U.S.C. § 242. Both plaintiffs subsequently brought civil actions against Giordano, in both his official and individual capacities, and against the City, seeking damages for violations of 42 U.S.C. § 1983 and state law violations based on the same conduct that resulted in Giordano's convictions. Both plaintiffs moved for summary judgment, arguing, among other things, that no genuine issues of material fact existed as to whether Giordano violated their rights, and that there was no genuine issue as to whether the City "was the moving force behind the violations" because Giordano acted as "the City's authorized final policymaker." The City filed a motion seeking summary judgment on the basis that Giordano's actions did not represent any official policy of the City; therefore, as a matter of law, there was no basis for holding the City liable under Section 1983 for

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his actions. Second, collateral estoppel was inapplicable because the legal and factual issues decided in the criminal trial were not identical to those in the civil actions, and the City was not in privity with Giordano. The district court granted the City's motion and dismissed all claims brought against it. The plaintiffs appealed, arguing that the City should be held liable because Giordano was a final policymaker for the City, and was acting within his official policymaking capacity when he sexually abused the plaintiffs.

The U.S. Court of Appeals for the Second Circuit affirmed. Under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978), to prevail in a claim against a municipality under Section 1983 arising from the acts of a public official, a plaintiff had to prove, among other things, that an official policy of the municipality caused the constitutional injury. Where a plaintiff sought to hold a municipality liable for a single decision by a municipal "policymaker," he or she had to show that the official had final policymaking power with respect to the particular conduct being challenged. The fact that Giordano was the mayor in a "strong mayor" form of city government and was, as a result, the Chief Executive Officer of the City, was insufficient to satisfy these requirements. He acted entirely outside his official policymaking capacity when he misused his power to advance a purely personal agenda. His authority as mayor did not empower him to violate clearly established law, and he was not an official policymaker with respect to the area of policy that encompassed his tortious acts: decisions to "sexually abuse young children are not 'made for practical or legal reasons' and are not in any way related to the City's interests." At most, he could be said to have had "some enforcement power with respect to the crime of sexual abuse based on his authority over the police department." Given the foregoing findings, the court found it unnecessary to address the collateral estoppel issue. *Roe v. City of Waterbury*, 542 F. 3d 31 (2d Cir. 2008).

Personnel and Employment

Political Speech Rights

In 2004, Town of Stoughton officials decided against renewing the contract of the police chief, Cachopa. This decision was controversial and a local campaign resulted to recall the selectmen who had voted in favor of the decision. The plaintiff, Welsh, was a detective sergeant (the highest-ranking position in his division) in the police department. He decided not to participate in activities related to the recall and to remain neutral. Cachopa apparently interpreted this as a sign of betrayal. During the campaign, the police department began investigating allegations of misconduct by Cachopa. Welsh was asked by the-then acting police chief to assist in this investigation, and while doing so, Welsh was subjected to harassment by other officers (for example, he found a bullet in his mailbox). Ultimately, the recall campaign was successful and Cachopa resumed his position as police chief for a short time, before being placed on administrative leave for his previous misconduct. The new acting police chief, a Cachopa supporter, decided not to reappoint Welsh to his detective sergeant position, replacing him with an officer who had supported Cachopa. (Other officers who supported him were promoted as well.) Welsh filed a Section 1983 action against the Town, Cachopa, and others who had participated in the decision not to reappoint him. Welsh claimed retaliation in violation of his First Amendment rights based on the refusal to reappoint, and by subjecting him to a hostile work environment. The district court granted summary judgment for the defendants.

The U.S. Court of Appeals for the First Circuit affirmed in part and reversed and remanded in part. Reviewing the decision not to reappoint Welsh, the court held this did constitute a cognizable adverse employment action, based on *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), where the Supreme Court held that adverse actions short of outright dismissal or demotion, such as denials of a promotion or rehiring, could still constitute adverse employment actions. However, the court limited liability only to the officer directly having the authority to appoint. (Here, it was the acting police chief, not Cachopa.) The court also dismissed the claim against Cachopa for harassment, as Cachopa was not responsible for the harassment perpetrated by other officers (who were not named as defendants). According to the First Circuit, a supervisor who did not participate in harassment could only be held liable if, among other factors, the supervisor's "action or inaction was affirmatively linked to the behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence of the supervisor amounting to deliberate indifference." Welsh, in this case, failed to produce evidence that Cachopa's conduct constituted such encouragement or acquiescence. The court also addressed the claim that the defendants violated free speech and political affiliation rights. Pursuant to *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006), Welsh was required to show that he spoke on a matter of public concern. Welsh contended that the matter of public concern was the recall election, and that his silence constituted speech. The court agreed, but did not find an actionable violation of speech rights because Welsh did not produce evidence that he was ordered to endorse, support, or reject the recall campaign. The court, however, did find an actionable violation of his right to political affiliation, as Welsh produced evidence that officers who did not support the recall campaign were perceived as opposing it and were harassed. "[T]he freedom not to support a candidate or cause is integral to the freedom of association and freedom of political expression protected by the First Amendment." The case was remanded to the district court. *Welch v. Ciampa*, 542 F. 3d 927 (1st Cir. 2008).

Speech Rights—Working Conditions

In another employee speech-retaliation case, *Miller v. Clinton County*, 544 F. 3d 542 (3d Cir. 2008), Miller was employed as a probation officer in the Clinton County Probation Office. The employees had a collective bargaining agreement with the County.