In 2010 Los Angeles received various complaints about homeless individuals living in cars on the streets of Venice. The City created a task force within the Los Angeles Police Department to cite and arrest people using their cars as "living quarters." The police relied on a 1983 ordinance to cite and arrest individuals, which stated "no person shall use a vehicle parked or standing upon any City street, or upon any parking lot owned by the City of Los Angeles and under the control of the City . . . as living quarters either overnight, day-by-day, or otherwise." The captain who ran the task force received informal, verbal training and an internal policy memo on how to enforce the ordinance. The memo directed officers to look for possessions normally found in homes to detect whether individuals were using vehicles as living quarters and instructed officers that individuals need not be sleeping in order to be in violation.

Officers began citing and arresting individuals under the ordinance. One plaintiff was cited while he was in his car parked on a public street waiting for a church to open so he could volunteer to serve food to homeless individuals. He knew the law and believed that since he did not sleep in his car on public streets – he had permission from the church to park in its lot at night – he was not breaking the law. A month later when officers saw him exiting his legally-parked vehicle they arrested him for violating the ordinance. A second plaintiff, after being issued a warning for sleeping in his car, began sleeping on the sidewalk near his parked car – which is legal in Venice. He was subsequently arrested when officers found him sitting in his car to avoid a rainstorm, despite his presenting an identification card from a local shelter where he was sleeping. A third plaintiff was driving through Venice when she was stopped by officers for failing to signal a left-hand turn and was issued a warning about the local ordinance. She had permission from a church in Santa Monica to park her RV at night and sleep there, but nonetheless the officers told her she would be arrested if ever again seen in Venice with her vehicle. A fourth plaintiff was cited and arrested after officers saw house-like items in his car, including bedding, boxed food, and bottles of medicine, despite his statements that he did not sleep in the vehicle.

Plaintiffs filed suit against the City under the Fourth, Fifth, and Fourteenth Amendments, alleging the ordinance was unconstitutionally vague and devoid of any standards to limit police discretion. The parties filed cross-motions for summary judgment and the District Court granted the City's motion on all claims.

HELD: On appeal, the Ninth Circuit reversed the District Court, holding the Los Angeles ordinance fails to provide sufficient notice to individuals of what conduct is prohibited and fails to provide guidelines to limit police discretion, enabling discriminatory enforcement.

DISCUSSION: The Ninth Circuit first dealt with the District Court ruling on summary judgment that it could not consider the plaintiff's vagueness challenge since it was not in the first amended complaint. The court held this was an abuse of discretion because the lower court should have granted the plaintiffs' request to amend. Noting that leave to amend should be granted freely and this policy should be "applied with extreme liberty," the court pointed out there are five factors courts use to determine whether an amendment should be granted. The factors include bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has already amended the complaint. The Ninth Circuit found none of these factors were an issue, and thus the lower court should have allowed the plaintiff's to amend their complaint a second time.

The court easily found the ordinance failed to provide fair notice such that citizens could conduct themselves accordingly. It did not define "living quarters" and did not set forth how long one must be using a car in this undefined fashion before breaking the law. As the Circuit Court put it, people "are left guessing as to what behavior would subject them to citation . . . . Is it impermissible to eat food in a vehicle? Is it illegal to keep a sleeping bag? Canned food? Books? What about speaking on a cell phone? Or staying in the car to get out of the rain? These are all actions plaintiffs were taking when arrested . . . all of which are otherwise perfectly legal."

The Ninth Circuit also found the ordinance unconstitutional for failing to provide any discernable guidelines to limit police discretion. The court found "arbitrary and discriminatory enforcement is exactly what [] occurred," given that the law is clearly broad enough to apply to anyone, but the police only targeted the homeless. The City argued that individuals were all cited and arrested because of health and safety concerns and that it was unsafe for them to be living in their vehicles. The court conceded that might well have been true, but the plaintiffs' conduct in each case "mimick[ed] the everyday conduct of many Los Angeles residents," and only the homeless were cited and arrested. The City also argued that it had legitimized an otherwise vague ordinance with limiting constructions given to the police, but the court rejected this argument, pointing out that the internal memo that was supposed to guide officers was completely ignored by the police and that the task force leader stated in his deposition that he did not favor that limiting construction and directed the task force members not to follow it.

***Desertrain v. City of Los Angeles*, No. 11-56957 (9th Cir. June 19, 2014).**

Where City Does Not Appeal Injunction, Non-Party Church Cannot Appeal As Intervenor

Where residents enjoined a city from permitting a church to erect a large religious display, the church, which had not been a party to the injunction suit, did not have standing to appeal the injunction.

The West Side Christian Church applied to Evansville, Indiana to construct "Cross the River," a display consisting of thirty-one, six-foot tall crosses covering four blocks of public riverfront. The City approved the application, but two residents filed suit to stop the display, claiming it violated the First Amendment's Establishment Clause. The District Court held for the residents and enjoined Evansville from permitting the display. The City did not appeal. However, West Side Christian Church appealed as an intervenor, arguing the display did not violate the Establishment Clause.

HELD: The Seventh Circuit held West Side Christian Church lacked standing to bring the appeal because any injury it may have suffered as a result of the lower court's injunction was not fairly traceable to Evansville.

Cases *Cont'd from page 35*

DISCUSSION: Article III standing requires a litigant show "(1) it has suffered an actual or imminent concrete and particularized "injury in fact"; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." The Seventh Circuit looked to the redressability prong of the analysis and determined that, because the only party bound by the injunction was Evansville, any injury West Side suffered as a result of that party being bound under the lower court's order was only "derivative" – not direct. It noted even if the injunction was reversed, that order would only allow Evansville – a third party – to review the application again, if it chose to do so, and after that potential review, potentially change West Side's position. As a result, the Circuit Court could only speculate as to whether the relief it ordered would redress West Side's asserted injury.

The second problem with West Side's position was the fact that Evansville had not appealed. The Circuit Court noted "it is basic appellate procedure that a judgment will not be altered on appeal in favor of a party who did not appeal [even if] the interests of the party not appealing are aligned with those of the appellant." *Albedyll v. Wis. Porcelain Co. Revised Ret. Plan*, 947 F.2d 246, 252 (7th Cir. 1991). Moreover, adjudicating the rights of a party that consciously decided not to appeal a decision would create a "free-rider problem": it would incentivize non-appealing parties to evaluate, in every case, whether their rights are closely enough aligned with those of an appealing party such that they should share in the benefits of an appellate judgment.

West Side countered that it should have standing because the injunction violated its First Amendment rights and, essentially, left the church in the same position as if the City had simply denied its permit application. The Seventh Circuit not only disagreed with this argument, but said it epitomized why West Side did *not* have standing--had the City denied its permit, the Church would absolutely have suffered an injury directly traceable to the City's actions. Under the facts however, the City did not deny the application – in fact it permitted the display – meaning the City did not "injure" West Side. The proper path forward, the Circuit Court directed, was for the church to re-apply in the future and, if denied a permit, file a Section 1983 suit alleging a First Amendment violation. However, the Circuit Court cautioned that "West Side's road ahead might not necessarily get any easier if it ever attains standing to challenge the injunction. We question whether a reasonable observer would be put on notice that the "Cross the River" display is strictly private speech given the sheer magnitude of a display that takes up four blocks and has two signs alerting citizens that it is a private display."

***Cabral v. City of Evansville*, 13-2914 (7th Cir. June 25, 2014).**

Incumbent Sheriff Has Qualified Immunity in Firing Deputy Who Ran Against Him

Basing its decision significantly on North Dakota law which provides that sheriffs have broad latitude in maintaining order in their departments, the Eight Circuit has reversed a lower court's denial of qualified immunity for an incumbent sheriff who fired his deputy after a contested election. Although the deputy made statements during the campaign that would generally be considered matters of public concern, the statements were challenged as untrue and gave rise to a reasonable assumption by the sheriff that he could fire his subordinate without violating an established constitutional right.

In 2010 Ron Nord, the deputy sheriff of Walsh County, North Dakota, ran for sheriff against the incumbent, Lauren Wild. Wild won the general election and the next day informed Nord he was terminated because of an "unwritten rule" that deputy sheriffs who run against sheriffs will be fired. Sheriff Wild also said he fired Nord for specific statements he made during the campaign.

Nord sued Walsh County and Sheriff Wild, alleging he was fired in retaliation for statements he made during the campaign that were protected First Amendment speech. The District Court denied Wild's qualified immunity claim. Wild appealed.

HELD: The Eighth Circuit reversed, holding Wild was entitled to qualified immunity.

DISCUSSION: Qualified immunity requires a two-step analysis, wherein courts ask "(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct." *Winslow v. Smith*, 696 F.3d 716, 731 (8th Cir. 2012). Nord had stated he was running because Wild's health was "bad," that Wild's wife did not want him to run, and that Wild was going to resign in a couple years to run for a state senate seat. Wild conceded that Nord's First Amendment rights may have been violated, but he was nevertheless entitled to qualified immunity because terminating Nord did not violate a clearly established constitutional right that Wild, as a reasonable person, would have been aware of.

The majority evaluated whether Nord's speech was protected by the First Amendment under the *Pickering/Connick* balancing test. This test required balancing "Nord's First Amendment rights against Wild's state government employer prerogatives" and involved four issues – "(1) the general authority and responsibilities of the employing government entity, (2) the nature and character of the specific employer-employee relationship, (3) the speech involved and (4) evidence tending to establish the speech's impact on the efficient operation of the government entity." The Eighth Circuit noted the North Dakota supreme court had held that a deputy sheriff's official acts are acts of the sheriff, that the deputy is "the deputy of the sheriff, not of the office of sheriff," and that as an official with no original power, the deputy sheriff is the agent of the sheriff, who is the principal.

The Circuit Court also relied on a state attorney general opinion for the principle that absent some type of restraint on an employee, employees in North Dakota are at-will employees, and that in light of the abovementioned state supreme court law, it was reasonable for the sheriff to consider his deputy an at-will employee whom he could fire without cause.

Finally, the Court looked to its own Circuit precedent for the principle that it gives broad latitude to law enforcement officers in executing their duties, especially the management of subordi-