New Hampshire relied on Reed to strike down a law that made it illegal to take a picture of a completed election ballot and show it to others. "As in Reed," Judge Paul Barbadoro wrote, "the law under review is content-based on its face because it restricts speech on the basis of its subject matter."

In a concurrence in the Reed decision, Justice Stephen G. Breyer suggested that many other laws could be at risk under the majority's reasoning, including ones concerning exceptions to the confidentiality of medical forms, disclosures on tax returns and signs at petting zoos.

Stay tuned for more as various federal courts work through these cases in the aftermath of *Reed*. Clearly, not all judges are thrilled with the decision and the resulting trends.

In this age of what seems like daily news items related to a public tragedies in one place or another, a quick listserv survey of colleagues reveals that almost everyone has law enforcement presence at their regular council meetings. Many report the Chief of Police regularly attends as a department head, but some report slightly higher levels of security.

One colleague reports: " We have metal detectors at the front doors and City marshals attend every Council meeting – it is part of our standard operating procedure. The Mayor also has police officers assigned to her for security that attend as well."

Others report:

"The police chief and fire chief (also a peace officer) attend every meeting as department heads. If we have an idea that there may be a controversial agenda item, or we have word that someone may be coming to make trouble, we will have additional officers present."

"We have routinely have 1-2 peace officers who attend as part of our SOP, but no metal detectors. When we know there will be a large gathering, we typically will request an increase in the number of officers in attendance."

"We have a metal detector and city marshal at every meeting."

"We have 1 or 2 police officers at each Council meeting – another 1 or 2 if there is a particularly contentious issue or an unusually large crowd is expected. We also have 1 or 2 at each Planning Commission meeting."

Sadly, one colleague reports that:

Our city used to be entirely open, but a few years ago a man walked into the Democratic state headquarters a few blocks from City Hall and shot a former state senator (and party chair) dead. So, the City imposed pass cards for all employees, and involved visitor's passes for visitors. We also have two entrances to City Hall for the public that have a metal detector in place. We were in a meeting a couple of years ago when the metal detector picked up on a long knife someone had, and he got extremely angry. Fortunately, the chief of police was in the meeting, and he anger subsided rapidly when he got to the door.

It is a sign of the times, I suppose, that these measures are necessary. I urge everyone to take security issues seriously, and review your emergency operations procedures on a regular basis. Sure, the grumbling is bound to take place, but preventing an incident such as cited above is of paramount importance.

As a profession, I think we need to pause, take a breath and not forget to have a little fun every now and then. The whole legal profession should not become a billable hours contest. There is enough pressure packed into the practice of law that many states now have CLE requirements that must (in some fashion) address substance abuse and mental health issues among lawyers. This is a shame, and I know a few lawyers who have retired and lamented that "The fun has been taken out of the practice of law."

Well, thankfully as one avenue of enjoyment for those of us who belong to IMLA, we have the Water Cooler. If you don't know, the Water Cooler was founded by New Jersey's Bill Kearns years ago for the purpose of discussing a variety of topics (most unrelated to the law) in an atmosphere of "Courtesy, Civility and Collegiality." It provides a momentary break from day to day activities and inserts a little "fun" into our professional lives.

During the IMLA Annual Meeting in San Diego this Fall, 18 of us gathered around the table for the 5th Annual Water Cooler Reunion. This annual event represents the one time of the year where our relationship is not virtual, but becomes reality as we meet face to face. I started this reunion back in 2012 at the Annual Meeting in Austin, and it has grown since that time. We've been to B.D. Riley's in Austin, Foley's in San Francisco, Pratt Street Ale House in Baltimore, The Hofbrau House in Las Vegas, and most recently met at The Field, an Irish Pub / Restaurant in the heart of San Diego's Gas Lamp District.

Representatives from Wisconsin, Georgia, Missouri, South Carolina, Kansas, Louisiana, Texas, New York and Canada, as well as some spouses and children, were on hand to share in the fun conversation and great food in the upstairs private room. Non-legal discussions covered college preparations for kids, travel plans and vacations, the birth of grandchildren (pictures were passed around, of course), and athletics. On top of all this, the food and drinks were outstanding! A nod to Chuck Thompson for recommending the venue. It provided a great atmosphere for the annual event, and hopefully we can keep it up. I look forward this event annually, as it is attended by folks who have become some of my best friends.

Of course, the 6th Annual Water Cooler Reunion comes our way during the week of October 14 through October 18th as IMLA visits Niagara Falls, Ontario, for its 82nd Annual Conference. The location and time/date are yet to be determined, but if you can make it to this event it has proven to be quite fun. Of course to make it, you need to register for and attend the Annual Conference. Please do so if at all possible. Support IMLA!

From the "Can You Believe It?" corner, an area city recently had an inquiry from a citizen who wanted to know if they should report getting scammed in a dope deal. Of course, the local police was response was "Yes, tell us all about this person from whom who you bought drugs."

In my fair city, we had a lady come through the metal detector safely as she headed into court. She then handed her purse to the police officer to have the contents reviewed. Upon opening the purse, the officer immediately saw in plain view a bag of marijuana. The officer asked "What are you doing with this?" The reply: "Oh, I forgot about that. Can I take it back outside?"

The prosecution rests, your honor... ML

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employees Metz identified were not similarly situated; Metz was serving a six-month probationary period when he committed his offense, and he was the only employee who was insubordinate to his superior officers. Three employees were cited for driving while intoxicated, but their offenses were not reported to the public. Two were working for Sasser's predecessor, and Sasser fired the third employee. "[D]isciplinary measures undertaken by different supervisors may not be comparable." A fourth employee, whose theft of a pelican was reported in the newspaper, did not embarrass the District by being identified as a District employee. "[T]he quantity and quality of [a] comparator's misconduct [must] be nearly identical" to evidence discriminatory discipline.

Supremacy Clause: County Cannot Undertake Fire-Mitigation Clearing in Federal Forest Lands without Forest Service Approval

***United States of America v. Board of County Commissioners of the County of Otero,* No. 15-2210 (10th Cir. Dec. 8, 2016)**

The interest of a state or county in protecting the health of its residents does not supersede federal authority over public lands, rendering unconstitutional a New Mexico county's efforts to clear underbrush in a federal forest without approval.

In 2001, after suffering devastating wildfires on federal land within its boundaries, the New Mexico state legislature adopted a statute providing for "self-help" by local communities. The statute purported to enable "a board of county commissioners for a county in which a disaster has been declared . . . [to] take such actions as are necessary to clear and thin undergrowth and to remove or log fire-damaged trees within the area of the disaster" after, among other things, consulting with the Forest Service."

In 2011 Otero County (County), 75% of which is federal land, suffered extreme drought, prompting the U.S. Forest Service to close the surrounding public lands to reduce fire danger, a decision the County replicated by declaring a state of emergency. The County then passed a resolution enacting a fire mitigation plan under the aforementioned New Mexico statutory authority, notified the U.S. Forest Service and, despite disapproval by the agency, implemented the plan.

The U.S. Forest Service sued the County and the state seeking a declaration that the resolution and its enabling statute were preempted by conflicting federal law. The district court granted summary judgment to the United States, holding "the Property Clause grants the federal government plenary power over federal lands, and consequently . . . the Tenth Amendment does not reserve an exclusive sovereign right to New Mexico to regulate federal lands in contravention of federal law." In sum, it held the Supremacy Clause preempted the state enabling statute and the County resolution. The County, but not the State of New Mexico, appealed.

The Circuit first took note that the County had not offered a construction of the statute that might coexist with federal law, instead framing the issue as whether "the Property Clause of the United States Constitution so thoroughly preempts state power that a state may not, under any circumstances, remove a deadly and destructive nuisance from National Forest lands even where the United States refuses or fails to remove that danger itself[?]"

The County followed up this argument saying "It is both troubling and nearly inconceivable . . . that the federal government would have unfettered and absolute authority over lands not expressly proclaimed by the Constitution as necessary for federal governance." It continued, arguing that the Property Clause does not grant the federal government "absolute, unfettered plenary power" to prohibit the States from taking measures they deem necessary "to protect their citizens from impending harm" and that since the power had not been expressly given to the federal government in the Constitution, it must have been reserved to the States under the Tenth Amendment.

The Circuit Court had little trouble rejecting this argument, citing constitutional and Supreme Court precedent that clearly ran contrary to the County's position. The Circuit referenced *Kleppe v. New Mexico*, 426 U.S. 529 (1976), where New Mexico had challenged the federal Wild Free-Roaming Horses and Burros Act (Act) on the grounds that the Act unconstitutionally expanded power to the federal government over horses and burros, not simply the federal lands they lived on. The Supreme Court rejected the argument, holding "that the Property Clause gives Congress the power over the public lands 'to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them . . . .'" The Circuit also cited a similar Supreme Court case involving elk on federal lands in Wyoming, which again held that federal authority over public lands also included authority over wildlife on those lands.

The County answered that these holdings – and others rendered under them – were based on misunderstandings of constitutional history and nonbinding dicta because the compelling interest at issue in this case – protecting the health and safety of local residents – was not at issue in the cases cited by the district court. The Circuit rejected this position, saying "[w]e have no authority to reject the reasoning behind a Supreme Court holding—whether based on questionable logic or history—and we see nothing in Supreme Court opinions suggesting that the Court might limit its precedents declaring that the federal power at issue here is 'plenary.'"

It concluded by noting that "[w]hen different governments differ in their assessment of danger, one must prevail, and the Supremacy Clause says that in these circumstances it must be the United States."

Taxation: Hotels Must Collect Transient Occupancy Taxes on Full Amount Charged to Travelers by Online Travel Companies
In re Transient Occupancy Tax Cases, No. S 218400 (Cal. Dec. 12, 2016)

The California Supreme Court has found that, although online travel companies are not hotel "operators" for purposes of a San Diego tax ordinance, hotel operators must collect transient occupancy tax on the full amount charged to travelers by the online travel companies for hotel stays.

In December 2004, Los Angeles filed a putative class action on behalf of various California cities against online travel companies (OTCs), alleging that they were liable for transient occupancy tax (TOT) on the full amount charged to the customer (the actual amount paid by the OTC for the hotel room, plus any markup and service fee charged by OTC). In October 2007, San Diego, whose tax ordinance provides for a 6 percent tax on hotel stays (Ordinance), began auditing the OTCs, issuing TOT assessments--which each OTC appealed. An administrative hearing initially determined that the OTCs owed tax on their markup. The superior court subsequently found in favor of the OTCs and issued a writ ordering the hearing officer to vacate his ruling. San Diego appealed. The Court of Appeal affirmed, reasoning that San Diego's Ordinance imposed tax on "rent charged by the ... operator" and concluded that hotels, not the OTCs, are "operators" within the meaning of the ordinance.

San Diego petitioned for rehearing to the California Supreme Court.

While holding that the OTCs are not "operators" of hotels, the California Supreme Court agreed with San Diego's argument that, under so-called "rate parity" agreements (which require OTCs to charge the same price for a given room as the hotels do) the hotels were effectively "charging" visitors for the full room price--and TOT was payable on the full amount.

> [T]o the extent a hotel determines the markup, such as by contractual rate parity provisions requiring the OTC to quote and charge the customer a rate not less than what the hotel is quoting on its own website, it effectively "charges" that amount, whether or not it ultimately receives or collects any portion of the markup, and that amount is therefore subject to the tax.

The decision placed responsibility for collection of the additional TOT on the hotel operator:

> We conclude that under the San Diego ordinance . . . the operator of a hotel is liable for tax on the wholesale cost plus any additional amount for room rental the operator requires the OTC to charge the visitor under what have been termed the "rate parity" provisions of hotel-OTC contracts . . .

San Diego also cited indemnification agreements in which OTCs agreed to be responsible to the hotels for any taxes assessed by any governmental authority on the markup. Although the court declined to make San Diego a third party beneficiary of such hotel-OTC agreements, the decision appears to clear the way for California municipalities to demand unpaid TOT from the hotels—which would then demand indemnification from the OTCs. (ML thanks Steven D. Wolens of the Dallas office of McKool Smith, the California municipalities' co-lead counsel in the case, for his observations about the decision).

Technology: No OPRA Right to Video Footage Which Reveals Municipal Surveillance Capacity
Gilleran v. Township of Bloomfield,
No. a-15-15 (N.J. Nov. 22, 2016)

The New Jersey Supreme Court has denied an Open Public Records Act (OPRA) request for access to a town's security video footage on the grounds that such review would disclose the area covered by, and vulnerabilities of, the security system; however, there may be a common law cause of action for releasing portions of footage.

Seeking to determine whether certain people had entered the Township's municipal building, Plaintiff Patricia Gilleran requested five days' worth of footage from one of Bloomfield's stationary security cameras. A clerk for the Township asked that the request be narrowed to a shorter time period, noting that five days of security camera footage was quite voluminous. Accordingly, Gilleran reduced her request to one day of footage and was later informed that her request had been denied under OPRA's exemption for security information.

Gilleran commenced action against the Township by filing a claim with its Law Division to access the requested footage under OPRA and a common law right-of-access claim, noting that the camera was in plain sight and surveying a public area. In her complaint, Gilleran requested that the court order the footage ether be released or redacted pursuant to OPRA's security exemptions.

The Township, despite having never viewed the entirety of the recordings, contended that the footage fell within OPRA's security exception because it would allow a viewer to ascertain the actual area being surveyed by the camera. Since the cameras were strategically placed and contained within smoked glass, it was not immediately obvious to the general public as to what the cameras were surveying, despite their location in a publically viewable area. As a result, Bloomfield contended, allowing members of the public to obtain this security camera footage would defeat the original purpose of the security camera. Further, the area potentially surveyed was used not only by public employees, but also by members of the police department, confidential informants, and victims of domestic violence whose identities needed to remain anonymous.

Gilleran responded that none of the OPRA security exceptions warranted a *blanket* prohibition, particularly given the Act's purpose (to grant public access to public records), and urged the court to require Bloomfield to examine the footage in order to determine whether portions of the video contained a security risk. Further, she reiterated, the cameras were publically viewable and had captured nothing that an individual physically present at the same location could also see. She also argued that since the Town had not actually viewed the tapes in their entirety, they had not effectively demonstrated that there was a security risk that warranted the OPRA exemption.

The trial court found Bloomfield in violation of OPRA. The Township appealed and the appellate court upheld the decision of the trial court.

New Jersey Supreme Court reversed the decision of the appellate court, concluding that OPRA's exception, while not a *blanket* exception, nonetheless exempts local governments from releasing of video footage that reveal security capacity for security surveillance systems protecting public buildings. It also found the compelled release of security footage to be at odds with the legislative intent of New Jersey's OPRA statute. The court noted, however, that despite OPRA's security exceptions, there still may be a common law right-to-access claim that balances the interests of both parties and allows for citizens to obtain certain sections of surveillance footage. As a result, the case was remanded to be decided under the unresolved common law claim.