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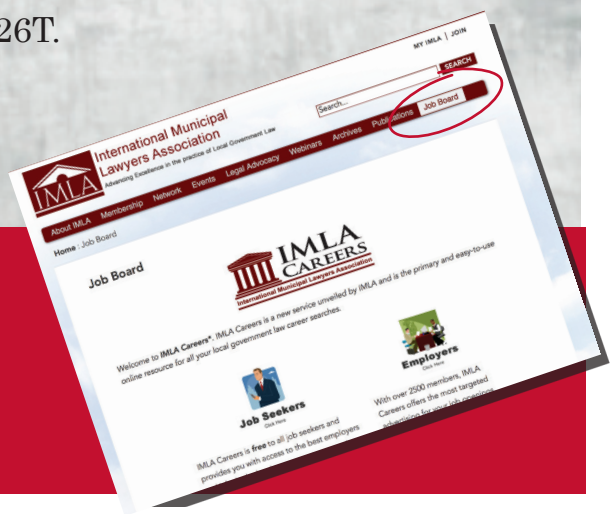

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RELIGIOUS SPEAKERS' ACCESS TO PUBLIC SPACES

By: Robert W. Higgason, Senior Assistant City Attorney, Houston, Texas

The rights of religious speakers in public venues are not unlimited. Municipalities have the prerogative to impose reasonable time, manner and place restrictions—within narrow constitutional parameters.

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DAMNED IF YOU DO, DAMNED IF YOU DON'T? THE PITFALLS AND PRATFALLS OF COMPLYING WITH THE ESTABLISHMENT CLAUSE

By: Ayesha N. Khan, Partner, Potomac Law Group, Washington D.C.

The *Lemon* test was just the beginning. Practitioners grappling with establishment clause issues—whether legislative prayer, monuments, funding or others—now must consider a wide spectrum of analytical standards.

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Raising the Bar

In the wake of what was arguably IMLA's most successful Mid-Year Seminar in many years, *Municipal Lawyer* brings to you one fragment of the excellent programming provided to our 400 attendees. The metes and bounds of constitutionally-protected religious expression continue to spark debate, particularly in the context of city council proceedings. We present two features on the subject--one by Ayesha Khan of the Potomac Law Group, who argued *Town of Greece* before the Supreme Court, and the other by Robert Higgason, Houston Senior Assistant City Attorney.

(While Denver's "International Church of Cannabis" opened its doors on 4/20, the same day our Mid-Year kicked off, we were not able to convene a panel analyzing the relationship between Hindu Kush and sincerely-held religious beliefs).

Our Mid-Year covered the broad spectrum of subjects confronting the local government attorney today, including employment, social media, environment, P3, cybersecurity, homelessness, telecommunications, municipal securities, driverless cars, crisis communication and much more. In particular, we devoted numerous sessions to the subject of qualified immunity and to the practices (both in the office and in the field), the trial techniques and the examination strategies which are most likely to protect municipalities and their employees. An upcoming issue of *ML* will focus on Section 1983.

And our Chief Legal Officer Forum brought together the top law officers from America's largest cities for an intensive look at issues most critical to their practices.

IMLA took the opportunity during the Mid-Year to honor the many amicus writers who contributed their time and outstanding appellate skills to advance the interests of our members nationwide. We bring you their names and faces on pages 18 and 19. It would simply be impossible to offer IMLA's highly-respected advocacy program without the dedication of these lawyers, and we are most appreciative.

Behind the scenes, IMLA continues to provide a network of resources for our members, including a recently-formed Sanctuary Cities group, an ever-more active listserv and an expanding webinar series bringing a wide swathe of practice topics to you. We will endeavor to host an even better program at our Annual Conference in Niagara Falls, Ontario this fall, and invite you to join us as we celebrate Canada's sesquicentennial--and only slightly less momentous, the retirement of our own Veronica Kleffner after more than three decades as the secret ingredient behind IMLA's success.

As always, we acknowledge the enthusiasm, ideas, acumen and contributions of our IMLA members across the country.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER

Smart Municipal Lawyer, Smart Municipality! It's the Future.



Mary Ellen Bench, IMLA President

Artificial Intelligence or "AI" meant UFOs when I was growing up, but now you find AI in virtually every law office. It is tied to our being a smart law department. It is tied to being a Smart City. It helps us organize our documents and record time spent. It helps us evaluate the outcome of trials. It helps us assess the fit of new staff into our existing team. And as my son says often when mocking my limited technological abilities, "It's the future."

I am always grateful to learn about new legal technology when I attend IMLA events and have the opportunity to hear from those who are using advanced technology, and learn what would fit my office from our vendors. It is pretty exciting, once the intimidation factor is behind you.

At a conference I attended recently I was amazed by a presentation about the skills lawyers will need in the future. It was based on an article by Amani Smithers and published by the ABA called "*The 21st Century T-shaped Lawyer.*" It talks about how lawyers need more than strong legal skills and subject matter knowledge, but now also require expertise in other areas such as legal technology and project management. (In the public sector, I would add political sensibility to that list as well).

Technology in the law office brings many benefits, creating opportunities to improve processes, project manage files, and decrease costs. Our biggest expense tends to be staffing, and technology allows for fewer administrative staff or at the very least allows more work to be done in-house with the same resources. It allows the lawyers on your team to get to know the business of their respective clients and be more proactive in providing legal support to the business units in the municipality. This is critical to meet the growing demand for legal services in municipalities as they recognize the benefit of involving the legal department at the outset of projects. These clients--and the public--have gotten accustomed to technology, and they expect ever-more rapid turn-around times. Precedents, templates, and access to on-line research may have gotten us here, but new legal technology is helping to keep us in the ballpark in terms of meeting client expectations.

As a chief legal officer, one of the decisions that I have had to face in meeting my client's needs is whether to build or buy what I need. That decision will be different for each one of us. Building means investing in young lawyers and in new technology. Big law firms and leading municipalities are investing more and more in legal technology and retaining consultants to guide them, so they continue to meet the needs of their clients.

Moving forward with legal technology requires due diligence regarding the usual concerns about privacy and confidentiality, and the challenges of cybersecurity. It also means looking more closely at some technology already available. Many of us have come to rely on AI in our private lives, going on Google or other social media platforms. We even use social media to search up case law. Wait until the day we can harness AI to predict the outcome of a trial or a certain business decision. (On that score, I highly recommend looking up the work of Daniel Linna at the Akerman Data Law Centre at the Michigan State University College of Law, Center for Legal Services Innovation ("Legal RnD"). It's fascinating).

While I joke to my staff that our clients' increasing requirements for legal support ensures job security, the demand for those services seems to be growing at a pace that is not sustainable, and adding more lawyers to do the work is increasingly a challenge.

Law office technology can help bridge that gap, but at what price? For those of us categorized as 'baby boomers' I think one of the biggest costs can be anxiety. I find not being able to keep up with the pace of technological change stresses me out. Half the time I don't even understand the language some of the 'millennials' in my office use when they refer to new technology. Luckily, I have some 'Gen X's' who can translate and help me out.

I am learning a lot about younger lawyers as they move into leadership roles. From what I can see, millennials in particular have no fear of the rapid pace of technological change because they have grown up with it and are eager to enjoy its benefits, including an improved work-life balance. Our younger colleagues are quite comfortable working independently without a lot of administrative support, and often prefer telecommuting and video-conferencing instead of needing to meet face-to-face (which is still my preference).

Despite an attraction to new technology, the younger lawyers I work with still embrace the same traditional values that have attracted all of us to municipal practice—the desire to make a difference, to give back and to shape our communities. At the same time they are much more open to exploring a changing world and adapting from the diversity and a breadth of experience around them.

I know that IMLA will tap into those youthful perspectives as we continue to evolve and expand our membership. This may actually require education at both ends of the spectrum: I was amused to see that the Canadian Bar Association recently ran a program to teach millennials how to understand Baby Boomers in the law office—and was a little chagrined to recognize that I'm at the older end of that spectrum! Maybe "How Municipal Law Offices Can Bridge the Generation Gap" will be a topic we will see on the IMLA Conference agenda one day soon! ML

Religious Speakers' Access to Public Spaces

By: Robert W. Higgason, Senior Assistant City Attorney, Houston, Texas



The continual tension between order and liberty can be most vividly manifest at the level of local government. The tension is exposed when police officers who are enforcing local ordinances collide with citizens who are engaging in what they understand to be constitutionally protected rights.

How can cities pass ordinances to preserve public order and safety—restricting speech and access to public spaces in the process—without violating constitutionally protected liberties? When officers enforce ordinances, at what point might they go too far and violate a citizen's rights? Courts have provided guidance on the contours of these competing interests. In light of that guidance, this article addresses some of the issues that arise when citizens seek to use public spaces to convey a religious message.

Constitutionally protected rights

In the collision between religious speakers and local police, the rights most often triggered are those protected by the First and Fourth Amendments to the U.S. Constitution. The First Amendment protects several rights that are particularly germane to religious speakers, including free exercise of religion, freedom of speech, and the right of assembly. The amendment's prohibition against establishing religion also plays an important role in circumscribing rights.[1]

The Fourth Amendment protects against unreasonable search and seizure.[2] If read in a vacuum, the relationship between these two amendments might not be obvious, but the connection becomes clear when religious speakers—typically Street preachers[3]—are arrested.

There are a number of situations in which speakers seeking to convey a religious message in a public space have encountered some form of restriction. Sometimes the restriction is as mild as a directive to move along; other times the speaker is detained, arrested, fined, or jailed. Several cases involving Street preachers (some arrested, some not) will be examined below.

Protected freedoms as limited negative rights

The freedoms of speech, assembly, and exercise of religion are fundamental to our republic and have long been held as sacred.[4] The Constitution's guarantee is that these freedoms will be protected against the government.[5] Because the Constitution protects rights to engage in some conduct free from government action, those rights are often referred to as "negative rights" as distinguished from "positive rights" that lay claim to government action.[6]

"[F]reedom of speech is a negative liberty."[7] That is true whether the speech is religious in nature or not.[8] This negative liberty guarantees that citizens can engage in speech, including religious speech, free from governmental prohibitions. But that liberty is not absolute.[9] Consistent with constitutional protections, the government can impose some limits on some categories of speech. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[10] Our freedom of speech does not extend to personal abuse, "threat[s] to public safety, peace, or order[,]" or incitement to violence.[11]

But what about exercising one's religion? That freedom is not absolute, either. The Exercise Clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute but . . . the second cannot be. Conduct remains subject to regulation for the protection of society."[12] Some religions—Christianity is one prominent example—have as a part of their teaching that adherents are to engage in some conduct well beyond the confines of the worship gathering.[13] Thus, the exercise of religion calls not just for worship, but for action—and in some instances that action might be subject to government regulation "for the protection of society."[14] This has the potential for being a "flashpoint."[15]

Constitutionally permissible restrictions on protected freedoms

Free speech and free exercise of religion are not absolute;[16] they are subject to time, place, and manner restrictions for the purpose of protecting the public.[17] "Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."[18] Constitutionally permissible limitations on protected speech are based on the "character of the property at issue[,]"[19] to which we now turn.

Categories of public space

Not all property is a forum, and not all public property is a public forum. For purposes of restricting First Amendment freedoms, public spaces fall into several different categories, and courts have recognized that the distinctions among them are sometimes unclear.[20] Despite possible challenges of identifying the category of the public space in a given case, it is critical to do so because it determines the level of scrutiny that applies to government restrictions on protected liberties.

Traditional Public Forum

The public spaces most likely to survive time, place and manner restrictions are those known as "traditional public fora" such as "streets and parks which have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[21] Sidewalks and easements sometimes substitute for streets as public spaces.[22]

Under governmental police power and the obligation to maintain peace and order, municipalities can restrict the time, place, and manner of speech with ordinances that (a) regulate noise and sound levels,[23] (b) require permits for events such as parades, demonstrations, rallies, or protests,[24] and (c) regulate the paraphernalia that participants can carry.[25]

Restrictions on speech in a traditional public forum are subject to strict scrutiny: "speakers can be excluded . . . only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[26]

The public spaces most likely to survive time, place and manner restrictions are those known as "traditional public fora" such as "streets and parks which have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

Street preacher in Portland at privately-sponsored, City-permitted events in public square, open to the public: *Gathright v. City of Portland*

In *Gathright v. City of Portland*,[27] Street preacher Edward Gathright had been preaching outdoors to the general public for several years in a variety of public locations, including the Courthouse Square.[28] At times, he would engage in preaching "at privately sponsored, City-permitted events open to the public in those venues."[29] "On at least six occasions, police forced Gathright to leave the open events by threatening him with arrest for trespass."[30] The officers' basis for evicting Gathright from the public square was a Portland ordinance protecting permit holders from having contrary messages expressed at their events.[31]

The Ninth Circuit considered the competing interests of Gathright's right to free speech and the permit holder's right not to be "compelled to communicate messages not of their choosing."[32] In resolving that tension, the Court applied strict scrutiny because the space in question—Pioneer Courthouse Square—was a traditional public forum. The Court held the City's ordinance "allowing permittees unfettered discretion to exclude private citizens on any (or no) basis is not narrowly tailored to the City's legitimate interest in protecting its permittees' right" to be free from compelled communication of a message the permittees find objectionable.[33]

Designated Public Forum

When the government intentionally opens up a nontraditional forum for public discourse, such as opening a city hall gallery for an art exhibit,[34] the space becomes a designated public forum.[35] "Restrictions on expressive activity in designated public fora are subject to the same limitations that govern a traditional public forum, *i.e.*, strict scrutiny."[36]

Excluding Art From the City Hall: *Hopper v. City of Pasco*

In *Hopper v. City of Pasco*,[37] the City opened Pasco City Hall Gallery to an exhibit of art from local artists.[38] Two artists submitted artwork for the exhibit but the city excluded their work on grounds that it was controversial.[39] The district court ruled for the city, "holding that the city hall is a nonpublic forum and that Pasco's decision to exclude their works was reasonable."[40] The lower court applied the more lenient standard of scrutiny based upon its characterization of the space as a nonpublic forum. The Ninth Circuit reversed, holding "that the city opened its halls to expressive activity and thereby created a designated public forum in the art gallery."[41] Strict scrutiny applied, and the city's decision to exclude art based on controversy alone was not justified by any compelling state interest.

Christian film in public senior center: *Church on the Rock v. City of Albuquerque*

In *Church on the Rock v. City of Albuquerque*, the church requested permission to show a Christian film entitled *Jesus* at city-owned Bear Canyon Senior Center, and the city refused on grounds that the film would violate the funding restrictions of the Older Americans Act.[42] The district court held for the city, "assum[ing] without deciding that the Senior Center is a designated limited public forum[,] . . . [and] conclud[ing] that the film constitutes sectarian instruction[,]" which

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Religious Speakers' Access Cont'd from page 7

the City can exclude "on the ground that its subject matter is not within the purpose of the Senior Centers. The court also held that the City's restriction is not viewpoint-based because the City does not permit sectarian instruction from *any* religious perspective."[43]

The Tenth Circuit held that Bear Canyon Senior Center is a designated public forum that the city limits in only two ways: first, with an age requirement for participation; and second, that the subject matter of presentations be "topics 'of interest to senior citizens.' The subject matter limitation has been extremely flexible in practice, evidenced by the long list of diverse topics presented in the past."[44] The city argued that its restriction was based on content rather than viewpoint because it excluded *all* religious worship from the centers, but the Supreme Court had previously rejected similar arguments, and the court held that the center was restricting religious viewpoints in favor of non-religious viewpoints.[45]

Because the senior center was a designated public forum and the restriction was viewpoint based, strict scrutiny applied.[46] The court of appeals overruled the city's arguments that permitting religious presentations would constitute an establishment of religion, would violate the Older Americans Act, and would subject "vulnerable" senior citizens to "coercion."[47] The city had not shown a compelling interest to justify "its policy of prohibiting sectarian instruction and religious worship at its Senior Centers[,]" and the court reversed and awarded attorney's fees to the appellants.[48]

Limited Public Forum

Within the designated public forum is a sub-category of limited public forum, which exists when the government intentionally (not by inaction or by permitting limited discourse) opens a nonpublic forum to certain groups or certain topics,[49] such as opening a public school's baseball field fence for paid advertising.[50] "In a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible."[51] Although the City of Albuquerque incorrectly argued in *Church on the Rock* that its senior center was a limited public forum, that category is correctly illustrated by the next case, *DiLoreto v. Downey United School District Board of Education*.[52]

Religious message at a high school baseball field:
DiLoreto v. Downey United School District Board of Education

In *DiLoreto*, the school district refused to accept Edward DiLoreto's paid religious message—the text of the Ten Commandments—for posting on the high school's baseball field fence; the refusal was based on concern about violating the Establishment Clause, and "disruption, controversy and expensive litigation that might arise . . . ."[53] After DiLoreto sought an opinion from the California Attorney General, the district closed its fundraising program and removed some 40 signs that had been posted on the baseball field fence.[54]

The undisputed evidence showed the school district had only accepted commercial advertising and had refused ads for "alcohol or taverns" as well as for Planned Parenthood.[55] On DiLoreto's appeal from summary judgment for the district, the Ninth Circuit noted, "The validity of the District's conduct turns on the nature of the baseball field fence as a forum for expression."[56] The record showed that the school district "did not intend to designate the baseball field fence as a public forum for expressive activity[,]"[57] but was using the fence in a proprietary manner as a tool for generating revenue. As a "nonpublic forum opened for a limited purpose," the fence is subject to subject matter restrictions that are reasonable in light of the purpose served by the forum.[58] The court affirmed, holding that the district's rationale for excluding DiLoreto's message was reasonable and did not constitute viewpoint discrimination.[59]

Religious group access to public school facilities:
Lamb's Chapel v. Center Moriches Union Free School District
and *Good News Club v. Milford Central School*

In *Lamb's Chapel v. Center Moriches Union Free School District*, a church had sought to use school facilities for a Christian film series on family values and child-rearing, and the district denied the application on grounds that the films "appear to be church related[.]"[60] The lower courts had characterized the school facilities as a limited public forum, which would require only that the district show that its restrictions were viewpoint neutral and reasonable for the forum's purposes.[61] The district argued that it treated "all religions and all uses for religious purposes" alike by denying their requests to use school property, and both lower courts agreed, upholding the district's exclusion.[62] The Supreme Court, however, reversed and held that the district's exclusion policy discriminated against religious viewpoints in favor of nonreligious viewpoints.[63]

In *Good News Club v. Milford Central School*, the school had a policy of permitting the public use of its facilities for specified purposes.[64] The Good News Club, a Christian organization, sought permission to hold "weekly afterschool meetings in the school cafeteria[,]" which the school denied "on the ground that the proposed use . . . was 'the equivalent of religious worship[,]'" in violation of the school's community use policy.[65] The parties agreed that the school had created and was operating a limited public forum by opening its facilities for public use, so the Supreme Court proceeded on that assumption without having to decide the characterization of the public space.[66] Any exclusion, then, would only have to be reasonable in light of the purpose of the forum and not involve viewpoint discrimination.[67]

Observing a split in the circuits "on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech[,]"[68] the Court applied its earlier opinion in *Lamb's Chapel* and reasoned that "the Club seeks to address a subject otherwise permitted under the [district's policy], the teaching of morals and character, from a religious standpoint."[69] It resolved the circuit split, holding that "the exclusion of the Good News Club's activities, like the exclusion of Lamb's Chapel's films, constitutes unconstitutional viewpoint discrimination."[70]

In contrast to *Lamb's Chapel* and *Good News Club*, some courts have held that schools may, in some circumstances, exclude religious groups from using their facilities.[71] Each case turns upon characterization of the public space (likely as a limited public forum) and the challenged restriction's viewpoint neutrality and its reasonableness in light of the forum's purpose.

Nonpublic Forum

The final category is the nonpublic forum, which includes all other public property. Low level scrutiny applies to restrictions on speech in this category: "All remaining public property is classified as nonpublic fora. The government may limit expressive activity in nonpublic fora if the limitation is reasonable and not based on the speaker's viewpoint."[72]

Disturbances and the heckler's veto

The government's police power enables municipalities to pass ordinances that prohibit (and punish) disorderliness and breaches of the peace,[73] because "[t]he right of free speech does not encompass the right to cause disruption[.]"[74] Some ordinances prohibit "[a]ddressing any offensive, derisive, or annoying words to any other person who is lawfully in any street, or other public place[.]"[75] Other prohibitions are against "such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them[.]"[76]

The concern with offending others might suggest that a speaker could be silenced by complaining citizens—the heckler's veto. As a factual matter, this occurs with some frequency.[77] But the law does not permit this; the probable reaction that listeners would have to offensive speech will not supply a content-neutral basis for restricting speech.[78] Police are not constitutionally empowered to silence a "rabble-rousing speaker." "The police must permit the speech and control the crowd; there is no heckler's veto."[79] Even though not permitted by law, the heckler's veto is a very real and ongoing challenge-in-fact for municipalities.[80]

Government restrictions on offensive language can be enforced if the words are directed at an individual, but not if directed at a group.[81] Incitement to violence is not protected;[82] nor are "fighting words" directed at an individual.[83]

The legal distinction between directing inflammatory words at a group rather than at an individual is illustrated in *Bible Believers v. Wayne County*,[84] where Sheriff's deputies had to weigh the free speech rights of Street preachers against public peace and safety.

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Street preacher addressing Muslims at festival in Dearborn:
Bible Believers v. Wayne County,

The City of Dearborn, Michigan, is home to the country's second largest population of Arab Americans, both Christian and Muslim.[85] The Arab International Festival has been held there since 1996, sometimes drawing as many as 300,000 people over three days.[86] "[A] diverse array of religious groups requested permission to set up information booths on the Festival grounds. The Festival also had a history of attracting certain Christian evangelists who preferred to roam free among the crowd and proselytize to the large number of Muslims who were typically in attendance each year."[87] The evangelists' practice of distributing leaflets on the sidewalks at the Festival was interrupted in 2009, when "Dearborn police enforced an anti-leafletting policy promoted by the American Arab Chamber of Commerce . . . and ratified by the City."[88] The Sixth Circuit later held that this anti-leafletting policy was a violation of free speech "because it failed to serve a substantial government interest and it was not narrowly tailored, as is required with respect to any time, place, or manner restriction on protected speech."[89] Wayne County Sheriff's Office (WCSO) then took over primary responsibility for security at the Festival.[90]

At the Festival in 2011, Bible Believers "walk[ed] the public streets and sidewalks, spreading their message to those who passed by."[91] Their message was essentially "that Mohammed was a false prophet . . . and that Muslims would be damned to hell if they failed to repent by rejecting Islam. This message was not well received . . . . The Bible Believers allege that they were assaulted by various members of the crowd and that the WCSO . . . eventually silenced the Bible Believers by kicking them out and requiring them to leave the Festival grounds."[92]

At the Festival in 2012, Bible Believers conveyed their message verbally and in writing on T-shirts, banners, and signs, including the statement, "Islam Is A Religion of Blood and Murder."[93] One of them also "carried a severed pig's head on a spike . . . [to] keep the Muslims at bay . . . ."[94] After one of the Bible Believers told a group of about 30 teenagers that Mohammad was "a pedophile" and "your religion will send you to hell[,]" some in the crowd began "throwing plastic bottles and other debris at the Bible Believers."[95]

Bible Believers continued preaching in this manner, and the crowd continued throwing debris. Bible Believers asked the WCSO to assign two officers to prevent violence from the crowd, but a deputy chief explained that it was the Bible Believers who were creating the problem, and he suggested that they leave. Ultimately, "the Bible Believers were escorted out of the Festival by more than a dozen officers."[96]

The Sixth Circuit Court of Appeals, sitting en banc, distinguished this case from the "fighting words" cases following *Chaplinsky v. New Hampshire*, in which the Supreme Court held that some speech is unprotected because it "inflict[s] injury or tend[s] to incite an immediate breach of the peace."[97] As much as Bible Believers' speech might have provoked a violent crowd response, it did not qualify as "fighting words" because of the Supreme Court's later holding that such words, to be unprotected, have to be directed at an individual, rather than at a crowd.[98] Despite the crowd's reaction, Bible Believers' speech was protected. The Sixth Circuit held that Wayne County, its sheriff's office, its sheriff, and two deputy sheriffs, "violated the Bible Believers' First Amendment rights because there can be no legitimate dispute based on this record that the WCSO effectuated a heckler's veto by cutting off the Bible Believers' protected speech in response to a hostile crowd's reaction[,]" and it ordered that summary judgment be entered for Bible Believers.[99]

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Denying parade permits for fear of violence or disturbance:
Beckerman v. City of Tupelo,
and *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Stuart*

The heckler's veto can even come into play before the hecklers voice their opposition. In *Beckerman v. City of Tupelo*, a city ordinance authorized the chief of police to deny a parade permit "if he finds that 'the conduct of the parade will probably cause injury to persons or property or provoke disorderly conduct or create a disturbance.'" [100] The Fifth Circuit noted that the ordinance lacked a definition of "disorderly conduct," and the definition that was in the criminal statute prohibiting disorderly conduct had "been declared overbroad as applied to certain situations."[101] Without a narrowing construction offered by the city, the court concluded that the ordinance had a "substantial potential for overbroad application" in this instance, and it held that part of the ordinance unconstitutional.[102]

The court further held that, by giving the chief of police the discretion to deny a parade permit, the ordinance constituted "an impermissible prior restraint upon free speech because it is not narrowly drawn to relate to health, safety, and welfare interests, but instead it sanctions the denial of a permit on the basis of the so-called 'hecklers' veto.' In authorizing the denial of a permit because the licensor has determined the activity will provoke disorderly conduct in others, the state treads on thin ice."[103]

Notice the difference between the *Beckerman* case and *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Stuart*, in which the Town of Pelion, South Carolina, passed an emergency ordinance prohibiting the Ku Klux Klan from participating in the Christmas parade because of fear of violence. [104] The Fourth Circuit upheld the ordinance, noting that it was not an instance of the heckler's veto: "Under the facts presented in this case, a 'heckler's veto' is not involved, because the real threat was believed to be presented by Klan members rather than by spectators."[105]

In *Beckerman*, denial of a parade permit was unconstitutional as a prior restraint that effectively embraced the heckler's veto. In *CKKKK*, denial of parade participation was constitutional as proper police power because the facts showed that violence was reasonably expected not from hecklers but from the Klan members themselves.

Search and seizure

Fourth Amendment protections against unreasonable search and seizure may also come into play when a citizen seeking access to public spaces violates a city ordinance or state law. Depending on the severity of that violation, this can lead to detention, arrest, fine, or jail. Courts have addressed this conflict on a number of occasions involving Street preachers who are charged with violating an ordinance or state law.[106]

Street preachers have claimed false arrest, arguing that they were silenced because of their message. Where the evidence shows that the speakers had violated an ordinance or a state or federal law—irrespective of the content of the message—then the seizure (and accompanying search) would be constitutional.[107]

Street preachers demonstrating on sidewalks in Houston:
Allen v. Cisneros

In *Allen v. Cisneros*,[108] the court addressed the claims of Street preacher David Allen that his First and Fourth Amendment rights had been violated when he was detained and arrested. Since 2010, Allen had participated in a number of demonstrations in the City of Houston, preaching the gospel and speaking against homosexuality and abortion.[109] He would preach outside Planned Parenthood centers, in front of City Hall, and at other locations around Houston. He regularly would sound a shofar as part of his preaching.[110] This case arose from two of his encounters with Houston police.

On October 31, 2011, Allen was preaching at a bus stop in front of a Planned Parenthood center, accompanied by David Stokes—another Street preacher—and two other individuals. Officer Montelongo and another officer responded to calls about a disturbance. When the police arrived, Stokes began video recording the interactions. Montelongo told Stokes that the signs he was carrying violated the ordinance governing the size of things that could be carried in a demonstration.[111] Stokes argued with Officer Montelongo that his signs complied with the ordinance. The video shows that Stokes threatened to sue Officer Montelongo personally and take all his assets.

Officer Montelongo told Allen and Stokes that they could continue with their demonstration and preaching but could not have the signs unless they made the signs comply with the dimensional requirements of the ordinance. Montelongo also told Allen that he could not possess his shofar at the demonstration because it did not comply with that ordinance. [112] Allen did not surrender the shofar and struggled when Montelongo reached to take it. Montelongo handcuffed Allen and put him in the back of his patrol car, he issued citations to Stokes and Allen for violating the ordinance, and he confiscated the signs and Allen's shofar (and later returned them).[113]

On January 14, 2012, Allen and Stokes were again engaging in street preaching and protesting, this time along the route of the Houston Marathon in downtown Houston, again carrying signs and Allen's shofar. Stokes "exchanged words" with a race official and a police officer on the scene, who "called for assistance because of 'two extremely uncooperative males' that were causing a disruption along the race route."[114]

Sergeant Cisneros arrived at the scene and spoke with the other officer and the race official, and then with Allen and Stokes "and directed them to move back from the edge of the race route."[115] Stokes, however, verbally refused to move, and Sergeant Cisneros escorted him to his patrol car, while Allen video recorded the interaction.[116] Allen followed Cisneros and Stokes toward the patrol car, Cisneros turned and directed him away from the car, and Allen verbally protested.[117] Sergeant Cisneros then placed Allen in the back of the patrol car. Shortly thereafter, Cisneros released both men and returned their belongings.[118] At that point, Allen began walking toward Cisneros's patrol car and video recording Cisneros. When Allen stepped into the street, Cisneros arrested him and issued him "a citation for failure to obey a lawful order of a police officer directing traffic and for violating Houston Ordinance § 28–33 by possessing a staff while participating in a demonstration."[119]

Allen sued the City of Houston,

HPD Chief Charles McClelland, Sergeant A.H. Cisneros, Officer F. Gallegos, and Officer J. Montelongo, claiming that his rights to free speech and free exercise of religion, and his right to be free from unreasonable search and seizure, were violated when officers detained and arrested him on multiple occasions.[120] Allen alleged that he was unconstitutionally seized in retaliation for preaching the Gospel and for video recording his interactions with police. The district court dismissed all of Allen's claims against the City and Chief McClelland, and dismissed some of Allen's claims against Cisneros and Montelongo. But the court denied qualified immunity for Cisneros and Montelongo for detaining Allen during the 2011 sidewalk demonstration and for arresting him during the 2012 protest at the marathon.[121]

After a short overview of the doctrine of qualified immunity and the rights protected by the First and Fourth Amendments, the Fifth Circuit concluded "the genuine disputes identified by the district court are not material and Allen has failed to show that either officer violated his constitutional rights," and Officer Montelongo and Sergeant Cisneros were entitled to qualified immunity.[122]

Liability for civil rights violations

Congress has provided a mechanism in 42 U.S.C. § 1983 for citizens to sue for violations of constitutionally protected rights.[123] The Supreme Court held in *Monell v. Department of Social Services* that Section 1983 lawsuits can be against individuals—typically law enforcement officers—as well as municipalities.[124] A plaintiff suing police officers under Section 1983 can establish a prima facie case by alleging: 1) a violation of a federal constitutional or statutory right; and 2) that the violation was committed by an individual acting under color of state law.[125]

A municipality may be held liable only for constitutional violations resulting from official policy or custom.[126] A municipality cannot be vicariously liable for torts of its employees; unconstitutional conduct must be directly attributable to the municipality through official action.[127] Isolated unconstitutional actions by municipal employees will almost never trigger liability.[128]

The plaintiff's search for a city's or individual officer's pattern of fairly similar violations thus becomes a focus of both discovery and argument. Determining what prior violations are fairly similar and what are not for purposes of identifying a pattern rests with the court.

To establish municipal liability, a plaintiff must show: (1) a policy maker; (2) an official policy; and (3) a violation of constitutional rights whose "moving force" is the policy or custom.[129] To show official policy, there must be a written policy or policy statement announced by the policy maker, or a "persistent widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy."[130] If the suit is based on custom rather than written policy, the plaintiff will also have to plead and show that the policymakers were aware of the custom and were deliberately indifferent to it.[131]

Municipal liability requires deliberate action attributable to the municipality that is the direct cause of the alleged constitutional violation.[132] A municipality cannot be liabile merely for employing a tortfeasor.[133] The standard is a stringent one, and all *Monell* elements must be established or the inquiry collapses into respondeat superior.[134]

A plaintiff claiming failure to train or failure to supervise must establish that the city's training or supervision policy was inadequate, that the city was deliberately indifferent in adopting such policies, and that the inadequate policy caused the constitutional violation.[135] Only where a municipality's failure shows "deliberate indifference" to the rights of its citizens can the shortcoming be considered a policy or custom. "[T]o establish deliberate indifference, a plaintiff must show at least a pattern of violations (fairly similar to what ultimately transpired) so that the failure of the city to respond with different training, better supervision, or punishment reflects a deliberate or conscious choice to endanger constitutional rights."[136]

The plaintiff's search for a city's or individual officer's pattern of fairly similar violations thus becomes a focus of both discovery and argument. Determining which prior violations are fairly similar and which are not for purposes of identifying a pattern rests with the court. Because the contours are imprecise, courts will differ, and some cases will proceed to trial while others, which might bear a superficial resemblance, will be dismissed.

Defenses

Qualified immunity

An officer defending against a Section 1983 claim for violations of constitutionally protected rights can assert qualified immunity, the purpose of which is to protect public servants from "undue interference with their duties and from potentially disabling threats of liability."[137] "Qualified immunity promotes the necessary, effective, and efficient performance of governmental duties by shielding from suit all but the plainly incompetent or those who knowingly violate the law."[138] It protects them not only from eventual liability, but even from having to defend themselves in litigation.[139] Once a defendant invokes qualified immunity, the burden shifts to the plaintiff to rebut it.[140]

Each individual officer's entitlement to qualified immunity turns on the objective reasonableness of his actions in light of legal rules clearly established at the time.[141] Proper application of the reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[142] The reasonableness of an officer's use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight.[143] The reasonableness analysis must consider allowances for the fact that police officers are often forced to make split second decisions about the amount of force that is necessary in situations that are tense, uncertain, and rapidly evolving.[144]

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Damned If You Do, Damned If You Don't? The Pitfalls and Pratfalls of Complying with the Establishment Clause

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Establishment Clause jurisprudence has been called "tangled,"[1] "confusing," and "confused."[2] The late Justice Scalia – one of the fiercest critics of Supreme Court jurisprudence in this area – went so far as to call the state of the law "embarrassing."[3] Others have been more diplomatic. They have expressed the view that Establishment Clause cases "sacrifice[] clarity and predictability for flexibility"[4] and that the language of the Clause – which prohibits the government from making any law "respecting an establishment of religion" – is itself opaque.[5] To be sure, that opacity has cramped the Court's efforts to settle on a standard to guide Establishment Clause decision-making, but shifts in the political and philosophical perspectives of the Supreme Court's Justices have played an equally prominent role in muddying the doctrine.

An Early Touchstone ~ The *Lemon* Test: In 1973, the Court adopted what ultimately became known as the "*Lemon* test," which asks whether a challenged governmental practice (1) lacks a secular purpose; (2) has the primary effect of advancing religion; or (3) excessively entangles government with religion.[6] The Court would subsequently refine the *Lemon* test to include an "endorsement" standard[7] and collapse the test's third prong into the second,[8] but it continued to apply the standard with relative consistency for the next few decades.[9]

More Recent History – A Multiplicity of Standards: The *Lemon* test met with criticism, most notably from Justice Scalia, who characterized it as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[10] The instances in which the test had been "killed and buried" included *Lee v. Weisman*, a high-school-graduation prayer case in which the Court applied a "coercion test" that asked whether a challenged practice coerced participation in a religious exercise.[11] Other instances in which the Court eschewed the *Lemon* test included a single controlling Justice's application of a "legal judgment" test in a case involving a Ten Commandments display[12] (more on that later); and the Court's application of a "historical test" to uphold a legislative-prayer practice in *Marsh v. Chambers*[13] (more on that later, too).[14] One commentator claims that, over the years, the Court has applied ten different tests in Establishment Clause cases.[15]

It is therefore understandable that some federal circuits have taken to applying several tests in any given Establishment Clause case.[16] Other circuits apply different tests depending on the fact pattern.[17] Not surprisingly, this has generated some confusion. The three areas that have been most beset with confusion are legislative prayer, government-sponsored religious displays, and public funding of religion, each of which is discussed in turn below. As in other areas of Establishment Clause jurisprudence, the legal precedents in these areas offer some bright-line rules but also leave many questions unanswered.

1. Legislative Prayer: The Supreme Court has addressed legislative prayer on two occasions: *Marsh v. Chambers*[18] and *Town of Greece v. Galloway*.[19] *Marsh* upheld the Nebraska state legislature's practice of employing a paid clergyman to deliver a nonsectarian prayer[20] at the beginning of legislative sessions. The Court emphasized that an "unambiguous and unbroken history of more than 200 years" indicated that the people who wrote the First Amendment did not view paid legislative chaplains and opening prayers as unconstitutional.[21] In addition to looking to history, the Court deemed it important that the audience members for the prayers were adults, who are "presumably not readily susceptible to religious indoctrination or peer pressure."[22] At the same time, however, the Court stated that legislative prayer is not a free-for-all: a prayer practice that is "exploited to proselytize or advance any one, or to disparage any other, faith or belief" would not pass muster.[23]

Because the Chaplain had voluntarily excised references to Jesus Christ, the *Marsh* Court had no reason to address whether faith-specific prayers would be deemed to proselytize or advance any one religion, a question that was answered in the negative in *Town of Greece*. At issue in that case was a Town's practice of inviting local volunteer clergymen to deliver an invocation to open Town Board meetings. Town leaders said they would allow a minister or layperson of any persuasion, even an atheist, to give the invoca-

tion. But most of the local congregations were Christian; and from 1999 to 2007, all of the participating ministers were too. Some of them read Bible passages, invoked religious holidays, and spoke in a distinctly Christian idiom – for example, discussing Jesus Christ's resurrection and crucifixion. After local residents complained, the town invited a Jewish layman and the chairman of the local Baha'i temple to lead the prayer. A Wiccan priestess who had read press reports about the prayer controversy was likewise granted an opportunity to give the invocation.

In a closely divided 5-4 vote that tracked traditional conservative-liberal lines, the Court approved the Town's practice, concluding that requiring prayers to be nonsectarian would be inconsistent with the historical underpinnings that justify the practice. The Court expressed doubt that consensus could be reached on what qualifies as generic or nonsectarian.[24] And it explained that the Founders were accustomed to prayers with explicitly religious references and that Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. Diversity is achieved – both in the U.S. Congress and in the Town of Greece – not by limiting what can be said, but by allowing prayer-givers from diverse religious traditions. The Court concluded that "[o]nce [the government] invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.[25]

The Court recognized, however, that prayers that "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion" may fall short of permissible.[26] Although two of the Town's guest ministers had strayed from the realm of permissible presentations – by characterizing objectors as a "minority" who are "ignorant of the history of our country" and by lamenting that other towns did not have "God-fearing" leaders – the practice was permissible "on the whole." Reprising a theme from *Marsh*, the *Town of Greece* Court held that, absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer is unlikely to meet with success.[27]

In addition to prohibiting practices that reflect a pattern of denigration, the Court explained that legislators should not direct the public to participate in the prayers, single out dissidents for opprobrium, or indicate that decisions might be influenced by a person's acquiescence in the prayer.[28] Such practices could run afoul of the principle that government may not coerce its citizens to support or participate in any religion or its exercise.[29] Although some guest ministers in Greece had solicited attendees to rise or bow their heads, board members had not done so.[30] The fact that citizens attended and participated at town meetings – to accept awards; to speak on matters of local importance; and to petition the board for permits, business licenses, and zoning variances – likewise did not render the practice coercive because, according to the Court, the principal audience for the prayers was the legislators themselves.[31]

In addition to prohibiting practices that reflect a pattern of denigration, the Court explained that legislators should not direct the public to participate in the prayers, single out dissidents for opprobrium, or indicate that decisions might be influenced by a person's acquiescence in the prayer.

The Court distinguished a town meeting from a high-school graduation ceremony on the ground that, in the former circumstance, members of the audience can leave the room during the prayer, arrive late, and even voice opposition to the practice during the public-comment portion of the meetings.[32] The Court also found it noteworthy that the prayers were delivered during the ceremonial part of the town's meeting, rather than during a portion of the meeting in which Board members are engaged in policymaking.[33]

Town of Greece did not indicate how pervasive denigrating or proselytizing remarks would need to be for a practice to be deemed unconstitutional. Nor did the Court address whether its holding would apply with equal force when legislators themselves offer the prayer. Two subsequent appellate decisions, and potential consideration by the Supreme Court, may provide answers to those questions.

In *Lund v. Rowan County*,[34] the facts closely resembled those in *Greece*: the overwhelming majority of the Rowan County Commission's opening prayers included Christianity-specific references, the prayers typically began with a variant of "let us pray," and audience members largely joined in standing and bowing their heads during the prayer. But the invocations were not delivered by guests; they were delivered on a rotating basis by the five members of the Board, all of whom were Christian.

A federal district court concluded that Rowan County's prayer practice could not find refuge in *Town of Greece*, but a panel of the Fourth Circuit reversed. It upheld the practice 2-1 under the view that the facts in *Rowan* were more similar than dissimilar to those in *Greece*: both involved practices that date to the Founding; both involved prayers that were replete with Christian-specific references; in both, the primary audience for the prayers was lawmakers rather than attendees; the deliberative body took a hands-off approach to the content of the prayers; attendees were invited to stand for the prayers but were also free not to do so or to leave the room and there was no evidence that objectors were penalized; and while some objectors had been denigrated, these occurrences did not add up to a pattern.[35] In concluding that the identity of the prayer-givers was a distinction without a difference, the Court pointed to *Town of Greece's* discussion of *Marsh*: "While *Town of Greece* involved a rotating group of local clergy and *Marsh* concerned a paid chaplain, the Supreme Court attached no significance to the speakers' identities in its analysis and simply confined its discussion to the facts surrounding the prayer practices before it."[36] Thereafter, however, the full Fourth Circuit voted to rehear the case. As of this article's publication, additional briefs had been submitted and the full court had heard oral argument, but no decision had been issued.

In another case with similar facts to those in *Rowan County*, the Sixth Circuit ruled 2-1 that the municipality had overstepped. In *Bormuth v. County of Jackson*,[37] a local resident challenged a Board's practice of opening its monthly meetings with a prayer. As in both *Town of Greece* and *Rowan County*, local residents participated in the monthly meetings. The prayers were delivered by members of the Board of Commissioners on a rotating basis and were preceded by the Board Chairman asking those in attendance to "rise" and "assume a reverent position."[38]

The court distinguished *Town of Greece* on

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several grounds: the prayer-givers were the Commissioners themselves, so there was no opportunity for persons of other faiths to counteract the uniformly Christian-specific messages; one of the Commissioners had stated that the Board members deliberately chose to deliver the prayers themselves to ensure that the public didn't say things that people "are not going to like;"[39] the Commissioners directed the public to participate in the prayers at every monthly meeting;[40] and some of the Board's members had singled out the plaintiff for opprobrium when they stated that his lawsuit was an "attack on Christianity and Jesus Christ," characterized his lawsuit as "political correctness nonsense," called him a "nitwit," made their displeasure known when the plaintiff used the public-comment period of a meeting to denounce the prayer practice, and denied him a position on the Board of Public Works after he had filed suit.[41] In distinguishing *Rowan County*, the court noted that there was no evidence there that the commissioners had chosen to deliver the prayers themselves in order to exclude non-Christian prayer-givers or that the Commissioners had insulted and penalized the plaintiff – and that, in any event, the Fourth Circuit had voted to rehear the case.[42]

However, a mere twelve days after the *Bormuth* panel decision was issued, the full Sixth Circuit voted to rehear the case, which had the result of vacating the panel opinion.[43] It remains to be seen how the en banc Sixth Circuit will rule and whether the ultimate loser in that case will seek review by the U.S. Supreme Court. Meanwhile, the full fourth Circuit will undoubtedly issue a ruling in *Rowan County* and the loser in that case could likewise seek review in the U.S. Supreme Court. If both circuits ultimately reach the same result, U.S. Supreme Court review becomes much less likely.[44]

2. Government-Sponsored Religious Displays: Another area of Establishment Clause jurisprudence characterized by 5-4 divides is the question of government-sponsored religious displays. Here's what is known right now:

a. No Religious Purpose: First, the government should not erect displays with a religious purpose. In *ACLU v. McCreary County*,[45] the defendant counties had passed resolutions ordering the text of the Ten Commandments to be hung in the hallways of county courthouses. After the ACLU filed suit, the counties modified the display to add eight other documents in smaller frames, each either having a religious theme or excerpted to highlight a religious element.[46] The district court preliminarily enjoined that second display, concluding that it lacked a secular purpose. The counties then modified the display again, changing its title to "The Foundations of American Law and Government Display" and incorporating eight additional items of equal size, including the Magna Carta, the Declaration of Independence, the Bill of Rights, and other items.[47] The district court supplemented its preliminary injunction to require removal of the third iteration of the display and the Sixth Circuit affirmed.[48]

The Supreme Court voted 5-4 to affirm the lower court's ruling. In doing so, it relied on the "purpose" prong of the *Lemon* test, holding that the primary purpose behind the County's action had been to advance religion. The Court concluded that the progression in the displays demonstrated that the County was "reaching for any way to keep a religious document on the walls of courthouses."[49] The Court was careful to note, though, that it was not holding that a sacred text can *never* be integrated into a governmental display; indeed, it acknowledged that its own courtroom frieze included the figure of Moses holding tablets exhibiting a portion of the Commandments, in the company of 17 other lawgivers.[50]

b. Longstanding Non-Controversial Religious Items With Secular Aspects: Second, as *McCreary* indicated, the government can maintain longstanding religious displays that are integrated with a variety of other non-religious items. In *Van Orden v. Perry*,[51] the plaintiff challenged a Ten Commandments monument that had been on display for 40 years, along with 17 other monuments and 21 historical markers, on 22 acres of park land surrounding the Texas State Capitol. The Supreme Court upheld the display in a 5-4 vote but, this time, the majority declined to rely on the *Lemon* test. Instead, a plurality of the Court drew on the historical test of *Marsh*, concluding that "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history."[52] According to the plurality, because acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America and such acknowledgments have both religious and secular elements, they do not run afoul of the Establishment Clause.[53]

Justice Breyer provided the fifth vote to create a majority. He noted that "the Court has found no single mechanical formula that can accurately draw the constitutional line in every case" and that in borderline cases, there is no "substitute for the exercise of legal judgment."[54] Breyer's "legal judgment" was that the circumstances surrounding the display's placement on the capitol grounds and its physical setting suggested that the State intended to highlight the Commandments' nonreligious aspects; and the fact that the monument had been on the Texas state grounds without complaint for 40 years indicated that the community understood that.[55]

c. Integration with Secular Symbols: A third principle that can be gleaned from the case law is that the government can incorporate religious items in a holiday display that includes a variety of secular elements or sends a message of diversity and inclusion. In *Lynch v. Donnelly*, the Court upheld a governmental holiday display of a crèche alongside numerous secular objects, such as candy-striped poles, a Santa Claus, colored lights, a reindeer, cutout figures of animals, a Christmas tree, carolers, and a "Season's Greetings" banner.[56] Five years later, in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,[57] the Court evaluated two separate displays: a crèche display in a county courthouse; and a display that incorporated a menorah, a Christmas tree, and a sign saluting liberty outside a city-county building.[58] The Court found that the crèche endorsed religion because it was the display's centerpiece (accompanying poinsettia plants and evergreen trees simply served as framing) and it appeared alongside a sign proclaiming "Gloria in Excelsis Deo!" ("Glory to God in the Highest.")[59] In reaching this conclusion, the Court distinguished *Lynch* as follows: unlike in *Lynch*, nothing . . . detracts from the crèche's religious message. The *Lynch* display composed a series of figures and objects, each group of which had its own focal point. . . . Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase.[60]

Conversely, the Court upheld the menorah display because, when coupled with a Christmas tree and a sign celebrating liberty, the display had the effect of conveying a secular message of recognition of the different ways to celebrate the holiday season.[61]

Unanswered Questions: These three guiding principles leave many questions unanswered. For instance, would the third amended display in *McCreary* (incorporating the Bill of Rights and other seminal political documents) have withstood scrutiny if it had been erected in the first instance? At least two lower courts have answered that question in the affirmative.[62] Another question left open by the Supreme Court's decisions is how long a display must have been in place to be "grandfathered" under *Van Orden* and how clear a religious purpose must be for a display to be impermissible.

The Tenth Circuit's decision in *Green v. Haskell County Board of Commissioners*[63] sheds some light on those questions. There, the court struck down a Board's decision to add a Ten Commandments display to a courthouse lawn that already included several other monuments, concluding that the display had a primarily religious effect. The court relied on the facts that two of the three County Commissioners had attended the monument's unveiling, which included remarks by local pastors; those same two Commissioners had attended a rally in support of the monument and one of them had made religious statements in the monument's defense; their statements appeared to be made in their capacity as Commissioners rather than in their private capacity and the Commission as a whole had taken no steps to disavow the comments; the overall message conveyed by the items was less cohesive than the overall message conveyed by the monuments in *Van Orden*; and the display had been challenged within one year of its erection.[64]

Yet other questions remain. For example, will a private donor's intent be imputed to the government? Will a government entity be protected from liability if the challenged monument was erected pursuant to a public-forum policy that allows contributors to erect what they wish? Would a disclaimer on a monument give the display legitimacy? A recent decision that brings together these and other elements provides some answers. In *Felix v. City of Bloomfield*,[65] the plaintiff challenged a Ten Commandments monument on the lawn in front of a municipal building complex that included City Hall. The display had been proposed by a member of the City Council (who had since retired), but it was funded by private individuals and entities. After the display was initially proposed, the City Council adopted a public-forum policy that allowed local citizens to display items relating to the history and heritage of the City's law and government. The Ten Commandments display, which included a disclaimer stating that its message was of the donors and not the City, was unveiled with a ceremony that included many religious elements and was attended by the monument's proponent, who was by then no longer a member of the Council. Pursuant to the public-forum policy, several other non-religious items were subsequently added to the lawn by the same donor.

The Tenth Circuit relied on a variety of factors to conclude that the government's action endorsed religion in violation of the Establishment Clause: the monument resided directly in front of the city's principal government building; the initial request was for the Ten Commandments alone; the fundraising focused on churches; the dedication ceremony was religious; and the monument was challenged less than a year after its unveiling.[66] The court concluded that the disclaimer was ineffective because the government had adopted the monument's message by accepting the display and because public properties are not, as a matter of law, public fora for erection of permanent monuments. The court also noted that the public-forum policy had been adopted after the initial display was approved and concluded that adding other items did not amount to the kind of sufficiently purposeful, public, and persuasive actions necessary to legitimize an otherwise impermissible display.[67]

The holding in *Felix*, like those in many religious-display decisions, was highly fact-specific. In this area of Establishment Clause jurisprudence, perhaps more than others, the devil is in the details. And because the legal principles are ambiguous and therefore malleable, the outcome in any given case will often turn at least in part on the judge's political and cultural leanings.

3. Public Funding of Religion: The provision of public funds to religious institutions has arguably engendered more confusion than any other aspect of Establishment Clause jurisprudence. This is ironic, because concern with the funding of religion was what animated the Founders' decision to include the Establishment Clause in the First Amendment in the first place.[68]

It is relatively well-established that there is no constitutional violation when government aid makes its way to religious institutions as a result of the genuine and independent choices of private individuals.[69] Four decisions from the 1990s illustrate the point. In *Mueller v. Allen*, the Court rejected an Establishment Clause challenge to a Minnesota program authorizing personal tax deductions for various educational expenses, including private school tuition costs, even though the majority of the program's beneficiaries were parents of children in religious schools.[70] In *Witters v. Washington Department of Services for the Blind*, the Court rejected a challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor.[71] In *Zobrest v. Catalina Foothills School District*, the Court rejected an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools.[72] And in *Zelman v. Simmons-Harris*, the Court upheld an educational voucher program despite the fact that most voucher recipients sent their children to parochial schools.[73] Together, these decisions indicate that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, wholly as a result of their own genuine and independent private choice, direct that aid to religious institutions, the program is not readily susceptible to challenge under the Establishment Clause.[74]

In contrast, government programs that provide aid *directly* to religious schools, without an intervening third party, are subject to a more nuanced analysis.[75] The Supreme Court has held that when an institution is "pervasively sectarian" (that is, when "'religion is so pervasive that a substantial portion of [the institution's] functions are subsumed in the religious mission . . . .'"),[76] it cannot receive government

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Ayesha N. Khan is a Partner with the Potomac Law Group, where she focuses on appellate litigation in state and federal courts around the country on behalf of commercial, municipal, and individual clients. She has served as counsel to a party or an amicus curiae in thirty-five U.S. Supreme Court cases, more than one hundred federal circuit court appeals, scores of federal district court proceedings, and dozens of state trial and appellate matters. She participated in many of the cases discussed in this article and was lead counsel for the plaintiffs in *Galloway v. Town of Greece*. She can be reached at akhan@potomaclaw.com.

The State Docket

Deere John: Is a Riding Lawnmower–or a Roomba–a "Motor Vehicle?"

By: Erich Eiselt,
IMLA Assistant General Counsel

The Supreme Court of Washington heard a mere 116 appeals in 2016. This term, it will allocate one such precious slot to a case brought by Chelan County, a scenic agricultural powerhouse of about 75,000 residents on the sunny eastern side of the Cascade Range. At issue is an unlikely question: is a riding lawnmower a "motor vehicle" under Washington State's theft laws?

The Crime: In August 2015, Wenatchee resident Joshua Michael Barnes drove to a local home, started the resident's Craftsman riding lawnmower, inched it up a ramp onto his white pickup truck and prepared to depart. He was intercepted by Judy Fraker, who demanded that he return the mower to *terra firma* forthwith. Barnes complied and sped away down Chumstick Highway. He was soon visited by local law enforcement and quickly admitted to the attempted theft.

Chelan County prosecutors did not limit their charge to garden variety second degree thievery, a Class C offense criminalizing the purloining of property worth between $750.01 and $5,000. Instead, they brought a more substantial Class B count against Barnes: attempted theft of a motor vehicle.

The Lower Court Holdings: Chelan Superior Court dismissed the motor vehicle charge, finding that a riding mower is not included within the State's vehicular theft jurisprudence. The Washington Court of Appeals arrived at the same endpoint. In *State v. Barnes*,[1] decided in October 2016, the court found that although a riding mower might plausibly fit into some definitions of "motor vehicle" along the spectrum of Washington state laws, theft statutes were not among them.

The Analysis: The Court of Appeals' analytical tour began with an examination of the legislative intent behind Washington's 2007 vehicular thievery law. That record was not helpful to the prosecution. It referenced "the family car" and "auto theft," but lawnmowers garnered nary a mention:

> (a) Automobiles are an essential part of our everyday lives. . . . The family car is a priority of most individuals and families. The family car is typically the second largest investment a person has next to the home, so when a car is stolen, it causes a significant loss and inconvenience . . . .
>
> (c) Law enforcement has determined that auto theft, along with all the grief it causes the immediate victims, is linked more and more to offenders engaged in other crimes. Many stolen vehicles are used by criminals involved in such crimes as robbery, burglary, and assault. In addition, many people who are stopped in stolen vehicles are found to possess the personal identification of other persons, or to possess methamphetamine. . . .[2]

Based on the RCW language, the Court of Appeals reasoned that although a riding lawn mower "is rarely found on a public street and is intended only for use on a lawn," it is "capable of transporting a person or property on a road." Therefore,"[i]f we read [the RCW traffic laws] literally, a riding lawn mower is a motor vehicle." Unfortunately for the prosecution, this was not the end of the journey.

Because the statute used the words "automobile," "car," "vehicle," and "motor vehicle" interchangeably, without ever defining them, the appeals court looked elsewhere to find a "plain meaning" interpretation. It found a more robust definition in the traffic law provisions of the Revised Code of Washington (RCW):

> "Motor vehicle" means every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails. ...
>
> "Vehicle" includes every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles. "Vehicle" does not include power wheelchairs or devices other than bicycles moved by human or animal power or used exclusively upon stationary rails or tracks. Mopeds are not considered vehicles or motor vehicles for the purposes of chapter 46.70 RCW. Bicycles are not considered vehicles for the purposes of chapter 46.12, 46.16A, or 46.70 RCW or RCW 82.12.045. Electric personal assistive mobility devices are not considered vehicles or motor vehicles for the purposes of chapter 46.12, 46.16A, 46.29, 46.37, or 46.70 RCW. A golf cart is not considered a vehicle, except for the purposes of chapter 46.61 RCW.[3]

Based on the RCW language, the Court of Appeals reasoned that although a riding lawn mower "is rarely found on a public street and is intended only for use on a lawn," it is "capable of transporting a person or property on a road." Therefore,"[i]f we read [the RCW traffic laws] literally, a riding lawn mower is a motor vehicle."[4]

Unfortunately for the prosecution, this was not the end of the journey. The court soon detoured from its "plain meaning" search and veered off-road on a very different path:

> We question, for at least two reasons, whether we should always follow the plain meaning principle. First, the state legislature sometimes ineptly expresses its intent . . . . If we took the plain meaning rule as an unyielding rule, we might slavishly follow the language of a statute despite knowing the legislature intended a different result. . . .
>
> Second, language can never adequately and comprehensively express the speaker's message or intent. If there can never be perfect human communication, language to some degree is always inept. If the legislature wanted to precisely and thoroughly express its objective, each enactment would comprise a book so as to identify the one and only meaning intended for each word in the statute . . . . Ludwig Wittgenstein's friend would need to instruct Wittgenstein for minutes, if not hours, as to the types of games he did not wish Wittgenstein to teach children. Although the friend could instruct Wittgenstein to teach only age appropriate games, the friend and Wittgenstein could disagree as to age appropriate games.[5]

While readers no doubt hit the brakes to ponder the relationship between Wittgenstein and internal combustion, the court sped onward, opining that "even if . . . the statute's meaning is not ambiguous, the court should still construe the statute to effect its purpose, and any unlikely, absurd, or strained consequences resulting from a plain and literal reading of the statute should be avoided."[6]

Under a literal reading of the law, the court saw vehicular absurdities up the road:

> An iRobot Roomba, a self-propelled vacuum, would be a motor vehicle, since one could transport small property on the Roomba. A jokester could place her cat on top of the vacuum and send the iRobot Roomba down her neighborhood street. Theft of a child's remote control car that includes a doll in the driver's seat would also qualify for theft of a motor vehicle if we literally read RCW 46.04.320 and .670.[7]

The State's odds waned further when the judges cited an additional guidepost: RCW's criminal code, which is structured "[t]o differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.[8] The charge against Joshua Barnes conflicted with this underlying proportionality: "Theft of a motor vehicle carries a potential sentence that is twice as long as standard theft, meaning theft of a lawn mower, Segway, or iRobot Roomba could be treated the same as theft of a Ferrari."[9]

As if there was remaining doubt about the court's travel plans, it then cited the Washington Supreme Court's treatment of Willie Day, a young man charged with driving while intoxicated.[10] Day had commandeered a pickup truck and careened in circles in a field on his family's property—but never entered or even drove near a public road. While the dissent noted that the plain language of the criminal law did not require the accused to drive on a public street, the majority reversed Day's conviction: the purpose of the drunk driving law was to reduce drunk driving hazards to highway safety and the traveling public, and Day had not posed such a threat.

Thus the Court of Appeals, having started in the direction of the State, unalterably accelerated towards the defendant by the end of its journey: "We affirm the superior court's dismissal of charges against Joshua Barnes for theft of a motor vehicle. A riding lawn mower is not a motor vehicle for purposes of theft."

The Appeal. The State disagreed with this endpoint and petitioned for yet another drive. Its persistence paid off. On May 9, all nine members of the Evergreen State's Supreme Court will hear Chelan County Deputy Prosecutor Nicole Hankins' arguments that a lumbering self-propelled lawn cutting machine with a steering wheel is, for purposes of Washington's theft laws, a motor vehicle.[11] The penal consequences to Joshua Barnes are significant—the motor vehicle charge could result in 29 months' incarceration, almost a year more than the lesser theft counts.

Other Landmarks. The Washington Supreme Court will have a number of scenic overlooks to consider as it travels this juridical highway. Some may be germane; some inconsequential.

The Mirror Image: Of special relevance may be one case with seemingly identical topology. *Harris v. State*[12] concerned a Georgia man who stole a Toro riding lawn mower worth more than $500. The applicable law defined "motor vehicle" as "'any device or vehicle including automobiles, motorcycles, motor trucks, trailers, and all other vehicles operated over the public highways and streets of this state and propelled by power other than muscular power . . . ."[13]

Although lawnmowers were not excepted from the law, the Supreme Court reversed the lower court and held the riding lawn mower not to be a motor vehicle. While a riding lawn mower was capable of transporting people or property and could drive on the street for short stretches, it was "not designed for street use since streets contain little grass to mow."[14]

The Dealership: Less interesting may be the Massachusetts case considering whether the state's statutory scheme regulating the relationship between motor vehicle manufacturers and dealers applied to John Deere and one of its franchisees. Deere manufactured riding lawn mowers and other lawn equipment. The regulations applied if Deere was producing "motor vehicles." The trial court found that some of Deere's riding lawn mower models traveled in excess of 12 miles per hour and could fit within the applicable law. The reviewing court reversed, concluding that the trial court took the statutory language too literally. [15]

The Insurance Policy: Also of peripheral help are at least two cases holding that a riding lawn mower is a motor vehicle for insurance purposes,[16] although other cases disagree.[17]

The Traffic Laws: It might seem beyond peradventure that straying from one's personal plot of groomed zoysia and steering a growling lawn mower down an active roadway will invoke the full complement of traffic statutes. This assumption would be accurate in Ohio, where a Canton man riding his mower in 2013 to pick up a pizza unluckily came upon a police stop and was summarily ticketed for driving without a license. His bad fortune was compounded after the officers determined that he was wanted on outstanding warrants, resulting in his arrest and impoundment of his "vehicle."[18]

For irresponsible drivers who have lost the privilege to traverse public roadways in an automobile, the riding lawnmower can become a low-tech substitute. If inebriated and not confined to a family-owned meadow, they surely risk citation. The media abounds with articles about drunks on a Deere; one of the more colorful is the account of Tyler Anspach, 25, a three-time DUI recipient who was intercepted driving a lawnmower down a Pennsylvania highway—with a six-pack of beer under his arm.[19] Although somewhat far afield, there is also the case of the Kentuckian who received a DUI for directing his horse onto public roads while drunk (referring to the rider, not the horse).[20]

The Flexible Flyer as Vehicle. Finally, given the meandering taxonomy of motor vehicles, we would be remiss not to recount the Maryland case of the runaway sled. *Moon v. Weeks*[20] involved seven-year old Kathryn Weeks, who was sledding with her brother down ice-covered Tallahassee Street in the small town of Loch Lynn on December 2, 1966. It was after 6pm, darkness had descended and the streets were treacherous, causing Richard Weeks to drive slowly down Shenandoah Street towards its intersection with Tallahassee. Kathryn's brother noticed Weeks' headlights and called out to her as she slid into the intersection from the right. She diverted her sled but collided with Weeks' right front fender and was badly injured.

As the Maryland Court of Special Appeals phrased it, the case turned "on the

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IMLA 2017 AMICUS SERVICE AWARD RECIPIENTS

IMLA gratefully acknowledges the extraordinary contributions to municipal law made by the following amicus brief authors:



STUART BANNER, Professor of Law at UCLA-*Murr v. Wisconsin* (Supreme Court merits case). Issue: whether the "parcel as a whole" concept establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes.

EREK BARRON, Counsel of Whiteford, Taylor, Preston LLP-*Siena Corporation v. Mayor and City and County of Rockville* (Fourth Circuit). Issues: (1) whether a zoning text amendment violated a company's due process and equal protection rights; and (2) whether the City has the burden to prove it acted rationally in adopting the ZTA (as opposed to the plaintiff proving pretext).

DOUGLAS BARUCH, Partner, **JANICE MAC AVOY**, Partner, **JENNIFER COLYER**, Special Counsel, **ANDREW CASHMORE**, Associate, and **LEIGH ROME**, Associate, with Fried Frank-*Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore* (Fourth Circuit). Issue: whether a City ordinance requiring Limited-Service Pregnancy Centers to post disclaimers stating that they do not provide or make referrals for abortions or certain types of birth control violates the Constitution.

BILL BRINTON, Shareholder of Roger Towers, P.A.-*Thomas v. Schoer* (Western District of Tennessee). Issue: whether provisions of the Tennessee Highway Beautification Act and localities' regulation of billboards are constitutional. Also *AusPro Enterprises v. Texas Department of Transportation* (Texas Court of Appeals-petition for rehearing). Issue: constitutionality of the Texas Department of Transportation's outdoor advertising regulations.

ERIC CITRON, Partner of Goldstein & Russell, P.C., and **RON PARSONS**, Partner of Johnson Janklow Abdallah Reiter & Parsons, LLP-*Direct Marketing v. Brohl* (Supreme Court petition stage). Issue: whether Colorado's law requiring out-of-state retailers to report total sales to purchasers and the Department of Revenue discriminates against interstate commerce. The Supreme Court denied certiorari, which was the unusual position advocated by our brief.

MICHAEL COLANTUONO, Shareholder of Colantuono, Highsmith & Whatley-*Leider v. Lewis* (California Supreme Court). Issue: whether a private citizen can seek injunctive relief against a city based on his taxpayer claims of alleged violations of a criminal statute.

ALLEGRA COLLINS, Professor at Campbell University-*Asheville v. State of North Carolina*, (Supreme Court of North Carolina). Holding: legislation requiring Asheville to cede ownership and control of its public water system to another political subdivision violated the North Carolina Constitution.

DANIEL COLLINS, Partner with Munger, Tolles & Olson-*County of Los Angeles v. Mendez* (Supreme Court merits case). Issues: (1) whether the 9th Circuit's "provocation" rule should be barred as it conflicts with *Graham v. Connor*; and (2) whether, in an action brought under Section 1983, an incident giving rise to a reasonable use of force is an intervening, superseding event which breaks the chain of causation from a prior, unlawful entry in violation of the Fourth Amendment.

SHAY DVORETZKY, Partner at Jones Day-*Flores v. City of San Gabriel* (Supreme Court petition stage), and **ARTHUR HARTINGER**, Partner with Renne, Sloan, Holtzman, Sakai LLP (Ninth Circuit petition for rehearing). Issue: whether cash-in-lieu of benefits payments are properly excluded from the regular rate of pay under the FLSA pursuant to § 207(e)(2) because they are not compensation for hours worked.

KYMBERLY EVANSON, Partner with the Pacifica Law Group--*District of Columbia v. Wesby* (Supreme Court petition stage). Issues: (1) whether a police officer assessing probable cause is entitled to credit one set of conflicting statements over another; and (2) even if the officer cannot, whether the law was clearly established for the purposes of qualified immunity.

ROBERT FUGATE, Deputy City Attorney of Arlington, Texas-*Hunter v. Cole* (Supreme Court petition stage). Issues: (1) does clearly established law require every police officer to wait before firing in self-defense or defense of another until after a person points his firearm directly at another, when it's then too late to stop the immediate deadly threat presented?; and (2) does a police officer accused of inaccurately reporting his perceptions of events during a dynamic shooting encounter violate clearly established rights under the Fourteenth Amendment? (Petition granted and judgment vacated in light of *Mullenix v. Luna*).

DEEPAK GUPTA, Founding Principal of Gupta Wessler PLLC-*Bank of America Corp. v. City of Miami* (Supreme Court merits stage). Issues: (1) whether, by limiting suit to "aggrieved person[s]," Congress required that a Fair Housing Act plaintiff plead more than just Article III injury-in-fact; and (2) whether proximate cause requires more than just the possibility that a defendant could have foreseen that the remote plaintiff might ultimately lose money through some theoretical chain of contingencies.

SCOTT HOUSTON, Deputy Executive Director & General Counsel for the Texas Municipal League-*Carruth v. City of Plano* (Texas Court of Appeals). Issue: whether a City's adoption of a comprehensive plan can be subject to referendum.

JOSEPH JACQUOT and **LINDA BENFIELD**, Partners with Foley & Lardner LLP~ *U.S. Army Corps of Engineers v. Hawkes* (Supreme Court merits case). Holding: an approved jurisdictional determination by the United States Army Corps of Engineers definitively stating the presence or absence of waters of the United States on a particular property is a final agency action judicially reviewable under the APA.

JOHN NEIMAN, Shareholder with Maynard Cooper & Gale, and **BRAXTON THRASH**, Associate~ *Packingham v. North Carolina* (Supreme Courts merits case). Issue: whether, under the Court's First Amendment precedents, a law that makes it a felony for any person on the state's registry of former sex offenders to "access" websites that are "know[n]" to allow minors to have accounts, like Facebook, is permissible, both on its face and as applied to petitioner.

ANDREW ORENSTEIN, Member of Harris Beach PLLC, and **BRADLEY WANNER**, Associate~*Turturro v. City of New York* (New York Court of Appeals). Holding: Roadway design decisions are propriety functions (as opposed to governmental) and entitled to a qualified immunity only for issues of roadway safety.

RUSI PATEL, Associate General Counsel for the Georgia Municipal Association~*Walker v. Calhoun* (Eleventh Circuit). Issues: (1) whether the District Court erred in determining that the City possesses control over its municipal court, specifically on issues of bail and bond, which are traditionally reserved to the judge and whether the exercise of such powers was derived from municipal policy or by state law; and (2) whether a municipality can be held liable under 42 U.S.C. §1983 for its municipal court having a policy of wrongfully incarcerating indigent defendants when the relevant decisions are made by municipal judges acting in their judicial capacities under direction of state law.

MARC POSTER, Partner, and **TIMOTHY COATES**, Managing Partner of Greines, Martin, Stein & Richland LLP~*Kirola v. City & County of San Francisco* (Ninth Circuit). Issues: (1) whether the City's departure from ADA guidelines in a few isolated instances when constructing or altering public facilities warrants the injunctive relief; and (2) whether the District Court erred when it determined that San Francisco provides meaningful access to the programs, services and activities offered by its parks, swimming pools, and public rights-of-way when it reviewed those programs in their entirety.

STEVEN RENICK, Partner, and **NICOLE THRELKEL**, Associate, with Manning & Kass, Ellrod, Ramirez, Trester LLP~*Lowry v. San Diego* (Ninth Circuit). Issues: (1) whether the use of police service dogs is a categorically "severe" use of force under *Graham* because dog bites can be fatal; and (2) in determining whether qualified immunity is appropriate, whether the *Graham* factors can be reviewed from the perspective of the facts known to the appellant, rather than the officers.

STEVEN RENICK~*Diaz v. City of Anaheim* (Ninth Circuit petition for rehearing and Supreme Court petition stage). Issue: whether liability and damages should have been bifurcated in a qualified immunity case that involved certain testimony related to the deceased's gang membership.

LANNY RICHMOND, Staff Attorney at the Arkansas Municipal League~*Gage County v. Dean* (Eighth Circuit). Issues: (1) whether the jury erred by finding the County liable for a final policy decision by the Sheriff where the Sheriff was found not to be liable for any of his actions.; and (2) whether the Sheriff is a final policymaker for the County under state law.

LAWRENCE ROSENTHAL, Professor of Law at Chapman University~*Manuel v. City of Joliet* (Supreme Court merits case). Holding: an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a Fourth Amendment claim for his/her pretrial detention. (Remanded to the lower court to determine when the statute of limitations begins to run for such a claim).

CHARLES ROTHFELD, Special Counsel with Mayer Brown~*Expressions Hair Design v. Schneiderman*. (Supreme Court merits case). Holding: New York's no-surcharge law regulated speech and not simply conduct; remanded to the lower court to conduct a First Amendment analysis.

RICHARD SIMPSON, Partner with Wiley Rein, LLP~*Ivy v. Morath* (Supreme Court merits case). Issue: whether the relationship between public and private actors invokes dual obligations to accommodate disabilities in any context other than an express contractual relationship between a public entity and its private vendor. (Judgment was vacated and case dismissed as moot).

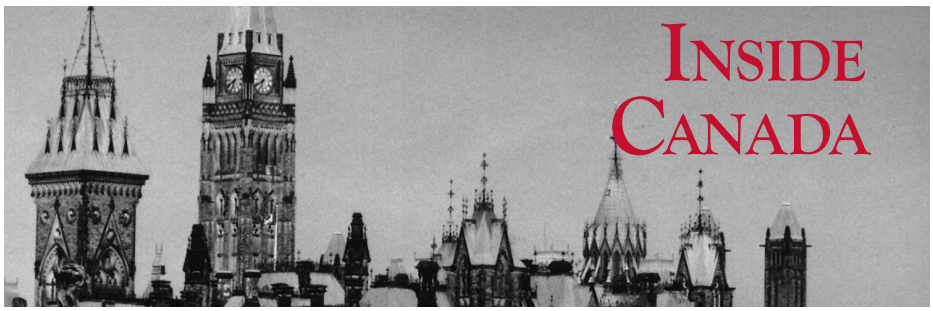
SARAH SHALF, Professor at Emory University, and **JOHN BAKER**, Founding Attorney of Greene Espel~*Ela v. Destefano* (Eleventh Circuit). Issue: whether a plaintiff is entitled to a liquidated damages award of $2,500 per Driver Privacy Protection Act violation/per lookup.

SARAH SHALF~*Town of Chester v. Laroe Estates, Inc.*, (Supreme Court petition stage and merits case). Issue: whether a party seeking to intervene as a matter of right needs independent Article III standing.

HELMUT STARR, Principal of Curtis, Heinz, Garrett & O'Keefe P.C.~*Josephine Havlak Photographer, Inc. v. Village of Twin Oaks* (Eighth Circuit). Issue: whether the requirement of a permit and fee for commercial photography in the public park violates the First Amendment.



From left to right: Mary Ellen Bench, Charles Thompson, Amanda Kellar, Charles Rothfeld, Rusi Patel, Sarah Shalf, Eric Citron, Timothy Coates, Deepak Gupta, Lanny Richmond, Arthur Hartinger, Daniel Collins, Douglas Baruch, Steven Renick, Andrew Cashmore, Leigh Rome, Allegra Collins, Andrew Orenstein, Nicole Threlkel, Marc Poster



Recent Cases of Interest

By Monica Ciriello, Ontario 2015

Leave Officials out of it: Subpoenas Quashed for Lack of Material Evidence

St. John's (City) v. Walsh, **2017 CanLII 15293 (NL SCTD) http://canlii.ca/t/h2q87**

Mr. Walsh (Plaintiff), a resident in the City of St. John's (City) was issued two tickets for operating without a permit on his property contrary to the City's Building By-law. The Plaintiff set one matter for trial, contesting the ticket pertaining to the installation of a site trailer without a permit, and requested that the Provincial Court issue a subpoena to the Mayor, the Chief Municipal Planner (CMP) and the Acting City Solicitor (ASC). The City sought *certiorari* to quash the subpoenas, arguing that the parties lacked evidence material to the trial. The Plaintiff contested the City's application.

HELD: Two out of three subpoenas against the City are quashed.

DISCUSSION: The Court began by addressing the authority of the City to issue tickets for violations of its by-laws under the *Provincial Offences Act (POA),* S.N.L. 1995, finding that the City acted in accordance with this authority. Next the Court addressed s. 6 of the *POA* which provides authority for the application of the *Criminal Code* s.698 with regards to proceedings, as in this case subpoenas:

698 (1) Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence.

The Provincial Court relying on s.698(1) had the authority to issue the three subpoenas. The Supreme Court of Canada decision in *R v. Jobin*, 1995 CanLII 144 found that this Court had the jurisdiction to hear an application to quash a subpoena issued by the Provincial Court. The Court relied on *Kent v. Kent,* 2010 NLCA 53 (CanLII) and "whether the information is relevant to the live issues in the proceeding" when determining if the subpoenas requested by Plaintiff should be quashed. The City argued that all three subpoenas were inappropriate as none of the three parties had relevant material evidence to provide at trial.

To strengthen its position, the City pointed to the language used by Plaintiff in his "Notice to the Applicant" to justify the subpoenas he requested. He simply stated, "...they are responsible for governing this City". The Plaintiff argued that the ASC would provide material evidence, as she was a City lawyer who is responsible for all legal actions, and his trial was a legal action. The Court disagreed, finding that the information that the ASC would provide would not be relevant to the proceedings.

With regards to the CMP subpoena, Mr. Walsh successfully argued that the CMP's knowledge of municipal zoning in the City was relevant to his defense. The Court agreed, finding that zoning of the property where Mr. Walsh's trailer was located was relevant to the proceedings, and therefore the CMP subpoena was not quashed. The Mayor's subpoena was quashed as the Court found that Mr. Walsh's argument about political accountability did not rise to the level of material evidence in this trial.

No Gift, No Standing: City Denies Compensation for Damages to Vehicle

Ryan v City of St. John's, **2017 CanLII 20334 (NL PC) http://canlii.ca/t/h368h**

In 2012, the City of St. John's (City) received a complaint that a partially burned vehicle with no license plates was parked on a City street. With no evidence of ownership, the City arranged for the vehicle to be towed to a scrap yard where it was damaged during the scrapping process before Mr. Ryan (Plaintiff), claimed the vehicle. The Plaintiff sought compensation from the City for damage to the vehicle that while there as no proof of ownership, he claimed was given to him from his late father. Following an investigation, the City denied the Plaintiff's compensation determining that the Plaintiff was not the owner of the vehicle, and was therefore not entitled to compensation. The Plaintiff claimed damages against the City for the loss of his vehicle.

HELD: Claim Dismissed.

DISCUSSION: The crux of the Plaintiff's argument was that the vehicle was a gift from his late father prior to his death. To establish the elements of what constitutes a gift, the Court relied on *Fornasier v. Grills,* [2009] O.J. No. 1369: intention to transfer property; certainty as to the property to be transferred; certainty as to the recipient of the gift; and delivery and perfection of the gift by doing everything necessary to effect an irrevocable transfer.

The Plaintiff's only evidence before

the Court that the voluntary transfer of property took place was his own testimony; no documentation or transfer documents were provide as evidence to support his claim. At the time the City towed the vehicle, the documentation stated the vehicle was in the Plaintiff's late father's name. As the father died intestate and his estate was not administered, the estate was the true owner of the vehicle. It was not until after the incident in 2016 that the Office of the Public Trustee sent a letter indicating that they were satisfied that the vehicle belonged to the Plaintiff. The Court was satisfied that as of 2016 the Plaintiff was the owner of the vehicle, but not before. The Court found the case of *Petten v. Petten* 1999 CanLII 19798 (NL SCTD) to be analogous to the facts of the current case; a grandfather died without a will and the estate was not administered. There, court held that the family member had no standing, no interest in the grandfather's estate and therefore no ability to bring a claim.

Therefore, when the City towed the vehicle it was the estate that was the owner of the vehicle, not the Plaintiff and it was up to the Public Trustee who had standing to bring a claim against the City, not the Plaintiff.

Watch Your Step! Negligence Claim Dismissed in Public Transit Incident

***Dahl v. South Coast British Columbia Transportation Authority,* 2017 BCSC 629 (CanLII) http://canlii.ca/t/h37xb**

Ms. Dahl (Plaintiff) claimed she was injured while aboard a City of Vancouver bus. The Plaintiff alleged that before she took her seat the bus driver quickly accelerated causing her to be thrown into the air and land on the bus floor where she went unconscious due to the impact. The South Coast British Columbia Transportation Authority (Defendant) disputed on behalf of the bus driver both the rate of acceleration and the severity of injury. The Plaintiff claimed the incident impaired her ability to pursue her career as an actor and as a free lance writer. She sought damages as a result of the injuries she suffered claiming: post-traumatic brain injury; balance issues; vision problems; torn muscles in her left calf; injury to her left knee, foot and ankle, memory loss; debilitating headaches; and problems with focus and concentration.

HELD: Action Dismissed.

DISCUSSION: To determine the liability of the bus driver, the Court relied on the recent Court of Appeal decision *Benavides v. Insurance Corporation of British Columbia*, 2017 BCCA 15 (CanLII) which outlined: The mere fact that a passenger is injured while riding on a public carrier does not establish a prima facie case of negligence;

The plaintiff bears the burden of proving on a balance of probabilities that the defendant breached the standard of care owed to the plaintiff;

Once the plaintiff establishes a prima facie case of negligence, in practical terms the burden shifts to the defendant to answer the case against him and show that he was not negligent.

Relying on these principles, the Court examined four decisions with analogous fact patterns to determine what would constitute a breach of the bus driver's standard of care. Similar conclusions were reached in all the decisions; it is not a breach of the standard of care for a bus driver to start driving before a passenger is seated. [*Brinacomb v. B.C. Transit et al*, 2000 BCSC 331 (CanLII), *Rehemtulla v. B.C. Transit*, unreported Edwards, J. Vancouver Registry No. B926381, 1995, *Mauro v. Romanica*, [1988] 1 W.W.R. 684 (Man. Q.B.), *Habib v. Jack*, 2011 BCSC 399 (CanLII).

In assessing the Plaintiff's evidence to determine if the bus driver breached the standard of care that was owed, the Court found that it was "exaggerated, over dramatized and unbelievable" as even the camera footage did not depict the events as the Plaintiff described. The Court indicated that there was nothing abnormal about the bus driver's operation of the vehicle, and relying on the case law the Court stated "it is not negligent for a driver to start the bus before a passenger is seated or holding on to something." Therefore the Court ultimately held that the driver did not breach the standard of care expected of a reasonable and prudent bus driver. ML





Can Disorderly Conduct Ordinances Survive in a Changing World?

By: Brad Cunningham, City Attorney, Lexington, South Carolina

Disorderly Conduct – this often—invoked but troublesome term is defined in Black's Law Dictionary as:

A term of loose and indefinite meaning (except when defined by statutes), but signifying generally any behavior that is contrary to law, and more particularly such as tends to disturb the public peace or decorum, scandalize the community, or shock the public sense of morality. An offense against public morals, peace or safety.

Black's goes on to elaborate:

A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or harm, or recklessly creating a risk thereof, he: (a) engages in fighting or threatening, or in violent or tumultuous behavior; or (b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor. (Model Penal Code §250.2)

An early test for Disorderly Conduct ordinances came out of the United States District Court for the Western District of Kentucky, Louisville Division, in *Baker v. Bindner*, 274 F. Supp. 658. The court there said "Though we recognize that a city clearly has the authority to handle objects of legitimate municipal concern, they nevertheless must be handled in a constitutional manner, i.e., the standards must appear in the face of the ordinance."

In common terms, the court was saying "you have to be specific as to what type of conduct is prohibited. Otherwise the ordinance is vague and fails constitutionally." The specificity requirement issued in *Baker* is likely the reason for Disorderly Conduct ordinances such as the following one, provided courtesy of a Listserv contributor:

It shall be unlawful for any person to be a disorderly person within the city. The following persons shall be deemed disorderly persons:

(A) Any person who shall act in a violent or tumultuous manner toward another whereby any person is placed in danger or fear of safety of his life, limb or health.

(B) Any person who shall act in a violent or tumultuous manner toward another whereby the property of any person is placed in danger of being destroyed or damaged.

(C) Any pe rson who shall endanger the lawful pursuits of another by acts of violence, angry threats or loud, boisterous or abusive conduct.

(D) Any person who shall cause, provoke or engage in any fight, brawl or riotous conduct so as to endanger the life, limb, health or property of another.

(E) Any person who shall, for the purpose of engaging in any fight or brawl, assemble or congregate with another or others.

(F) Any person who shall be found jostling or roughly crowding or pushing any person in any public place.

(G) Any person who shall assemble or congregate with another or others for the purpose of or with the intent to engage in unlawful gambling.

(H) Any person who shall accost or attempt to force his/her company upon any person against his/her will.

(I) Any person who utters, while in the presence of another, any bawdy, lewd or obscene words or epithets or who makes any lewd, vulgar or suggestive gestures with his hands or body.

(J) Any person who shall act in a dangerous manner towards others.

(K) Any person who shall use "fighting words" directed towards any person who becomes outraged and thus creates a turmoil.

(L) Any person who shall assemble or congregate for the purpose of trouncing upon another.

(M) Any person who shall, by acts of violence, interfere with another's pursuit of a lawful occupation.

(N) Any person who shall congregate with another or others in or on any public way so as to halt the flow of vehicular or pedestrian traffic and refuse to clear such public way when ordered by the city police or other lawful authority.

(O) Any person who shall interrupt or disturb any individual, group, audience or other lawful assembly of people within this city by any noise or loud talking, indecent behavior or other annoyance, which may in any manner interfere with good order and decorum.

(P) Any person who is grossly drunk in or on any street or other public place in the city.

(Q) Any person who makes any indecent exposure of his person.

(R) Any person who urinates or defecates in public.

(S) Any person who refuses to leave a residence, business or commercial establishment after having been asked to do so by the owner or person in control of the premises, or by law enforcement.

Rather long, isn't it? The entire text is provided to emphasize the point that specificity requirements (while a valid concern) render long statutes. And, as a side observation, it appears the ordinances in several cases have been used as a "catch all." That is, these ordinances are used to ticket an individual or group of persons when "the authorities have nothing else with which they can charge a person" in a given situation.

Indeed, I am told by the contributor that the above ordinance has been amended several times to encompass behavior for which the authorities (but for the amendment) could not have issued a ticket. Thus, Listserv research has shown a second consequence of the specificity requirement: frequent amendments. "We have changed it several times," said one contributor "to account for specific situations we had not previously encountered."

Baker took place in the "turbulent" 1960s. Standards of permissible behavior have come a long way (be it good or bad) since then. Behaviors such as wearing a mask in public, cross-dressing or intense picketing formerly were held to be disorderly, but might pass muster in today's society. Many existing Disorderly Conduct ordinances are older than the above example. How would such an ordinance be crafted today, if starting from scratch?

Changing morals and societal values have an effect on many statutes, but it would be difficult to find one more fluid than Disorderly Conduct, i.e., aka "bad behavior." And, as specificity necessitates longer and longer ordinances, at what point will the ordinances be deemed "overreaching or overbroad?" Further, given that what used to be "bad behavior" is now often considered "mainstream," one wonders how long these ordinances can survive?

City Council Choreography: Another interesting topic discussed on the Listserv has been the seating arrangements for members at a City Council meeting. IMLA members report the following arrangements:

Left to right in order of seniority.... District order from left to right... City Manager and Assistant Manager on either side of the Mayor, others in random order... Mayor sits in the middle, to his left is the City Manager, then the council members surround in a random and changing order... Random seating order based upon when people take office.....The presiding officer sits in the middle, the next senior elected official sits to the presiding officer's right (the place of honor), the next senior person sits at the presiding officer's left, etc... In the absence of anyone's making a challenge, it's first come, first served/seated... Decided by the Chair (Mayor)... Mayor is in the middle of a semicircular dais, the City Clerk to the right of the Mayor, the Mayor Pro Tem to the right of the Clerk, then another Commissioner on the right end. To the left of the Mayor is the City Manager, then another Commissioner, the City Attorney, and a seat for a Deputy Clerk to run the recording equipment. The positions of the three Commissioners other than Mayor and Mayor Pro Tem are determined by where the Clerk puts their name tags, not any type of seniority or other custom. (A little complex?)... City Attorney is to the Mayor's right and the Manager is to his left. Beyond that, we've left it to the Mayor's discretion on seating. Since all our members are at large, we don't have the issue of having at large sit closer and district further out...

And the winner for most complicated seating arrangement is this one: In an arc, from right to left: City Attorney, City Manager, District 6, District 7, District 8, District 9, District 10, Mayor, District 1, District 2, District 3, District 4, District 5, Deputy City Manager, Assistant to Council. The Manager/Attorney and the Deputy/Assistant are separated by a small divider from the Council. The Clerk and Deputy City Clerk sit at a table on the floor below the raised Dais, facing the Mayor, District 1 and District 10... (Rumor has it there is a quiz on this as a qualification for office).

Obviously, there is no single way to arrange the seating, and a lot has to do with form of government and/or whether there are single member districts or members at large. But, what fun to discuss the nuances in how we all accomplish the same thing.

As proof positive that fact is stranger than fiction, take this story from a local municipal court. The Prosecutor takes on a case to convict two gentlemen of violating the Business License ordinance for soliciting persons in the public to have their windshield inspected, and, if necessary repaired or replaced. The Prosecutor and Municipal Court Judge agree to dismiss the charges if the gentlemen go ahead and obtain the necessary license and maintain compliance. The defendants agree and proceed to the Business License Department. However, upon learning the requirements to obtain the license, the defendants decide to disregard the court's instruction and return to the streets to again solicit.

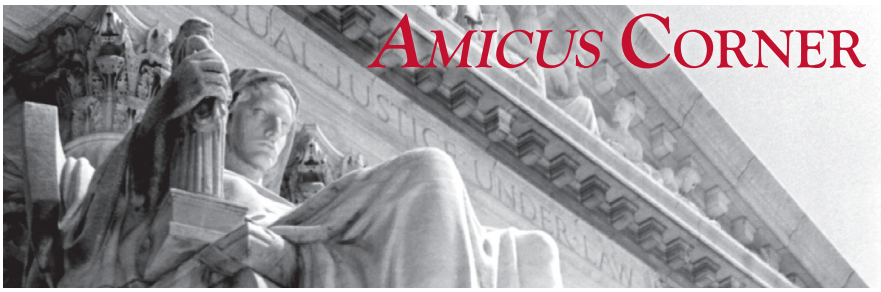
They make their first call an hour later at a local gas station, and approach a gentleman from behind as he fills his tank. They look over his windshield and shout out "Good afternoon sir. I couldn't help but notice that you might be in need of a windshield repair." "Well, good afternoon, gentlemen" responds the Prosecutor while turning around as he continues to fill his tank.

The result: Another ticket for a Business License Ordinance violation, an additional ticket for Contempt of Court, and a severe chewing out by the same Municipal Court Judge.

From the Humor Corner, a few real-life news headlines regarding municipal business:

Police Begin Campaign to Run Down Jaywalkers... Juvenile Court to Try Shooting Defendant... Federal Agents Raid Gun Shop, Find Weapons... City Council Runs Out of Time to Discuss Shorter Meetings... Multiple Personality Rapist Sentenced to Two Life Terms...Man Found Dead in Cemetery... Lawsuit - Miners Refuse to Work after Death... Mayor Says City is Safe Except for Murders... Man Shoots Neighbor With Machete...

The Prosecution rests, your honor... ML



What Do Small Locally Controlled Airports and Sanctuary Cities Have in Common?

By Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy

After a 14-month hiatus, Justice Gorsuch has been confirmed and the Supreme Court is again at full strength. As of this writing, we are still awaiting decisions in a number of important Supreme Court cases affecting local governments in which IMLA filed an amicus brief, including: *County of Los Angeles v. Mendez; Bank of America Corp. v. City of Miami and Packingham v. North Carolina.*

While we await the Court's remaining opinions before the summer recess, IMLA continues to provide our members with amicus support across a broad spectrum. Two cases in which IMLA recently filed amicus briefs could not be more factually distinct, but both raise important issues relating to local government autonomy and preemption:

Quieting a Noisy Local Airport: *Town of East Hampton v. Friends of the East Hampton Airport, Inc.*

The Town of East Hampton owns and operates a small community airport. The airport provides no scheduled commercial services, but serves a range of private chartered helicopters and fixed-wing aircraft. Due to concerns about airport noise, the Town enacted the following ordinances: (1) a mandatory curfew on all aircraft traffic; (2) an "extended" curfew for certain "noisy" aircraft; and (3) a weekly one-round-trip limit on noisy aircraft. Various industry groups sued the Town, claiming that the ordinances were preempted by federal law. The district court entered a preliminary injunction, barring the enforcement of the weekly flight limit, but declined to enjoin the other two laws.

On appeal, the Second Circuit held that federal law preempted the Town's restrictions on access to its airport because the Town had not followed the procedures set forth in Airport Noise and Capacity Act's (ANCA) when imposing those restrictions. The court concluded that the ANCA procedural requirements are mandatory and apply to public airport operators regardless of their federal funding status. The court also determined that the Town's failure to follow those procedures could not be deemed reasonable so as to support the proprietor exception to federal preemption under the Airline Deregulation Act, as the failure to comply with mandatory procedures under federal law is by its nature unreasonable.

In so holding, the Second Circuit claimed that it was not overruling its prior decision in National Helicopter Corp. of America v. City of New York, 137 F.3d 81 (2d Cir. 1998). In that case, the City's restrictions on its heliport were found to be a lawful exercise of its power under the proprietor exception, despite the fact that it apparently did not comply with ANCA procedures. In this case, the Second Circuit distinguished *National Helicopter*, claiming that the court at the time did not consider "whether and to what extent the ANCA's procedural requirements cabined the reasonable exercise of a municipality's proprietary authority over airport noise, much less did it decide whether local restrictions imposed in the absence of ANCA procedures were federally preempted." (The Town disagrees that the court did not consider the failure to follow the procedural requirements in *National Helicopter*, and thus believes the Second Circuit is overruling its prior decision).

The Town is petitioning the Supreme Court for certiorari and the issue in its petition is whether a municipality must comply with the ANCA's procedural requirements, regardless of federal funding status in order to invoke the proprietor exception to federal preemption.

This case is important to all municipalities that own and operate airports / helipads and wish to enact their own laws to help balance the operation of the airport with the needs of its community, by for example, preventing unreasonable aircraft noise that would disrupt its citizens. Thousands of airports not previously subject to the requirements of ANCA would now be subject to those requirements based on the Second Circuit's decision, despite the fact that these airports / municipalities seek no federal airport grants and levy no passenger facility charges. For example, the curfews and restrictions imposed by New York City for its heliport that was the subject of the 1998 case would be jeopardized by this decision. IMLA's brief points out that it makes little sense to require small local airports to comply with these onerous federal acts where they are not a part of the national airport system. Unlike the larger airports, which need uniform rules regarding noise and aircraft size so that the same airplane can take off in JFK and land in LAX six hours later, these same regulations are inapplicable to small and rural airports that primarily serve local communities.

Even more broadly, IMLA believes it is important to generally support local

autonomy and advocate against broad federal preemption positions. IMLA focused on supporting the Town's autonomy to enact laws addressing its citizens' concerns related its local airport, particularly concerns related to noise. IMLA's brief notes that the "result of 'federalizing' every airstrip in the nation ...will be to discourage local governments from developing and maintaining airport facilities they cannot adequately regulate. Local airports will continue to close. Local communities in turn will be deprived of the tourism and commerce those airports facilitate, as well as the benefits of private aviation."

Rebutting the Attack on Sanctuary Cities: *City and County of San Francisco v. Trump*

Our last issue of *Municipal Lawyer* highlighted the flaws in the President's Executive Order (EO) aimed at Sanctuary Cities, pointing out its tenuous legal footing under the Tenth Amendment and otherwise. We reported at some length on San Francisco's early legal action to enjoin the EO.

We have now filed an amicus brief in support of San Francisco. While it is unusual for IMLA to participate at the district court level, it is not unheard of in a case like this with issues of significance for local governments nationwide. Our brief summed up the quandary facing municipal lawyers: "The Executive Order does not comply with the law and it puts ethical municipal lawyers in an untenable situation in advising their clients: either advise constitutional violations to ensure continued receipt of mission-critical federal monies, or advise violation of the Executive Order and risk termination of that federal funding."

As we noted previously, the EO ("Executive Order 13768: Enhancing Public Safety in the Interior of the United States") threatens to cut federal funding to "Sanctuary Jurisdictions":

Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373. (a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.

The EO does not define "Sanctuary Jurisdictions." But it purports to implement 8 U.S.C. § 1373, (Section 1373) which provides that local governments may not prohibit or restrict any government entity or official from "sending to, or receiving from, [federal immigration officials] information regarding the citizenship or immigration status . . . of any individual."

San Francisco laws limit when city employees and agencies may assist with enforcing federal immigration law. These laws generally prohibit city employees from using city funds or resources to assist in the enforcement of federal immigration law, unless required by federal or state law. They specifically prohibit local law enforcement officers from cooperating with Immigration and Customs Enforcement (ICE) detainer requests, which they deem to be voluntary, and limit when local law enforcement officers may give ICE advance notice of a person's release from local jail.

San Francisco seeks declaratory and injunctive relief that Section 1373 is unconstitutional both on its face and as applied and that the federal government should be enjoined from enforcing the unconstitutional aspects of the EO.

IMLA's brief notes that numerous courts have concluded that ICE detainer requests must be considered voluntary, or else they would violate the Tenth Amendment. The EO effectively converts ICE detainers from requests to commands via the unlawfully coercive funding condition. Specifically, the "economic dragooning" that so concerned the Supreme Court in *Nat'l Fed. of Independent Business v. Sebelius*, is even more coercive in this case, given that the *Sebelius* funding pertained to 10% of the State's overall funding, whereas here, if all federal funding is at risk, San Francisco alleges that it would lose 13% of its funding.

We argue that requiring (through economic coercion) local governments to comply with ICE detainer requests in the absence of probable cause is tantamount to requiring localities to violate the Fourth Amendment. Such a requirement renders the funding condition in the EO unconstitutional in violation of *South Dakota v. Dole*, 483 U.S. 203 (1987). Local governments' Section 1983 liability for violating individuals' Fourth Amendment rights by honoring insubstantial ICE detainer requests could be staggering. As IMLA sees it, the EO:

presents municipal lawyers with a Hobson's choice. On the one hand, municipal lawyers could advise their clients to comply with the Executive Order by honoring ICE detainer requests. To do so, municipal lawyers would have to counsel their clients to engage in behavior that courts across the country have found to be both unconstitutional and grounds for imposing civil liability. On the other hand, municipal lawyers could advise their clients not to abide by the Executive Order's provisions requiring compliance with ICE detainer requests. To so advise their clients, however, municipal lawyers would be encouraging municipalities to engage in behavior that jeopardizes mission-critical federal funding.

From East Hampton to San Francisco, IMLA appreciates the opportunity to be of service to our members in advocating for the interests of local government.

To learn more about these cases, or IMLA's amicus program, please contact Amanda Kellar at akellar@imla.org.

EDITOR'S NOTE-WINS FOR IMLA MEMBERS!: On April 25, 2017, San Francisco's motion for preliminary injunction against the funding restrictions in the President's Sanctuary Cities Executive Order was granted. And on May 1, 2017, the Supreme Court held, 5-3, that Miami has standing to bring its action under the Fair Housing Act. The Court also found that the Eleventh Circuit had incorrectly applied foreseeability as satisfying the FHA's proximate cause requirement. It reversed and remanded for a lower court analysis of whether Miami's losses were proximately caused by the banks. ML



A Look at Evidence, Probable Cause and Qualified Immunity.

By: IMLA Editorial Board

Ignoring Sanctimony: Prosecutor Not Required to Consider Self-Serving Exculpatory Statements Where Documentary Evidence Indicates Otherwise

***Patterson v. Lawhorn,* No. 16-1936 (4th Cir. Apr. 21, 2017).**

Although the state ultimately dropped the prosecution of 13 counts of tax irregularities against a church president, there was sufficient documentary evidence to support probable cause and defeat the plaintiff's malicious prosecution and Fourth Amendment claims.

Denise Lawhorn (Lawhorn), a criminal investigator for the Virginia Department of Taxation, swore out six felony complaints and seven misdemeanor complaints against church president Leslie Patterson (Patterson), alleging that Patterson underreported his income, took credit for unpaid employee withholding taxes and failed to pay the church's quarterly withholding taxes. Virginia ultimately entered orders of *nolle prosequi* for all 13 complaints. Patterson sued Lawhorn for malicious prosecution under Virginia law and brought a §1983 claim for Fourth Amendment violations. The district court granted summary judgment to Lawhorn on both grounds.

The Fourth Circuit affirmed. The state law malicious prosecution claim required a showing that the prosecutor: (1) lacked probable cause, (2) possessed malice, (3) caused the case to be brought against the plaintiff or cooperated in that effort, and (4) terminated the prosecution in a manner favorable to the plaintiff.

The Circuit Court found that Patterson failed to show Lawhorn lacked probable cause for either the felony or misdemeanor complaints. Here, probable cause means that the prosecutor had "knowledge of such a state of facts and circumstances as excite the belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff [wa]s guilty of the crime of which he [wa]s suspected." Based on conversations with church personnel and a review of Patterson's own accounts, Lawhorn had probable cause for all the complaints. Contrary to Patterson's argument on appeal, Lawhorn did not need to consider Patterson's self-serving innocent explanations for his tax discrepancies; they were not credible when compared to contrary documentary evidence.

The same logic required denial of Patterson's Fourth Amendment claim. The record showed that Lawhorn had "enough evidence to warrant the belief of a reasonable [prosecutor] that an offense has been or is being committed."

http://www.ca4.uscourts.gov/Opinions/Unpublished/161862.U.pdf

Outside the Envelope: Search of Vehicle Parked 200 Yards from Address in Warrant is Not Objectively Reasonable

***Rogers v. Lee County,* no. 16-60537 (5th Cir. Apr. 3, 2017).**

Where officers found 190 grams of crack cocaine in a truck located 200 yards from the address specified in the warrant and allegedly attempted to expand the scope of the warrant via a telephone call to the court, their search of the vehicle described as "parked in back of the residence" was not objectively reasonable and did not support qualified immunity.

Kermit Rogers (Rogers) was arrested in 2009 after officers executed a search warrant for "320 CR 401, Shannon, Lee County, Mississippi, together with all approaches and appurtenances thereto. Also, all vehicles and out buildings on the property." Five grams of crack cocaine was found at that residence, but a much bigger amount--190 grams--was found in a red truck parked at an adjoining property some distance away, at 320A.

Rogers was sentenced under Mississippi law for cocaine sale, served time and was released on probation. But federal authorities also pressed charges under a statute criminalizing possession of more than 50 grams of crack. Rogers provisionally pled guilty, but moved to suppress. The district court agreed, based on "fruit of the poisonous tree" analysis. It had initially declined to consider Rogers' suppression argument based on the government's assertion that the crack had been found in a truck "parked behind the residence" at 320. The court found otherwise upon further study:

> The property where the red truck was located—320A CR 401—is in no way part of that description. It has a different address. It is owned by someone other than the defendant. It is at least 200 yards away from the property at 320.

Rogers had served 452 days under the federal charges before being released. He sued a variety of defendants under §1983, including Lee County, the City of Tupelo and various law enforcement officers, alleging violations under the Fourth and Fourteenth Amendments as well as under Mississippi law. The district court dismissed each of them based on qualified immunity.

The Fifth Circuit reversed as to officer Sam Warren of the Lee County Sheriff's Department and Paul Howell of the Tupelo Police

Continued on page 27

Department, disagreeing that a "good faith" exception applied to their actions. Although the officers had allegedly called the court to expand the scope of the warrant, there was no record of the call, and such a tactic would not have been legitimate under federal or Mississippi law. And although the good faith exception can rescue certain inconsistencies between an underlying affidavit and an actual search, law enforcement officials cannot establish objective good faith when the warrant is based on an affidavit "so lacking in indicia of probable cause as to render the official's belief in its existence entirely unreasonable." The Circuit disagreed with the lower court that the warrant for the 320 property might conceivably have been construed to include an "outbuilding" 200 yards away and not even visible from the primary residence. The search of the red truck was effectively warrantless and violated the Fourth Amendment.

http://www.ca5.uscourts.gov/opinions/unpub/16/16-60537.0.pdf

Selective Memory: No Qualified Immunity where Officer Omits Material Discrepancies from Probable Cause Affidavit
***Andrews v. Scuilli,* No. 15-3393 (3d Cir. Apr. 10, 2017).**

Where an officer omitted from his affidavit in support of a warrant that the complainant's descriptions of an alleged sexual predator's vehicle were inconsistent, there were material questions as to whether the resulting warrant and subsequent arrest were supported by probable cause—requiring denial of qualified immunity.

A fifteen-year old was approached by a man in a vehicle while she walked in Stowe Township, Pennsylvania. He asked her to get into his car, and she refused. Her mother contacted police whereupon the girl described the driver (about 35, with dark hair); the vehicle (a red four-door sedan); and a partial license plate number to Officer Robert Scuilli (Scuilli). The next day she believed that she saw the same vehicle at a local shopping center, watched as the driver exited the car, and then contacted Scuilli, who immediately drove to the location.

The shopping center vehicle was owned by 51-year old Robert Andrews (Andrews). When Scuilli presented the girl with various line-up photographs, the girl identified Andrews. Scuilli wrote a probable cause affidavit in support of a warrant, but neglected to state that the shopping center vehicle was only a three-door model, not the four-door vehicle the girl had described the day before. Andrews was arrested for attempted luring of a juvenile, stalking and harassment. He was subsequently acquitted of all charges, and sued Scuilli for false arrest and malicious prosecution. The district court granted Scuilli summary judgment based on qualified immunity.

The Third Circuit reversed. While the discrepancies between the girl's original description of the driver and Andrews' actual appearance might be within acceptable tolerances, the difference between a three-door and four-door vehicle was significant enough to require mention in Scuilli's affidavit. Failure to do so meant that the probable cause underlying the arrest warrant was suspect. This undermined Scuilli's qualified immunity argument that he had not violated any clearly established Fourth Amendment right of Andrews, and required remand for a trial.

http://www2.ca3.uscourts.gov/opinarch/153393p.pdf

Wrong Place, Wrong Time: Probable Cause Can Arise from Mistaken Inference that Transporting Known Drug Suspect Means Driver is Also Engaged in Illicit Activity
***Sampson v. Village of Mackinaw City,* no. 16-1919 (6th Cir. Apr. 6, 2017).**

The arrest of a driver who was unknowingly transporting the subject of a police drug sting operation did not constitute malicious prosecution or support Fourth Amendment claims based on lack of probable cause.

Darryl Sampson (Sampson) agreed to drive Darryl Duncan (Duncan) to various locations around Mackinaw City, Michigan (City). Duncan, who was the subject of an outstanding warrant for drug charges, was being tailed by a confidential informant, allowing City police to follow Sampson's vehicle and pull Sampson over when he rolled through a stop sign. Sampson allowed a search of the vehicle, whereupon the police found heroin behind his seat. They arrested both Sampson and Duncan. All charges against Sampson were later dropped. He sued under §1983, claiming false arrest and malicious prosecution by the officer, and sought municipality liability by the City for failure to properly train and supervise.

The Sixth Circuit affirmed the lower court's dismissal of each of Sampson's claims. Although Sampson argued that his driving was not sufficiently haphazard to provide probable cause for a traffic stop, both courts found that factor irrelevant: probable cause to stop Sampson stemmed from the outstanding warrant for Duncan, a passenger in Sampson's vehicle.

Given the outstanding warrant for Duncan, the arresting officer had reasonable grounds to assume that stopping the vehicle and arresting the occupants was a lawful activity. As the lower court had phrased it "In the context of a drug case, ... an officer may reasonably infer a common enterprise between the driver of a vehicle and a passenger under certain circumstances...." Here Sampson's chauffeuring Duncan to a hotel and other locations at 3 am supported such an inference, even if it was ultimately mistaken: "The fundamental question remains: Did Officer Klave have cause for a reasonable—even if mistaken—belief that Sampson had committed a crime based on the totality of the facts and circumstances within his knowledge? The record here establishes that he did."

The officer's dismissal on qualified immunity grounds was upheld, as was dismissal of the action against the City based Sampson's inability to establish any deficient policy or practice by the City its oversight of officers. http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0205n-06.pdf

Religious Speakers' Access Cont'd from page 11

A two-prong test is used to determine whether an official is entitled to a qualified immunity defense.[145] First, the court must determine if the facts, taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a constitutional right.[146] Second, if a constitutional right has been violated, the court must ask whether the right was clearly established.[147] If the conduct did not violate a constitutional right, there is no need to address the second prong of the qualified immunity analysis.[148]

Missing elements

Municipalities may move for summary judgment on the lack of evidence of one or more of the elements required under *Monell*: (1) a policy maker; (2) an official policy; and (3) a violation of constitutional rights whose "moving force" is the policy or custom.[149] In many instances, municipalities might be able to assert all of the following: the allegations and proffered evidence do not show a constitutional violation; there is no "moving force" nexus between the alleged constitutional violation and the municipal policy; plaintiff has not identified a policy maker; plaintiff has not identified a policy; if alleging custom, the plaintiff has not shown deliberate indifference toward that custom on the part of the policymaker.

Conclusion

As municipalities pass ordinances that restrict speech and police officers enforce those ordinances, officers and officials must maintain a balance between liberty and order that sometimes can be delicate. Municipal attorneys can play an important role in advising the city's policymakers and department heads about the developing contours of those competing interests.

Notes

1. U.S. Const. amend. I.
2. U.S. Const. amend. IV.
3. The term "Street preacher" is used broadly here to refer to Christian evangelists who—using the spoken word, signs, written or graphic materials, or musical performances—convey a religious message outdoors in a variety of public spaces.
4. A number of cases—federal, and from a variety of states, over a long period of time—acknowledge that these rights are sacred. *See, e.g.*, McCollum v. Bd. of Ed, 333 U.S. 203, 246 n. 11 (1948) (Reed, J., dissenting) (quoting Thomas Jefferson: " '. . . the constitutional freedom of religion, the most inalienable and sacred of all human rights, over which the people and authorities of this state, individually and publicly, have ever manifested the most watchful jealousy . . .' 12 Ford, The Works of Thomas Jefferson (Fed. Ed. 1905) 272.").
5. *See*, e.g., McDaniel v. Paty, 435 U.S. 618, 620, 629 (1978) (addressing "the right to the free exercise of religion guaranteed by the First Amendment and made applicable to the States by the Fourteenth Amendment.").
6. Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307, 319 (6th Cir. 1998).
7. Pahls v. Thomas, 718 F.3d 1210, 1240 (10th Cir. 2013).
8. Capitol Square Review & Adv. Bd. v. Pinette, 515 U.S. 753, 753 (1995).
9. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).
10. *Id.*
11. Cantwell v. Connecticut, 310 U.S. 296, 308-10 (1940).
12. *Id.* at 303-04.
13. The reference here to Christianity is because of its prominence in this country, although some other religions have similar expectations for their members.
14. *Cantwell*, 310 U.S. at 303-04.
15. Use of the word "flashpoint" here is a reference to the title of the panel presentation, of which this paper is a part: "Prayer, Prisons, and Public Fora: Flashpoints at the Intersection of Religion and Municipal Practice" at the 2017 IMLA Mid-Year Seminar. This title was suggested by co-panelist Ayesha Khan, who is a partner with Potomac Law Group, PLLC.
16. *Chaplinsky*, 315 U.S. at 571; *Cantwell*, 310 U.S. at 309-10.
17. Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 369 (1997); *Cantwell*, 310 U.S. at 308.
18. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 799-800 (1985).
19. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).
20. DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 n.4 (9th Cir. 1999).
21. *Perry Educ.* Ass'n, 460 U.S. at 45 (internal quotations marks omitted).
22. *See, e.g.*, Netherland v. Eubanks, 302 Fed. Appx. 244, 246 (5th Cir. 2008) (involving Street preacher on grassy public easement between street and restaurant's parking lot).
23. *See, e.g.*, Houston, Tex. Code of Ordinances, Ch. 30 ("Noise and Sound Level Regulation"), Sec. 30-2 (restricting time, volume, and nature of sound); Sec. 30-8 (requiring permit for amplification equipment); Sec. 30-16 (providing defense if part of religious service and of short duration).
24. *See, e.g.*, Houston, Tex. Code of Ordinances, Ch. 25 - SPECIAL EVENTS; Sec. 25-1 (declaring policy of public use of parks, streets, and other city property); Sec. 25-4 (requiring permits for special events).
25. *See, e.g.*, Houston, Tex. Code of Ordinances, Sec. 28-33 ("Carrying clubs, poles, etc., in demonstrations, picket lines, etc."). *See also* Florida's breach of the peace and disorderly conduct statute, West's Fla. Stat. § 877.03, in *Gold v. City of Miami,* 121 F.3d 1442, 1445 (11th Cir. 1997).
26. Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001) (citing Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800 (1985)).
27. 439 F.3d 573 (9th Cir. 2006).
28. *Id.* at 575.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 577.
34. *Hopper*, 241 F.3d at 1074.
35. *Id.*
36. *Id.*
37. 241 F.3d 1067 (9th Cir. 2001).
38. *Id.* at 1069-70.
39. *Id.* at 1070 ("The parties agree that the art is not obscene or pornographic. Instead, the case boils down to a matter of taste and perception.")
40. *Id.*
41. *Id.* at 1078.
42. 84 F.3d 1273, 1276-77 (10th Cir. 1996) (citing 42 U.S.C.A. § 3027(a)(14)(A)(iv)").
43. *Id.* at 1277.
44. *Id.* at 1278.
45. *Id.* at 1279 (citing Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 830-31 (1995).
46. *Id.* at 1279-80.
47. *Id.* at 1280 (regarding the vulnerability argument: "This claim is at best tenuous, and at worst insulting to senior citizens.").
48. *Id.* at 1281.

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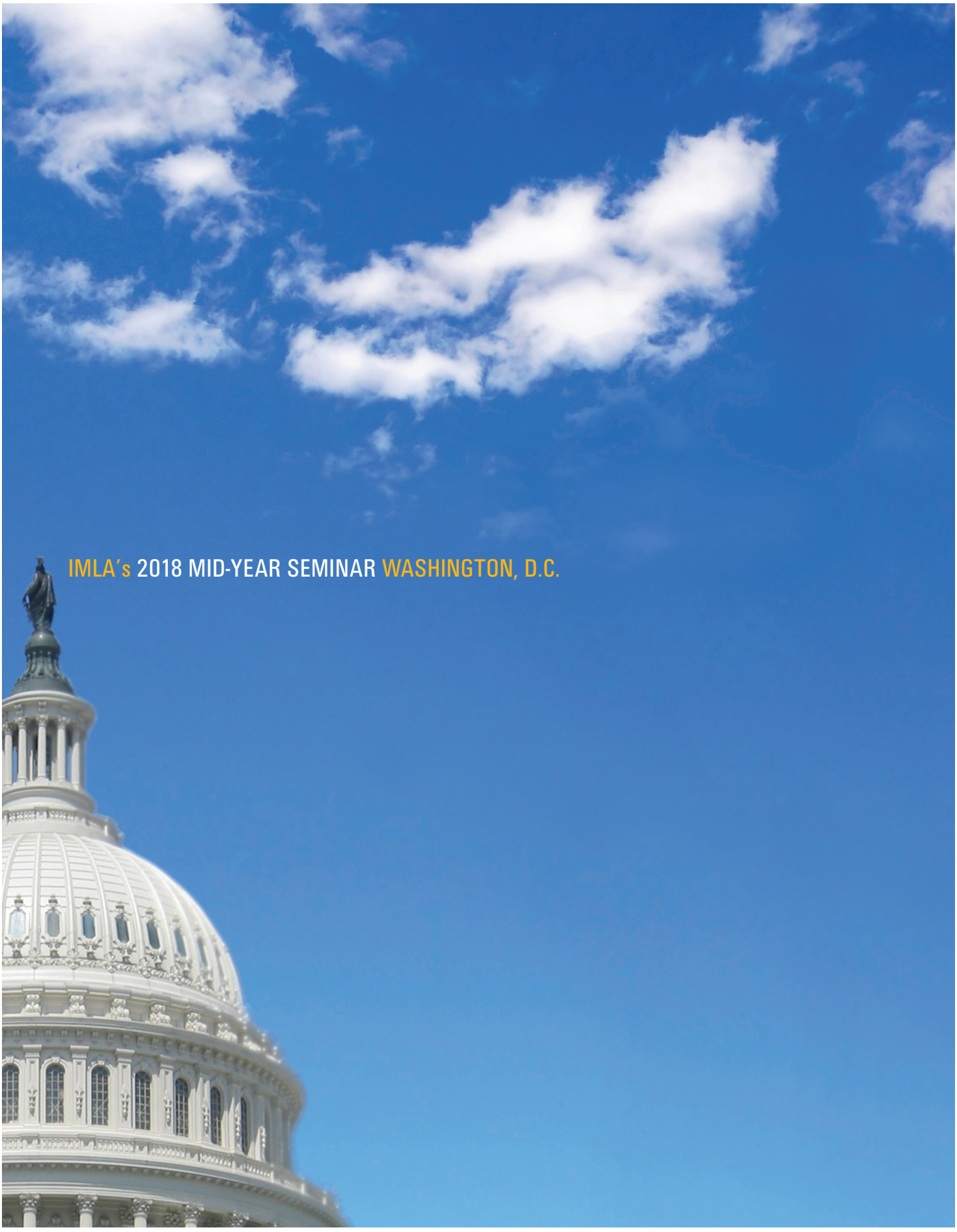
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49. *Hopper*, 241 F.3d at 1078.
50. *DiLoreto*, 196 F.3d at 965.
51. *Hopper*, 241 F.3d at 1074-75.
52. 196 F.3d 958 (9th Cir. 1999).
53. *Id.* at 963.
54. *Id.*
55. *Id.*
56. *Id.* at 964.
57. *Id.* at 966.
58. *Id.* at 967.
59. *Id.* at 970.
60. 508 U.S. 384, 387-89 (1993).
61. *Id.* at 390.
62. *Id.* at 393-94.
63. *Id.*
64. 533 U.S. 98, 102, 104-05 (2001).
65. *Id.* at 103.
66. *Id.* at 102, 106.
67. *Id.* at 106-07.
68. *Id.* at 105-06.
69. *Id.* at 109.
70. *Id.* at 110.
71. *See, e.g.*, Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 215 (2d Cir. 1997) (upholding district's refusal to make public middle school gymnasium-auditorium available for church's weekly worship services as reasonable and viewpoint neutral); Bronx Household of Faith v. Bd. of Educ. of City of New York, 650 F.3d 30, 33, 40, 51 (2d Cir. 2011) (same).
72. *DiLoreto*, 196 F.3d at 965.
73. *See, e.g.*, *Netherland,* 302 Fed. Appx. at 245 (involving disturbing the peace ordinance of City of Zachary, Louisiana, Code Ordinance § 58-93.2).
74. Startzell v. City of Philadelphia, Penn., 533 F.3d 183, 198 (3d Cir. 2008).
75. *Id.*
76. WEST'S FLA. STAT. § 877.03, quoted in *Gold,* 121 F.3d at 1445.
77. The heckler's veto is being used in a variety of public spaces. *See, e.g,* Anne Neal, *Colleges Are Paralyzed by the 'Heckler's Veto,'* N.Y. TIMES, May 19, 2014, available at http://www.nytimes.com/roomfordebate/2014/05/19/restraint-of-expression-on-college-campuses/colleges-are-paralyzed-by-the-hecklers-veto (last accessed Mar. 29, 2017).
78. Forsyth County, Georgia v. Nationalist Mvmt., 505 U.S. 123, 134 (1992).
79. Ovadal v. City of Madison, Wisconsin, 416 F.3d 531, 537 (7th Cir. 2005).
80. In addition to the Supreme Court, every circuit court (except the Federal Circuit) and at least a dozen state courts have in some way addressed the issue of the heckler's veto in varying contexts.
81. Bible Believers v. Wayne County, Mich., 805 F.3d 228, 246 (6th Cir. 2015).
82. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
83. *Chaplinsky*, 315 U.S. at 572.
84. 805 F.3d 228 (6th Cir. 2015) (en banc).
85. *Id.* at 234-35 (citing census data).
86. *Id.* at 235.
87. *Id.*
88. *Id.*
89. *Id.* at 235-36.
90. *Id.* at 236.
91. *Id.*
92. *Id.*
93. *Id.* at 238.
94. *Id.* (internal brackets omitted).
95. *Id.* at 238-39.
96. *Id.* at 240-41.
97. *Id.* at 246.
98. *Id.*
99. *Id.* at 242-43, 261-62.
100. 664 F.2d 502, 507 (5th Cir. 1981).
101. *Id.* at 507-08.
102. *Id.* at 509.
103. *Id.*
104. 934 F.2d 318 (Table) at *1-2 (4th Cir. 1991).
105. *Id.*
106. *See, e.g.*, Allen v. Cisneros, 815 F.3d 239, 246 (5th Cir. 2016) (reversing denial of qualified immunity for officers who arrested Street preacher for carrying a shofar in violation of Houston city ordinance restricting items that participants in a demonstration can carry); Redd v. City of Enterprise, 140 F.3d 1378 (11th Cir. 1998) (reversing denial of qualified immunity for officers who arrested traveling ministers for disorderly conduct); Costello v. City of Burlington, 632 F.3d 41, 43 (2d Cir.2011) (affirming dismissal of suit by Street preacher who was issued a written warning for violating city noise control ordinance).
107. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the fourth Amendment, arrest the offender.").
108. 815 F.3d 239 (5th Cir. 2016).
109. 815 F.3d at 241-42. Although the court of appeals' opinion does not specify that Allen was speaking against homosexuality and abortion, those facts are in the record in this case, which was handled on appeal by the author of this article.
110. *Id.* & n. 1 ("A shofar is a trumpet-like instrument made from a ram's horn.").
111. *Id.* at 242 n. 2.
112. *Id.* at 242.
113. *Id.*
114. *Id.* at 242-43.
115. *Id.*
116. *Id.* at 243.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 243-44.
122. *Id.* at 244-47.
123. 42 U.S.C. § 1983.
124. 436 U.S. 658, 690 n. 55 (1978).
125. Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402, 1406 (5th Cir. 1995).
126. Board of County Comm'rs v. Brown, 520 U.S. 397, 403 (1997).
127. *Monell*, 436 U.S. at 690 n. 55.
128. Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir. 2001).
129. *Monell*, 436 U.S. at 693.
130. Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir.), rev'd en banc on other grounds, 739 F.2d 993, 993-94 (1984).
131. Sander-Burns v. City of Plano, 594 F.3d 366, 381 (5th Cir. 2010).
132. *Monell*, 436 U.S. at 391-92.
133. City of Canton, Ohio v. Harris, 489 U.S. 378, 392 (1989).
134. Board of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown, 520 U.S. 397, 415 (1997).
135. *Sander-Burns*, 594 F.3d at 381.
136. Anderson v. City of Minden, Civil Action No. 07-0905, 2009 WL 1374122 (W.D. La. May 15, 2009).
137. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).
138. Tolan v. Cotton, 713 F.3d 299, 304 (5th Cir. 2013), rev'd on other grounds, 134 S. Ct. 1861 (2014); Malley v. Briggs, 475 U.S. 335, 341 (1986).
139. DePree v. Saunders, 588 F.3d 282, 287 (5th Cir. 2009).
140. *Tolan*, 713 F.3d at 304.
141. Pearson v. Callahan, 555 U.S. 223, 243 (2009).
142. Graham v. Connor, 490 U.S. 386, 396 (1989).
143.*Id.*
144. *Id.* at 396-97.
145. Thompson v. Johnson, 348 Fed. Appx. 919, 922 (5th Cir. 2009) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)).
146. *Id.*
147. *Id.*
148. *Thompson*, 348 Fed. Appx. at 922.
149. *Monell*, 436 U.S. at 693. ML


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aid because the religious components cannot be divorced from the secular ones.[77] In such circumstances, there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the institution's religious mission.[78] Aid can be given, however, to religiously affiliated institutions that are not pervasively sectarian when adequate safeguards are put in place to ensure that the aid supports only secular elements.[79] Thus, the Court held, building-construction aid could be given to religiously affiliated colleges, provided that the constructed or repaired facilities would not – now or in the future – be put to religious use.[80] The provision of such aid to *pervasively sectarian* institutions, however, is frowned upon.[81]

More recently, however, the Supreme Court issued a fragmented decision in *Mitchell v. Helms*[82] that arguably marked a jurisprudential shift. There, the Court considered a program that channeled federal funds via state educational agencies to local entities that, in turn, loaned educational items, such as library and media materials and computer software and hardware, to public and private elementary and secondary schools for "secular, neutral, and nonideological" programs.[83] The enrollment of each participating school determined the amount of aid received; and in an average year, about 30% of the funds were allocated for private schools, most of which were Catholic or otherwise religiously affiliated.

A plurality of four Justices voted to uphold the program pursuant to a simple rule: Aid is permissible when it is allocated with neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.[84] The two concurring Justices, however, disagreed with the plurality's conclusion that neutrality in selection is all that matters and that diversion of the funds to religious use was irrelevant. In their mind, that was so only for true private-choice programs, where the aid is given to the intervening beneficiary; it was not so for per-capita funding programs like the one at issue, where the aid is given directly to the institution.

The two concurring Justices concluded that, because the program in question fell into the latter category, the aid was permissible only because the funding program incorporated various protections: the aid was distributed on the basis of neutral, secular criteria and was available to assist students regardless of whether they attended public or private schools; the program was designed to supplement programming otherwise available to religious schools and explicitly prohibited funds from being used to supplant funds from other sources; no funds ever reached the coffers of a religious school because the funds were controlled by public agencies, which purchased and retained title to the materials and then lent them to the schools; and the statute required the materials and equipment to be "secular, neutral, and nonideological."[85]

These caveats – which the plurality characterized as a "smorgasbord of 11 factors"[86] – left open several questions, the most important of which was how the Court would treat cash grants (as opposed to in-kind benefits). A few lower courts have grappled with that question. In *American Atheists, Inc. v. City of Detroit Downtown Development Authority*,[87] the Sixth Circuit upheld churches' participation in a downtown revitalization program under which reimbursement grants funded by property tax revenues were given to downtown property owners to renovate building exteriors. The Court concluded that the pervasively-sectarian doctrine remained alive but that the presumption created by the doctrine had been rebutted because the "the vast majority of the reimbursed repairs – the renovation of exterior lights, pieces of masonry and brickwork, outdoor planters, exterior doors, concrete ramps, entrance ways, overhangs, building trims, gutters, fencing, curbs, shrubbery and irrigation systems – lack any content at all, much less a religious content."[88] The exceptions (for example, funds for church signs that display customized messages) were "de minimis" and did not doom the program because any displayed messages were attributable to the churches, not to the government.[89]

A similar fact pattern was presented in *Trinity Lutheran Church of Columbia, Inc. v. Pauley*,[90] but this time, the government had *prohibited* awards to religious institutions. There, a church's preschool and daycare center sought access to a Missouri Department of Natural Resources program that offered funds to qualifying organizations for the purchase of recycled tires to resurface playgrounds. The Church's application was rejected pursuant to a state constitutional provision that prohibits public funds from being used in aid of a religious institution. The Church filed suit, claiming that the denial ran afoul of the Equal Protection Clause and various clauses of the First Amendment. After the Eighth Circuit rejected the claim in a divided panel opinion, the Supreme Court accepted review.

In deciding the case, the High Court will be asked to revisit its decision in *Locke v. Davey*,[91] in which it rejected a challenge to Washington State's decision to disallow devotional theology students from participating in a scholarship program for post-secondary education. The plaintiff, a scholarship recipient, sued upon learning that his scholarship could not be used toward a degree in pastoral ministry, alleging violations of the Free Exercise and Equal Protection Clauses (among other claims).[92] The *Locke* Court upheld Washington's restriction because the scholarship program was not borne of animosity towards religion, but, rather, went "a long way toward including religion in its benefits" by permitting payment for attendance at pervasively religious schools;[93] and because the challenged program neither imposed sanctions on the practice of religion nor forced students to choose between a religious belief and the receipt of a governmental benefit.[94]

In its filings with the U.S. Supreme Court, Trinity Church echoes many of the arguments that the plaintiff made in *Locke*. For example, the Church argues that the categorical exclusion of religious institutions from the Missouri Scrap Tire Grant Program exhibits a hostility to religion that violates the Free Exercise and Equal Protection Clauses. But the Church argues that its case should come out the other way and that the decision in *Locke* should be limited to the funding of devotional training of clergy, which, Trinity Church argues, raises unique historical concerns.[95]

Missouri, in turn, points out that the Court has long held that the government does not infringe the exercise of a constitutional right by declining to subsidize it.[96] In the State's view, "Trinity Lutheran mistakes the State's adherence to traditional anti-establishment values for hostility to religion."[97] And it argues that the Church's interpretation of *Locke* has it precisely backwards: the more religious an activity, the greater the free-exercise interests; so if funding can be denied for

a purely religious pursuit, it can surely be denied for a project that is not even remotely religious.[98]

It is not clear which argument will prevail – but the arguments do highlight an important dynamic. Most of the Supreme Court's cases have asked whether government *can* provide funds and materials to religious institutions when it chooses to provide such aid to secular institutions. *Trinity Lutheran*, however, asks a different question (as did *Locke*): whether government *must* provide aid to religious institutions in such circumstances. An affirmative answer to the former question gives state and local governments the leeway to do as they wish; an affirmative answer to the latter question, by contrast, ties governments' hands.

Looking Forward: Whether pending appellate decisions, as well as the upcoming change in the Supreme Court's composition, will bring greater clarity to this area of the law remains to be seen. Incoming Supreme Court Justice Neil Gorsuch has generally disfavored a robust interpretation of the Establishment Clause. For example, he dissented from the denial of rehearing in *Green v. Haskell County Board of Commissioners*, the case (discussed above) in which a panel majority struck down a Ten Commandments display on an Oklahoma county's courthouse lawn. In his view, the display should have been subject to a less exacting standard than the *Lemon* test and the Commissioner's religious statements should not have been attributed to the Commission as a whole.[99] Similarly, in *American Atheists, Inc. v. Duncan*, where a panel of the Tenth Circuit had struck down a memorial for Utah Highway Patrol officers that consisted of 12-foot-tall crosses bearing the Highway Patrol's symbol, [100] Gorsuch joined a dissent from the denial of rehearing, arguing that the crosses had a secular meaning that could be divorced from their religious significance.[101]

These and other opinions written or joined by Judge Gorsuch suggest that Justice Kennedy will remain the swing vote in Establishment Clause cases, at least for the time being, and that Establishment Clause jurisprudence will remain a highly nuanced, continually evolving area of municipal law practice.

Notes

1. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part).
2. Doe v. Duncanville Indep. Sch. Dist., 986 F.2d 953, 959 n.7 (5th Cir. 1993).
3. Edwards v. Aguillard, 482 U.S. 578, 639 (Scalia, J., dissenting).
4. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1979).
5. Lemon v. Kurtzman, 403 U.S. 603, 612 (1973).
6. *Id.* at 612-13.
7. *See Cnty. of Allegheny*, 492 U.S. at 592 (explaining that the endorsement test asks whether a reasonable observer would conclude that the governmental action has either the purpose or the effect of endorsing or disapproving of religion).
8. *See* Agostini v. Felton, 521 U.S. 203, 232-33 (1997).
9. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 648-49 (2002); Agostini v. Felton, 521 U.S.
203, 234-35 (1997); Bowen v. Kendrick, 487 U.S. 589, 602 (1988).
10. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).
11. 505 U.S. 577, 592 (1992).
12. Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring).
13. 463 U.S. 783 (1983).
14. These tests apply to laws or actions affording uniform benefit to all religions. *See* Larson v. Valente, 456 U.S. 228, 252 (1982). In contrast, the Court applies a fourth standard to governmental actions that discriminate among religions. In that instance, courts apply "strict scrutiny," asking whether the action is "closely fitted to the furtherance of any compelling governmental interest asserted." *Id.* at 255.
15. Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. Pa. J. Const. L. 725, 728-64 (2006).
16. 16 *See, e.g.,* Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 468 (5th Cir. 2001) (noting "three lines of analysis developed by the Supreme Court," "the three-part inquiry of Lemon v. Kurtzman," "the 'coercion' test," and "the 'endorsement' test").
17. *See, e.g.*, ACLU of Ky. v. Mercer Cnty., 432 F.3d 624, 636 (2005) (concluding that *Lemon* remains applicable in challenge to religious display).
18. 463 U.S. 783 (1983).
19. 134 S. Ct. 1811 (2014).
20. *Id.* at 793 n.14.
21. 463 U.S. at 788, 791-92; *see also Cnty. of Allegheny*, 492 U.S. at 602 (*Marsh* "relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights")
22. *Id.* at 792 (internal citations and quotation marks omitted).
23. *Id.* at 794-95.
24. *Town of Greece*, 134 S. Ct. at 1822.
25. *Id.* at 1822-23.
26. *Id.* at 1823.
27. *Id.* at 1824.
28. *Id.* at 1826
29. *Id.* at 1825
30. *Id* at. 1826.
31. *Id.* at 1825.
32*Id.* at 1827 (distinguishing Lee v. Weisman, 505 U.S. 577 (1992), which invalidated a public school's practice of having a student deliver a prayer at high-school graduation ceremonies).
33. *Id.* at 1827.
34. Lund v. Rowan Cty., 837 F.3d 407 (4th Cir. 2016), *vacated for reh'g en banc*, ___Fed. App'x___, 2016 WL 6441047 (4th Cir. Oct. 31, 2016).
35. 837 F.3d at 417-30.
36. *Id.* at 418.
37. 849 F.3d 266, No. 15-869, 2017 WL 603851 (6th Cir. Feb. 15, 2017).
38. *Id.* at *1.
39. *Id.* at *12.
40. *Id.* at *14.
41. *Id.* The court also offered another ground of distinction: that the Board had acted with the purpose of imposing religion on the public, as reflected in the fact that it included prayers at public meetings but not at ones attended by the Commissioners alone. Because this argument had been made by an amicus, rather than by the plaintiff, however, the court concluded that it could not rest its decision on this factor. *Id.* at *13.
42. *Id.* at *17.
43. *See* __ F.3d __, No. 15-1869, 2017 WL 744030 (6th Cir. Feb. 27, 2017).
44. None of the cases discussed above involved prayer at school-board meetings, where the courts are truly all over the map. Just recently, in American Humanist Ass'n v. McCarty, __ F.3d __, 2017 WL 1055571 at *6 (5th Cir. 2017), the Fifth Circuit upheld a school board's practice of inviting a student to deliver a one-minute statement, which usually (but not always) consisted of

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an invocation – often including references to Jesus Christ and requests to the audience to "stand for the prayer" or "bow your heads." The presentation had historically been denominated an "invocation" but, prior to the filing of the lawsuit, the school district began referring to the period as involving a "student expression" and enacted a policy stating that the presentations do not reflect the school district's views. *Id.* at *2. The audience mostly consisted of adults who were free to come and go, but the meetings were also frequently attended by students who were there to receive awards or to perform as part of the school band or choir. *Id.* The court concluded that a school board is more like a legislature than a school classroom or event and the *Town of Greece* therefore controlled. *Id.* at *4.

The court noted, however, that several other circuits have come out the other way. *Id.* at *5. In Coles ex re. Coles v. Cleveland Board of Education, 171 F.3d 369, 383 (6th Cir. 1999), the court held that the legislative-prayer exception does not apply to school-board meetings, which are inextricably intertwined with the public-school system. It struck down a practice in which prayers, often sectarian, were delivered by clergymen chosen by the school board president or by the school board president himself. *Id.* at 373. The Third Circuit reached the same result in Doe v. Indian River School District, 653 F.3d 256, 278-79 (3d Cir. 2011), where the prayers were delivered by rotating board members and almost always included Christian references. *Id.* at 265. The Fifth Circuit distinguished those cases on the grounds that they predated *Town of Greece*, that the prayers were in some instances delivered by board members themselves, and that the school boards had official representation from students. 2017 WL 1055571, at *5. The Fifth Circuit also noted that, in Bacus v. Palo Verde Unified School District Board of Education, 52 Fed. Appx. 355, 356-57 (9th Cir. 2002) (per curiam), the Ninth Circuit had struck down the presentation of sectarian prayers at school-board meetings, but the Fifth Circuit noted that its sister circuit had assumed that legislative-prayer jurisprudence was applicable to the school-board setting and that *Town of Greece* since held that the Constitution does not require invocations to be nonsectarian. 2017 WL 1055571, at *6.

In light of the developing split in the circuits, it may not be long before the Supreme Court steps in to address whether and how *Marsh* and *Town of Greece* map on to the school-board setting.

45. McCreary Cty. v. ACLU of Ky., 545 U.S. 844 (2005).
46. *Id.* at 853-54.
47. *Id.* at 856.
48. *Id.* at 857-58.
49. *Id.* at 873.
50. *Id.* at 874.
51. 545 U.S. 677, 681 (2005).
52. *Id.* at 686.
53. *Id.* at 688, 691-92.
54. *Id.* at 699, 700 (Breyer, J., concurring).
55. *Id.* at 701-704.
56. 465 U.S. 668, 671, 681-85 (1984).
57. 492 U.S. 573 (1989).
58. *See* 492 U.S. at 579-82.
59. *See id.* at 580, 598-602.
60. *Id.* at 598.
61. *See id.* at 614-20 (Blackmun, J.); *Id.* at 634-36 (O'Connor, J., concurring).
62. *See* ACLU of Ky. v. Mercer Cnty., 432 F.3d 624, 631-32 (6th Cir. 2005); Books v. Elkhart Cnty., 401 F.3d 857, 862 n.2 (7th Cir. 2005).
63. 568 F.3d 784 (10th Cir. 2009).
64. *Id.* at 801-06.
65. 841 F.3d 848 (10th Cir. 2016).
66. *Id.* at 857-59.
67. *Id.* at 861-62, 864.
68. *See, e.g.,* Flast v. Cohen, 392 U.S. 83, 103-04 (1968) ("The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general."); *see also* NOAH FELDMAN, Divided by God: America's Church-State Problem—And What We Should Do About It 48 (2005) ("The advocates of a constitutional ban on establishment were concerned about paying taxes to support religious purposes that their consciences told them not to support.").
69. Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002) (citing Mueller v. Allen, 463 U.S. 388 (1983); Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481 (1986); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).
70. 463 U.S. at 397-400.
71. 474 U.S. at 483-89.
72. 509 U.S. at 8.
73. 536 U.S. at 653.
74. *Id.* at 652.
75. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 810–814 (2000) (plurality op.); *id.* at 841–844 (O'Connor, J., concurring in judgment); Agostini v. Felton, 521 U.S. 203, 225–227 (1997); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 842 (1995) (collecting cases).
76. Bowen v. Kendrick, 487 U.S. 589, 610 (1988) (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).
77. Roemer v. Bd. of Pub. Works, 426 U.S. 736, 755 (1976); *accord Hunt*, 413 U.S. at 743 ("Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . .").
78. *Bowen*, 487 U.S. at 610 (emphasis added).
79. *See, e.g., Bowen*, 487 U.S. at 609-10; *Hunt*, 413 U.S. at 743-44.
80. *See* Tilton v. Richardson, 403 U.S. 672, 683-84 (1971) (plurality op.) (approving provision of aid to religiously affiliated colleges for construction of buildings that are not used for religious instruction, training or worship, but striking down twenty-year limitation on use prohibition); *id.* at 664 (White, J., concurring).
81. *See Nyquist*, 413 U.S. at 774, 776-77 (striking down statute providing money for maintenance and repair of parochial schools because "[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, *nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions*") (emphasis added).
82. 530 U.S. 793 (2000).
83. *Id.* at 802.
84. *Id.* at 809-12.
85. *Id.* at 848-49.
86. *Id.* at 825.
87. 567 F.3d 278 (6th Cir. 2009).
88. *Id.* at 292, 296.
89. *Id.* at 293-94.
90. 788 F.3d 779 (8th Cir. 2015).
91. 540 U.S. 712.
92. *Id.*
93. *Id.* at 721, 724, 725.
94. *Id.* at 720-21.
95. Br. for Pet'r at 36, Trinity Lutheran Church of Columbia, Inc. v. Pauley, *petition for cert. granted*, No. 15–577 (Apr. 14, 2006).
96. Br. for Resp't at 4, Trinity Lutheran Church of Columbia, Inc. v. Pauley, *petition for cert. granted*, No. 15–577 (June 28, 2006).
97. *Id.* at 16.
98. *Id.* at 22.
99. 574 F.3d 1235, 1245, 1246 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of reh'g en banc).
100. 616 F.3d 1145, 1164 (10th Cir. 2010).
101. American Atheists, Inc. v. Davenport, 637 F.3d 1095, 1106 (10th Cir. 2010) (Kelly, J.,dissenting from denialof reh'g enbanc). ML

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answer to the question what, in the contemplation of the traffic laws, is a child on a sled travelling on a street a "vehicle", a "motor vehicle", or a "pedestrian."[21]

At the lower court, Moon's counsel pointed out that Maryland's Annotated Code defined a motor vehicle to be "self-propelled or propelled by electric power obtained from overhead trolley wires, but not operated upon rails." Therefore, "a sled is not within the meaning of a motor vehicle, [and] would not have any right of way over a motor vehicle upon the highway."[22]

Kathryn's counsel responded: "[I]f the sled is not a vehicle, then it's obviously a pedestrian. . . . you either have to be dealing with a vehicle case or a pedestrian case. In either case, you've got the same situation. If you want to consider it some kind of a vehicle, which the defendant argues it's not, you've got someone approaching from the right. If you want to consider it a pedestrian, then you've got an intersection then, and a pedestrian has a right-of-way at an intersection."[23]

The lower court granted Week's Motion for Directed Verdict, finding not even "one iota of testimony to hold this defendant guilty of any negligence." (It did not discuss the issue of contributory negligence by a child of tender years, which is itself a subject of great discourse in the annals of justice).

The Court of Special Appeals agreed that a sled was not a motor vehicle. "But we think it obvious that it falls squarely within the definition of 'vehicle' when a person is transported upon it upon a highway." This required reference to laws relating to right-of-way:

> Except as hereinafter provided, all *vehicles* or trackless trolleys shall have the right-of-way over other *vehicles* or trackless trolleys approaching at intersecting public roads from the left, and shall give right-of-way to those approaching from the right. (emphasis added).[24]

Thus, the judge below had erred in his application of the law: "He reached his conclusion because he did not consider that the sled was a vehicle. As a vehicle, however, it had the benefit of the right-of-way statute."[25]

Unfortunately for Kathryn and her family, this did not end the opinion. In order to qualify as a "vehicle" entitled to right of way provisions, the sled was also subject to another Maryland traffic law provision:

> Every vehicle upon a highway within this State at any time when there is not sufficient daylight to render persons, vehicles, animals and substantial objects on the highway clearly discernible at a distance of 300 feet ahead, shall display lighted lamps and illuminating devices as hereinafter respectively required for different classes of vehicles subject to exceptions with respect to parked vehicles as hereinafter stated."[26]

Kathryn's garden-variety sled was not so equipped. The lower court's directed verdict was reversed and remanded for a new trial.

Conclusion. The legal analysis surrounding moving objects bearing human beings along public thoroughfares has clearly travelled a long way, and apparently has more miles to go. An inquiry into the nuances of lawnmower theft may seem unworthy of high court consideration. But to a defendant facing an additional year behind bars depending on whether a Craftsman, Toro or Deere is a "motor vehicle," the issue is hardly trivial. We look forward to the Washington Supreme Court's upcoming journey, even if it takes us through the weeds.

Notes

1. State v. Barnes, 196 Wn. App. 261 (Wa. Ct. App. 2016).
2. *Id. at 265.*
3. *Id. at 268.*
4. *Id. at 269.*
5. *Id. at 270.*
6. *Id. at 271.*
7. *Id.*
8. Revised Code of Washington 9A.04.020
9. *State v. Barnes*, *supra* note 1.
10. State v. Day, 96 Wn.2d 646 (1981)
11. State v. Barnes, 2017 Wash. LEXIS 279 (Wash. Mar. 8, 2017).
12. Harris v. State, 286 Ga. 245, 686 S.E.2d 777 (2009).
13. Ga. Code Ann. § 10-1-31(a)(4))
14. *Id.*
15. Deere & Co. v. Ford, 434 Mass. 223, 747 N.E.2d 1208 (2001),
16. Goldstein v. Grinnell Select Insurance Co., 2016 IL App (1st) 140317, ¶¶ 33-35; Stonger v. Riggs, 85 S.W.3d 703 (Mo. Ct. App. 2002).
17. In *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 334 S.E.2d 250 (1985), aff'd, 316 N.C. 489, 342 S.E.2d 882 (1986), a child sued a parent for injuries sustained from a riding lawn mower driven by her father. A North Carolina statute removed a parent's immunity from actions brought by a child arising out of the "operation of a motor vehicle" without defining "motor vehicle." The court held that riding lawnmowers were not included.
18. http://fox8.com/2013/09/28/man-riding-mower-busted-at-checkpoint/
19. N.Y. Daily News, July 22, 2015. http://www.nydailynews.com/news/crime/pa-man-busted-drunk-driving-lawnmower-article-1.2300957
20. Huffington Post, April 17, 2015. http://www.huffingtonpost.com/2015/04/17/michael-kimmel-drunk-driving-horse_n_7087950.html.
21. Moon v. Weeks, 25 Md. App. 322, 333 A.2d 635 (Md. App. 1975).
22. *Id. at 323.*
23. *Id. at 330.*
24. *Id. at 334.*
25. *Id. at 335.*
26. *Id. at 336.*



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