IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

SEPT OCT 2018 Vol. 59 No. 05

IMLA RIDES INTO
HOUSTON
OCTOBER 17-21, 2018



FEATURES

Qualified Immunity in Section 1983 Cases: Recent Supreme Court Decisions and Considerations for Government Practitioners

Lot Mergers and Takings Claims After *Murr v. Wisconsin*

"$1 To Start"-Municipalities and the Shared-Mobility Ride

DEPARTMENTS

AMICUS CORNER: Alaska's Spring Break Ends Up at the Supreme Court

LISTSERV: "But I had a Prescription!"

INSIDE CANADA: Late, Vexatious, and Otherwise Unsuccessful Litigants

CASES: All But the Plainly Incompetent



Have a job position that you need to fill?

Use IMLA's job board to reach top quality candidates.

Take advantage of our 20% discount until October 31, 2018.

Promo code: WH6DW99Z.

.



IMLA

Phone: 202.466.5424
Fax: 202. 785.0152
E-mail: info@imla.org
Website: www.imla.org

OFFICERS
President
Arthur Pertile
City Attorney
Stafford, Texas
President-Elect
Andrew J. Whalen, III
City Attorney
Griffin, Georgia
Immediate Past President
Mary Ellen Bench
City Solicitor
Mississauga, Ontario
Treasurer
Wayne Esannason
Village Attorney
Scarsdale, New York
General Counsel And Executive Director
Charles W. Thompson, Jr.
IMLA
Rockville, Maryland

BOARD OF DIRECTORS
Monica Allen
City Attorney
Jackson, Mississippi
Patrick Baker
City Attorney
Durham, North Carolina
Beth Anne Childs
City Attorney
Broken Arrow, Oklahoma
Tyrone E. Cooper
City Attorney
Beaumont, Texas
Jeffrey Dana
City Solicitor
Providence, Rhode Island
Gary Ebert
Director of Law
Bay Village, Ohio
Jennie Granahan Tarr
Chief Assistant County Attorney
Hillsborough County, Florida
Lori Grigg Bluhm
City Attorney
Troy, Michigan
Arthur Gutekunst
Senior Assistant Corporation Counsel
White Plains, New York
Douglas Haney
Corporation Counsel
Carmel, Indiana
Joy Hulton
Regional Solicitor
Newmarket, Ontario
Rose Humway-Warmuth
City Solicitor
Wheeling, West Virginia
Wynetta Massey
City Attorney
Colorado Springs, Colorado
Gregory Priamos
County Counsel
Riverside County, California
Nancy Thompson
City Counselor
Columbia, Missouri
Sozi Tulante
City Solicitor
Philadelphia, Pennsylvania
JoAngela Woods
General Counsel
Accelerate Indiana Municipalities
Indianapolis, Indiana

IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

LEAD STORY

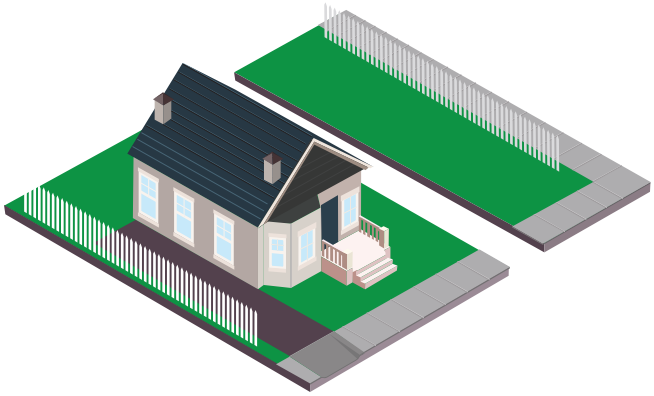
Qualified Immunity in Section 1983 Cases: Recent Supreme Court Decisions and Considerations for Government Practitioners

By: Susan E. Lappen, Assistant City Attorney, Milwaukee, Wisconsin

The contours of state and local liability for deprivation of citizens' constitutional rights—and the grounds for avoiding such liability—continue to evolve. Municipal lawyers need to be versed in the changing standards.

PAGE 6





Lot Mergers and Takings Claims After *Murr v. Wisconsin*

By: Derek Howard, Monroe County, Florida Attorney's Office

A seemingly unremarkable dispute about whether the owners of Lot E and Lot F along the St. Croix River could sell one parcel and develop the other becomes a textbook takings case, with the Supreme Court upholding a local government merger ordinance.

PAGE 14

"$1 To Start"-Municipalities and the Shared-Mobility Ride

By: Erich Eiselt, IMLA Assistant General Counsel, Rockville, Maryland

Unanticipated and uninvited, dockless bikes and e-scooters are invading America's cities. Local governments seek sensible regulations which allow innovation while keeping streets safe.

PAGE 20



DEPARTMENTS

30 LISTSERV
"But I had a Prescription!"
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
America's opioid epidemic hits close to home.

32 INSIDE CANADA
Late, Vexatious, and Otherwise Unsuccessful Litigants
By: Monica Ciriello, Assistant Barrister and Solicitor, Middlesex County, Ontario
Recent cases of interest.

34 AMICUS CORNER
Alaska's Spring Break Ends Up at the High Court
By: Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy
Probable cause versus retaliatory arrest at a "Sledneck Revival."

38 CASES
All But the Plainly Incompetent
By: IMLA Editorial Staff
A federal judge critiques qualified immunity.

STAFF

EXECUTIVE EDITOR
Charles W. Thompson, Jr.

EDITOR
Erich R. Eiselt

EDITORIAL STAFF
Negheen Sanjar

ART DIRECTION, ART WORK & PRODUCTION
Trujillo Design

Views appearing in Municipal Lawyer are those of the author. Publication of articles in this magazine does not reflect a direct or implied endorsement of an author's views. © Copyright 2018 by the International Municipal Lawyers Association (IMLA). All rights reserved. IMLA is a non-profit professional association of municipal lawyers from across the United States and Canada. It offers its members continuing legal education courses, research services, litigation assistance on amicus briefs and an information-sharing network in the field of municipal law. Municipal Lawyer is IMLA's membership magazine. It is published bi-monthly. Views expressed by authors and contributors are not necessarily the views of IMLA. For membership information contact: IMLA, 51 Monroe Street, Suite 404, Rockville, Maryland 20850, phone: (202) 466-5424, or e-mail: info@imla.org. Contributions of articles are welcome. Municipal Lawyer reserves the right to refuse or edit manuscripts submitted for publication.

A Season Passes, and an Era

> "Nothing in life is more liberating than to fight for a cause larger than yourself, something that encompasses you but is not defined by your existence alone."

As America's summer vacation reluctantly comes to a close, we also mark the end of a far longer and more consequential epoch in our national life, saying farewell to statesman and soldier John McCain. While is perhaps self-important to reference such a major personage in this publication after so many others have amply eulogized him, it would be an omission not to do so. His sense of purpose, willingness to seek compromise, and unwavering devotion to his country stand as a mission statement for public servants everywhere, whether they labor in the marble edifices of Capitol Hill or in the more austere trappings of local government. We wish for more leaders with his temperament.

IMLA endeavors to advance such service in these pages, bringing you discussions intended to broaden professional acumen across a spectrum of practice areas. Our first feature in *September-October 2018* is a compendium of Supreme Court qualified immunity antecedents and a look at the doctrine's current parameters. As we've highlighted of late, the principle is under recurring challenge and its contours will bear further scrutiny. (Along those lines, we provide a recent federal district court decision in our *Cases* department which denies qualified immunity and offers a pungent critique of its expanding boundaries).

More arcane to some, but important in understanding the Court's analytical framework for takings cases, is our second feature discussing *Murr v. Wisconsin*--indicative yet again of how a seemingly innocuous property dispute, in this case involving a merger ordinance, can assume national dimensions.

Our third feature examines another disruptive technology which rolled rapidly across American streets in the summer of 2018: "shared mobility" in the form of dockless bikes and e-scooters. Once more, municipal lawyers are called upon to devise appropriate regulations that balance innovation, safety and public order.

Other pieces follow. *Amicus Corner* discusses a fracas in Alaska has that developed into a High Court weighing of retaliatory arrest versus probable cause, *ListServ* offers a sobering anecdote about mortality and opioid overdose, and *Inside Canada* provides examples of various non-meritorious claims against local government.

We thank you for your support of IMLA, and look forward to seeing you in mid-October at our Conference in Houston.

Best regards-

Erich Eiselt

EXECUTIVE DIRECTOR'S LETTER

By: Chuck Thompson, IMLA Executive Director and General Counsel



As we approach our Annual Conference it is a time to reflect on what has transpired over the past year and to again envision IMLA's future. For starters, let me say that our past 12 months under Art Pertile's leadership as IMLA President has been thoroughly successful. Art has endeavored to include younger lawyers in every aspect of our leadership. He recognizes that IMLA's future requires attention to the interests of new municipal attorneys who are driven by differing generational influences, and that those interests are best infused in our organization by adding young lawyers to our management. Art has also worked tirelessly to make our upcoming Houston Conference one of IMLA's very best. It promises not only to enlighten and entertain, but will also include a project organized by Art allowing IMLA members to volunteer to help the Houston community which was devastated by historic flooding only a year ago.

When our most recent fiscal year ended on June 30, 2018, IMLA was in a stronger financial position than it has achieved in many years. We continue to work hard to strengthen the organization so that it can serve communities well into the future. Looking back, without the dedication of a prior Executive Director--Henry Underhill--as we went through tumultuous financial times in the early part of this century, IMLA would not be here today. He and the Board, and our dedicated IMLA staff, worked through some very bleak days where our survival hung by a thread. Today, while we continue to rely on sustainable membership levels, we are gratified to see more and more communities recognizing the need for the help and leadership that IMLA can provide.

This achievement is the result of hard work and collaboration. My colleagues Amanda Kellar and Erich Eiselt have become lynchpins in IMLA's success, handling both the important day-to-day work of serving members and addressing much larger marquee issues. Erich may know as much about the opioid crisis and what municipalities are doing as anyone in the country, while Amanda is hosting bi-weekly programs that keep localities up to date on latest sanctuary cities developments as well as heading our legal advocacy efforts. We not only deal with the biggest municipal law concerns of the day, such as advocating for the preservation of sensible qualified immunity standards and bringing post-*Reed* expertise to our members, we also grapple with many more ground-level issues, as evidenced in a new Model Dangerous Dog Ordinance that our colleague Caitlin Cutchin has handled. Caitlin transitioned last month to a position with the federal government but left us better for her hard work. She developed some terrific podcasts and a superb program of webinars while helping countless members during her time with us. We now welcome Negheen Sanjar, who I'm happy to say was one of my outstanding students this past year at George Washington University Law School. Negheen has already proven herself as a strong member of the team and I know she will be an excellent resource for our members.

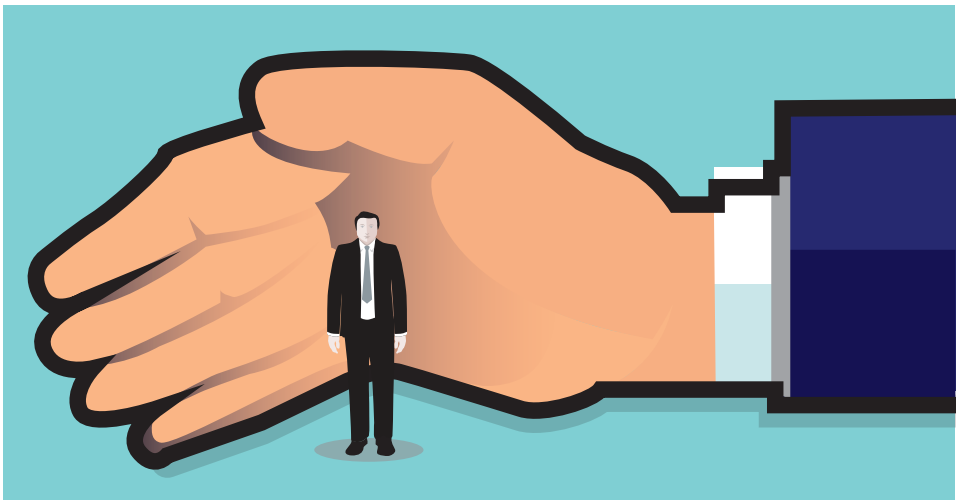
As we look to the future, whether as an organization or as individual attorneys, all of us need to recognize that the practice of law will not stagnate. IMLA has scheduled a program at the Houston Conference on disruptive technologies where we'll discuss topics like Uber and AirBnb—business models that have changed core aspects of life and governmental regulatory paradigms. We'll also assess dockless bikes and scooters--another technology-driven innovation impacting our urban environment--as well as the coming wave of 5G communication technology. And more specifically directed at the actual practice of law, we will discuss Artificial Intelligence, which portends perhaps the greatest future impact on our profession. Machine-driven intelligence will quantify and analyze data at speeds humans cannot and then, meshing that data with complex algorithms and learned processes, offer solutions to problems, old and new. AI will create new opportunities and new efficiencies, and will no doubt require changes in our approach to serving clients.

Modest examples of AI at work already abound: a Google search yields results based on prior searches and an iPhone offers word selections based on modelling prior user input. Envisioning the influence of quantum computing is an expansive exercise. It seems probable, for example, that passwords as we know them today will necessarily become obsolete; none are likely to withstand a hacker deploying a quantum computer. Just as those risks evolve, so too will potential solutions. Advertisements today offer a vision of 5G technology, depicting doctors in one country operating on patients far across the globe. Lawyers should similarly be able to harness technical powers to streamline legal processes, such as working in tandem with clients to craft the terms of a contract or the elements of a will. A city or county legislative body may have the ability to offer proposed ordinances or other regulatory provisions for much more rapid review and comment by the public--or suggest changes in budgets and taxes in real time to gauge public support.

Since our founding more than 80 years ago, IMLA has endeavored to help local government attorneys serve their communities with the highest standards of excellence and professionalism. We commit to be a continuing resource in enabling you to stay abreast of new developments that impact your practice of law, and we look forward to your ideas, insights and energies. I encourage you to become involved.

Qualified Immunity in Section 1983 Cases: Recent Supreme Court Decisions and Considerations for Government Practitioners

By: Susan E. Lappen, Assistant City Attorney, Milwaukee, Wisconsin



INTRODUCTION

In 1871, intending to further safeguard the civil rights extended to newly-enfranchised Americans under the Thirteenth, Fourteenth and Fifteenth Amendments, Congress enacted 42 U.S.C. § 1983. "Section 1983" permitted any citizen or other person within the United States to seek redress in federal court against anyone who, "under color of" state law deprived the complainant of any constitutional privilege or immunity. For most of its life, Section 1983 was a relatively little-used device. But over the past 50 years, it has gradually become the primary vehicle for individuals seeking redress against state or municipal officials alleged to have abridged their constitutional protections.

Against a backdrop of ever-proliferating Section 1983 actions, a judicial doctrine arose which significantly limits the circumstances in which local government actors can be found liable: qualified immunity. This article assesses recent Supreme Court caselaw defining qualified immunity--much of it in the context of law enforcement activity--and is intended to provide municipal lawyers with practical guidance on the subject.

1. **Qualified Immunity is Perhaps the Ultimate Defense in Section 1983 Cases.** Qualified immunity is a judicially-created doctrine that shields government officials from constitutional claims for money damages, even if those officials have violated plaintiffs' constitutional rights, as long as those constitutional rights were not clearly established. This affirmative defense balances the public interest to hold public officials accountable when they exercise power irresponsibly, against the need to shield public officials from harassment, distraction, and liability when they perform their duties reasonably. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

A. Qualified immunity is properly resolved on summary judgment because its analysis is ostensibly objective. *See Rakovich v. Wade*, 850 F.2d 1180, 1203-04 (7th Cir. 1988), *cert. denied*, 488 U.S. 968 (1988).

B. Although intertwined with the facts of a case, the qualified immunity issue is a question of law for the Court. *Alvarado v. Picur*, 859 F.2d 448, 452 (7th Cir. 1988).

C. In *Hunter v. Bryant*, 502 U.S. 224 (1991), the United States Supreme Court "stressed the importance of resolving immunity questions at the earliest possible stage of litigation." *Id.* at 227. The Supreme Court reversed the Ninth Circuit's denial of summary judgment, holding that:

> [t]he decision of the Ninth Circuit ignores the import of these decisions. The Court of Appeals' confusion is evident from its statement that "whether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach." This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.
>
> *Id.* at 227-28 (citations omitted).

D. The defense of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. _____, _____ (2015) (Slip op. at 4-5); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations and footnote omitted). The principle behind the doctrine is that if the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he or she fairly be said to know that the law forbade conduct not previously identified as unlawful. *Id.*

E. The Seventh Circuit has noted that "[w]hat is important, in the final analysis, is 'whether the legal norms governing [the government official's] behavior were clearly established at the time of the challenged actions.'" *Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991) (citations omitted). In fact, the United States Supreme Court has recently reconfirmed the tenet that existing precedent must have placed the statutory or constitutional question beyond debate. (*Mullenix*, Slip op. at 5).

II. A Qualified Immunity Review Involves Three Analytic Components.

The question of whether qualified immunity applies is comprised of three analytic components: (1) identification of the specific right allegedly violated; (2) determination of whether that right was so "clearly established" as to alert a reasonable official to its constitutional parameters; and (3) the ultimate determination of whether a reasonable official could have believed

lawful the particular conduct at issue. *See Gooden v. Howard County*, 917 F.2d 1355, 1361 (4th Cir. 1990); *Burns v. Loranger*, 907 F.2d 233, 235-36 (1st Cir. 1990); *Robison v. Via*, 821 F.2d 913, 920-21 (2d Cir. 1987).

A. Courts have the discretion to resolve a qualified immunity challenge at the outset by utilizing the "clearly established" prong without first having to decide whether there was any underlying constitutional violation. *Camreta v. Greene*, 563 U.S. 692, 707, 131 S. Ct. 2020, 2032, 179 L. Ed. 2d 1118 (2011). In fact, the court need never decide whether the plaintiff's claim, even though novel or otherwise unsettled, in fact has merit. *Id.*, 563 U.S. at 705-706.

B. In revisiting the defense of qualified immunity, the United States Supreme Court has held that, even assuming that a constitutional right may have been violated, a lower court must review the second question – whether the right was clearly established – in a case-specific manner. In *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 148 L.Ed. 2d 454 (2001), the Court held that "The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was lawful in the situation he confronted...If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." (121 S.Ct. at 2156-57) (citations omitted.)

Furthermore, the Court also held that even if the officer's mistake as to what the law requires is reasonable, the officer is entitled to the immunity defense. (*Id.* at 2158).

C. Qualified immunity is "designed to shield from civil liability 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix*, slip. op. at 5; *Hughes v. Meyer*, 880 F.2d 967, 971 (7th Cir. 1989).

D. Qualified Immunity should be applied unless "it has been authoritatively decided that certain conduct is forbidden." *Upton*, 930 F.2d at 1212 (quoting *Alliance to End Repression v. City of Chicago*, 820 F.2d 873, 875 (7th Cir. 1987)).

E. When considering the defense of qualified immunity, courts must consider only the facts that were knowable to the defendant officer. *White v. Pauly*, 580 U.S. _____, _____ (2017) (Slip op. at 3); See also *Kingsley v. Hendrickson,* 576 U.S. _____, _____ (2015) (Slip op. at 9).

F. Courts have maintained the longstanding principle that "clearly established law" should not be defined "at a high level of generality." *White v. Pauly*, 580 U.S. ___, ___ (2017) (Slip op. at 6, citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).) And clearly established law must be particularized to the facts of the case. (*White*, Id., *City of Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

G. Cases from other circuits are instructive on what the law is as to constitutionally protected rights. *Spreen v. Brey*, 961 F.2d 109, 113 (7th Cir. 1992).

III. Qualified Immunity Decisions can be Immediately Appealed.

A district court's denial of qualified immunity is an immediately appealable final decision, within the meaning of 28 U.S.C. §1291. *Behrens v. Pelletier*, 516 U.S. 299, 306-07 (1996). The Supreme Court has found this necessary because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial. *White v. Pauly*, *Id.* at slip op. p. 6 (citation omitted).

IV. Recent Supreme Court Decisions.

In the past seven years, the United States Supreme Court has issued a number of opinions reversing federal courts in qualified immunity cases.

A. *Camreta v. Green*, 563 U.S. 692 (2011) (Kagan, J.)

1. **Procedural posture and decision date:** This case was decided by the Supreme Court on May 26, 2011, on appeal from the Ninth Circuit. The Court vacated the lower court's ruling on the constitutional claim and reversed the lower court's denial of qualified immunity.

2. **Summary of facts:** Sarah Green filed suit personally, and on behalf of her two minor daughters, against Bob Camreta, an Oregon State Protective Services worker, and Deputy Sheriff James Alford, alleging that they violated her constitutional rights, and those of her daughter, S. G., by conducting an interview of S.G. regarding allegations that her father had sexually abused her. The interview was conducted without parental consent, and at the girl's school. The father was criminally charged with the alleged abuse and went to trial, but the jury failed to reach a verdict, and the charges were later dismissed. Plaintiffs claimed that the in-school interview breached the Fourth Amendment's proscription agaisnt unreasonable seizures.

The District Court granted summary judgment to the officials, and the Ninth Circuit affirmed. The Circuit ruled that interviewing the girl, absent a warrant, court order, parental consent, or exigent circumstances, violated the Constitution, but also that the defendants were entitled to qualified immunity because no clearly established caselaw had warned them of the illegality of their conduct. Although the Ninth Circuit entered judgment in their favor, Mr. Camreta and Deputy Alford petitioned the Supreme Court to review the Ninth Circuit's ruling that the subject warrantless, in-school interview violated the Fourth Amendment. The plaintiffs declined to cross petition. The Supreme Court granted certiorari to review two questions: first, whether government officials who prevail on grounds of qualified immunity can obtain Supreme Court review of a

continued on page 8



Susan E. Lappen has served as an Assistant City Attorney for the City of Milwaukee since 1989, defending the City and its employees, including eight Chiefs of Police, in more than 600 lawsuits, and taking more than 200 cases to trial. She has argued extensively before Wisconsin's Court of Appeals and Supreme Court as well as the Seventh Circuit, and has briefed cases pending before the United States Supreme Court. Sue holds a BA and MA from the University of Wisconsin and is a 1988 graduate of the University of Wisconsin Law School, where she was Editor in Chief of the Wisconsin International Law Journal. Before joining the City Attorney's Office, Sue clerked for the Hon. William Moser of the Wisconsin Court of Appeals.

Qualified Immunity Cont'd from page 7

Court of Appeals decision that their conduct violated the constitution, and second, whether the Ninth Circuit correctly determined that the interview of the child breached the Fourth Amendment. Ultimately, the Supreme Court vacated that portion of the Ninth Circuit decision which related to its determination that the interview violated the Constitution and remanded the case for further proceedings.

3. Significant aspects of the *Camreta* decision:

- Because the child was almost 18 years old and moved across the country by the time the Supreme Court heard the case, and thus would never again be subject to the in-school interviewing practices that were at issue, the Supreme Court did not reach the Fourth Amendment question, and in line with their normal practice when mootness frustrates a right to appeal, the Court vacated that portion of the Ninth Circuit's opinion which decided the Fourth Amendment issue.

- The Court recognized that an official who regularly engages in the conduct that has been challenged as part of his job, as did Mr. Camreta, would likely suffer injury caused by the adverse constitutional ruling. As long as the adverse ruling continues to be in effect, the government official must either change the way he performs his duties or risk a meritorious damages action. The Court held that "[o]nly by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future. He thus can demonstrate, as we demand, injury, causation, and redressability. And conversely, if the person who initially brought the suit may again be subject to the challenged conduct, she has a stake in preserving the court's holding." (563 U.S. at 703) (citations omitted)

- The Court explained its reasoning behind reviewing a lower court ruling appealed by the "prevailing party." The Court noted that such rulings in the context of qualified immunity "have a significant future effect on the conduct of public officials – both the prevailing parties and their co-workers – and the policies of the government units to which they belong. . . . and more: they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of immunity in later cases. And still more: they are rulings designed this way with this Court's permission, to promote clarity – and observance – of constitutional rules. We have described in more detail below these features of the qualified immunity world and why they came to be. We hold that taken together, they support bending our usual rule to permit consideration of immunized officials' petitions." (563 U.S. at 704-705).

- The Court confirmed that its precedent clearly established that a Court need not address a constitutional claim if qualified immunity applies. The Court noted that a lower court "need never decide whether the plaintiff's claim, even though novel or otherwise unsettled, in fact has merit." (563 U.S. at 705).

- However, the Court also noted that its "regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo." (563 U.S. at 706) (citations omitted). The Court held that "[o]ur decision today does no more than exempt one special category of cases from our usual rule against considering prevailing parties' petitions. Going forward, we will consider these petitions one by one in accord with our usual standards." (563 U.S. at 709).

- The Court also recognized that by failing to clarify uncertain questions, address novel claims, or give guidance to officials about how to comply with legal requirements, deciding cases solely on the grounds of qualified immunity might frustrate "the development of constitutional precedent" and the "promotion of law-abiding behavior." (563 U.S. at 706). The Court noted that for this reason, it has "permitted lower courts to avoid avoidance – that is, to determine whether a right exists before examining whether it was clearly established." (563 U.S. at 706).

- The decision of whether to address the constitutional claim, even if qualified immunity applies, is left to the discretion of the lower courts. (563 U.S. at 707). The Court noted that "[i]n general, courts should think hard, and then think hard again, before turning small cases into large ones. But it remains true that following the two-step sequence – defining constitutional rights and only then conferring immunity – is sometimes beneficial to clarify the legal standards governing public officials." (563 U.S. at 707).

- The Court concluded that this case was moot as to S.G. because she could no longer claim that she was in any need of protection from the challenged interviewing practice. The Court determined that it would vacate that portion of the Ninth Circuit's decision which addressed the constitutionality of the subject warrantless, in-school interview of S.G. (563 U.S. at 710). The Court explained that "a constitutional ruling in a qualified immunity case is a legally consequential decision; that is the very reason we think it appropriate for review even at the behest of a prevailing party. . . . [w]hen happenstance prevents that review from occurring, the normal rule should apply: Vacatur then rightly "strips the decision below of its binding effect," and "clears the path for future religitation." (563 U.S. at 713) (citations omitted).

4. Constitutional right clarified?

The Supreme Court vacated the Ninth Circuit's ruling on the con-

stitutional issue, and thus did not provide guidance as to whether interviewing a minor at her school, without either a warrant or parental consent, regarding sexual misconduct allegations made against one parent, violated the Fourth Amendment. What was decided, evidenced by the affirmance of qualified immunity, was that, at the time of the interview in 2001, such a constitutional right was not clearly established.

B. *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (Scalia, J.)

1. **Procedural posture and decision date:** *Ashcroft* was decided on May 31, 2011, on appeal from the Ninth Circuit. The Supreme Court reversed the Circuit's determination that 1) the Attorney General violated the Fourth Amendment by allowing the unlawful issuance of federal material-witness subpoenas, and 2) the Attorney General was not entitled to qualified immunity.

2. **Summary of Facts:** Plaintiff Abdullah al-Kidd alleged that, after the September 11th terrorist attacks, then Attorney General John Ashcroft authorized federal officials to detain terrorism suspects using the federal material-witness statute. He claimed that this pretextual detention policy led to his material-witness arrest, as he was boarding a plane to Saudi Arabia. al-Kidd was apprehended in March, 2003. He was held in federal custody for 16 days, and he remained on supervised release until the trial of an alleged terrorist was concluded 14 months later. Mr. al-Kidd was never called as a witness in that trial, and he alleged that government officials had never intended to call him as a witness. In March 2005, he filed a *Bivens* action, challenging the constitutionality of the Attorney General's policy. The Attorney General filed a motion to dismiss, based on absolute and qualified immunity, which the District Court denied. A divided panel of the Ninth Circuit affirmed, holding that the Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrong-doing, and that Mr. Ashcroft could not claim qualified or absolute immunity. (563 U.S. at 734).

The *al-kidd* Court instructed that in deciding qualified immunity, reviewing courts are "not to define clearly established law at a high level of generality," and that "[t]he general proposition, for example, that an unreasonable search and seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."

Mr. al-Kidd conceded that individualized suspicion supported the issuance of the underlying material-witness arrest warrant, and he did not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant. Therefore, the Supreme Court found no Fourth Amendment violation. In so holding, the Court ruled that "[e]fficient and evenhanded application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer." (536 U.S. at 740).

3. **Significant aspects of the *Ashcroft* decision:**

- The Supreme Court reiterated that qualified immunity "shields federal and state officials from money damages unless the plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct," and that "lower courts have the discretion to decide which of the two prongs of [the] qualified immunity analysis to tackle first." (563 U.S. at 735).

- The Court held that lower courts "should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.' . . .When, however, a Court of Appeals does address both prongs of [the] qualified-immunity analysis, we have discretion to correct its errors at each step. Although not necessary to reverse an erroneous judgment, doing so ensures that courts do not insulate constitutional decisions at the frontiers of the law from our review or inadvertently undermine the values qualified immunity seeks to promote. The former occurs when the constitutional-law question is wrongly decided; the latter when what is not clearly established is held to be so. In this case, the Court of Appeals' analysis at both steps of the qualified-immunity inquiry needs correction." (563 U.S. at 735).

- The Court reaffirmed its prior holdings that determining Fourth Amendment reasonableness involves a predominantly objective inquiry, which "recognizes that the Fourth Amendment regulates conduct rather than thoughts . . . and it promotes evenhanded, uniform enforcement of the law." (563 U.S. at 736).

- The Court noted that there are two "limited exceptions" to this general rule, which are "special-needs" and "administrative-search" cases. (563 U.S. at 736). The Court noted that "[a]part from those cases, we have almost uniformly rejected invitations to probe subjective intent." (563 U.S. at 737).

- With reference to reviewing the qualified immunity issue at hand, the Court noted that at the time of "al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional." (536 U.S. at 741). The Court further noted that even "a district judge's *ipse dixit* of a holding is not 'controlling authority' in any jurisdiction, much less in the entire United States; and his *ipse dixit* of a footnoted dictum falls far short of what is necessary absent controlling authority: a robust 'consensus of cases of persuasive authority.'" (563 U.S. at 741-742) (citation omitted).

- The *al-kidd* Court instructed that in deciding qualified immunity, reviewing courts are "not to define clearly established law at a high level of generality," and that "[t]he general proposition,

continued on page 10

for example, that an unreasonable search and seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." (563 U.S. at 742).

- With specific reference to the underlying case, the Court held that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.' . . . Ashcroft deserves neither label, not least because eight Court of Appeals judges agreed with his judgment in a case of first impression. . . . He deserves qualified immunity even assuming – contra-factually – that his alleged detention policy violated the Fourth Amendment." (563 U.S. at 743) (citations omitted).

4. **Constitutional Right Clarified**? The Court's decision confirmed that in March 2003, it was not unconstitutional for the Attorney General to maintain a policy which allowed the pretextual use of a material-witness warrant under the federal material-witness statute, as long as the arrest warrant itself was based upon individualized suspicion.

C. *Plumhoff v. Rickard*, 572 U.S. _____ (2014) (Alito, J.)

1. **Procedural posture and decision date**: Plumhoff was decided on May 24, 2014, on appeal from the Sixth Circuit Court of Appeals. The Supreme Court held that police officers did not violate the Fourth Amendment by shooting at a motorist who had engaged in a dangerous, high speed pursuit, and also concluded that the officers were entitled to qualified immunity, reversing the decision of the Sixth Circuit.

2. **Summary of facts**: Donald Rickard led police officers on a high-speed car chase that came to a temporary halt when his vehicle spun out in a parking lot. He continued to use his car as a weapon, accelerating as it pressed against a patrol car. Officers fired three shots into Rickard's car, but he managed to drive away, almost hitting an officer in the process. Officers fired additional shots, striking both Rickard and his passenger; both died. Mr. Rickard's minor daughter filed under 42 U.S.C. § 1983, alleging that the officers used excessive force in violation of the Fourth and Fourteenth Amendments. The Tennessee District Court denied the officers' motion for summary judgment based on qualified immunity, holding that their conduct violated the Fourteenth Amendment and was contrary to clearly established law. On review, the Sixth Circuit affirmed the District Court. The Supreme Court reversed.

3. **Significant aspects of decision**:

- The Court noted that its prior decision in *Saucier* should not be regarded as an "inflexible requirement," but reaffirmed that the two-step procedure for analyzing qualified immunity in *Saucier* is often beneficial because it promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable. (134 S. Ct. at 2020).

- The Court reaffirmed that it had previously held that "a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." (134 S. Ct. at 2021).

- Salient facts were generally not disputed. The chase exceeded 100 miles per hour and lasted for over five minutes, during which time Rickard passed more than two dozen other vehicles, several of which were forced to alter course. His car eventually collided with a police car, and came temporarily to a standstill, but less than three seconds later, Rickard resumed maneuvering his car. Just before shots were fired by the police, the front bumper of his car was flush with that of one of the police cruisers, and Rickard was pushing down on his accelerator. He threw the car into reverse, in an attempt to escape. (134 S. Ct. at 2021).

- The Court held that "[u]nder the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. Rickard's conduct even after the shots were fired – as noted, he managed to drive away despite the efforts of the police to block his path – underscores the point. In light of the circumstances we have discussed, it is beyond serious dispute that Rickard's flight posed a great public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk." (134 S. Ct. at 2022).

- The Court also rejected the petitioner's argument that the firing of a total of 15 shots was itself excessive force. The Court held that "[w]e reject that argument. It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. As petitioners noted below, "if lethal force is justified, officers are taught to keep shooting until the threat is over." (134 S. Ct. at 2022).

- The Court noted that it surveyed lower court decisions regarding the reasonableness of lethal force as a response to vehicular flight, and observed that "this is an area 'in which the result depends very much on the facts of each case' and that the cases 'by no means 'clearly establish[ed]' that [the officer's] conduct violated the Fourth Amendment.'" (134 S. Ct. at 2023).

- The Court found that the *Brosseau* case made it plain that as of February 21, 1999, which was the date of the events at issue in that case, it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger. Therefore, the Court held that to "defeat immunity here, then, respondent must show at a minimum either (1) that the officers' conduct in this case was materially different from the conduct in *Brosseau* or (2) that between February 21, 1999, and July 18, 2004, there emerged either 'controlling authority' or a 'robust consensus of cases of persuasive authority' . . . that would alter our analysis of the qualified immunity question." (134 S. Ct. at 2023).

- The Court found that the respondent could not meaningfully distinguish *Brosseau* and had not pointed "to any case – let alone a controlling case or a robust consensus of cases – decided between 1999 and 2004 that could be said to have clearly established the unconstitutionality of using legal force to end a high-speed car chase. And respondent receives no help on this from the opinions below. The District Court cited only a single case decided between 1999 and 2004 that identified a possible constitutional violation by an officer who shot a fleeing driver, and the facts of that case – where a reasonable jury could have concluded that the subject merely 'accelerated to eighty-five miles per hour, in a seventy-miles-per-hour zone' and did not 'engag[e] in any evasive maneuvers' . . . bear little resemblance to those here." (134 S.C. at 2024). Therefore, the Court found that the officers in this case were also entitled to the defense of qualified immunity.

4. **Constitutional right clarified?** The *Plumhoff* Court reminded that it held in 1999 that a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of officers and/or innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death, and that if lethal force is justified, officers can lawfully continue to shoot until the threat has ceased (i.e., the number of shots fired does not determine the constitutionality of the officer's decision to shoot.)

D. City and County of San Francisco v. Sheehan, 575 U.S. ____, 135 S. Ct. 1765 (2015) (Alito, J.)

1. Procedural posture and decision date: This case was decided on May 18, 2015, on appeal from the United States Court of Appeals for the Ninth Circuit. The Supreme Court reversed in part and remanded, determining that officers' entry and use of potentially deadly force were lawful, and that they were entitled to qualified immunity.

2. **Summary of facts:** Teresa Sheehan was living in a San Francisco group home for individuals with mental illness. She began behaving erratically and threatened to kill her social worker. Officers Reynolds and Holder were sent to help escort

The *Plumhoff* Court reminded that it held in 1999 that a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of officers and/or innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death, and that if lethal force is justified, officers can lawfully continue to shoot until the threat has ceased (i.e., the number of shots fired does not determine the constitutionality of the officer's decision to shoot.)

Sheehan to a mental health facility. The officers entered her room, using a key provided to them by an employee of the group home. When the officers first entered, Ms. Sheehan grabbed a knife and threatened to kill them. The officers then retreated and closed the door. However, they were concerned about what Ms. Sheehan might do to herself in that room, and admitted that, without considering if they could accommodate her disability, they reentered her room. Ms. Sheehan again confronted the officers with a knife, and after pepper spray proved ineffective, the officers shot her multiple times. Ms. Sheehan survived, and filed suit against the City and County of San Francisco, asserting that her rights under the Americans with Disability Act were violated, along with those under 42 U.S.C. § 1983.

The District Court granted summary judgment, concluding that officers are not required to determine whether their actions complied with the ADA before protecting themselves and others, and also holding that the officers did not violate the Constitution. Vacating in part, the Ninth Circuit held that the ADA applied, and that a jury must decide whether the officers should have accommodated Ms. Sheehan's disability. The Circuit also held that the officers were not entitled to qualified immunity, because it was clearly established that, absent an objective need for immediate entry, officers cannot forcibly enter the home of an armed, mentally ill person who has been acting irrationally and has threatened anyone who enters. The Supreme Court dismissed the ADA-related question because it determined that certiorari was improvidently granted on that claim. The Court held that the officers did not violate the Constitution when they opened Ms. Sheehan's door the first time, and that their use of force was reasonable. As to the question of whether or not they violated the Constitution when they entered her room the second time, the Court determined that such a Fourth Amendment right was not clearly established, and that therefore, the officers were entitled to qualified immunity.

3. Significant aspects of decision:

- The Court reiterated its holdings in *Plumhoff* and *Ashcroft* that any alleged constitutional right must be clearly established at the time of the challenged conduct, and that an officer cannot violate a clearly established right unless the right's contours were sufficiently definite such that **any** reasonable official would have understood that he was violating it. (135 S. Ct. at 1774) (emphasis added).

- The Court reaffirmed its previous ruling that "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." (135 S. Ct. at 1775).

- The Court noted that [t]he real question, then, was "whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability. Here we come to another problem. San Francisco, whose attorneys represent Reynolds and Holder, devotes scant briefing to this question. Instead, San Francisco argues almost exclusively that even if it is assumed that there was a Fourth Amendment violation, the right was not clearly established. This Court, of course, could decide the constitutional question anyway. See *Pearson v. Callahan*, 555 U.S. 223, 242, 129 S. Ct. 808, 172 L.Ed.2d 565 (2009) (recognizing discretion). But because this question has not been adequately briefed, we decline to do so. See *id.*, at 239, 129 S.Ct. 808. Rather, we

continued on page 12

simply decide whether the officers' failure to accommodate Sheehan's illness violated clearly established law. It did not." (135 S.C. at 1775).

- The Court noted that asserting that the objective reasonableness test applies to excessive force claims under the Fourth Amendment is "far too general a proposition to control this case." (*Id.*)

- The Ninth Circuit had relied solely on *Graham* to deny the officers qualified immunity. The Supreme Court held that "[e]ven a cursory glance at the facts of *Graham* confirms just how different that case is from this one. That case did not involve a dangerous, obviously unstable person making threats, much less was there a weapon involved. There is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction, see *Graham*, *supra*. at 388-389, 109 S. Ct. 1865, and responding to the perilous situation Reynolds and Holder confronted. *Graham* is a nonstarter." (135 S.C. at 1775).

- The Court held that "[e]ven if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as "a reasonable officer could have believed that his conduct was justified," a plaintiff cannot "avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." (135 S.C. at 1777).

- The Court also held that "*[n]o precedent clearly established that there was not "an objective need for immediate entry" here*. No matter how carefully a reasonable officer read *Graham*, *Deorle*, and *Alexander* beforehand, that officer could not know that reopening Sheehan's door to prevent her from escaping or gathering more weapons would violate the Ninth Circuit's test, even if all the disputed facts are viewed in respondent's favor. Without that "fair notice," an officer is entitled to qualified immunity. See, e.g. *Plumhoff*, 572 U.S., at _____, 134 S. Ct., at 2023."

- The Court found that "[u]nder Ninth Circuit law, an entry that otherwise complies with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction. . . . Under this rule, qualified immunity necessarily applies here because, as explained above, competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales. Indeed, even if Reynolds and Holder misjudged the situation, Sheehan cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'. .. Courts must not judge officers with 'the 20/20 vision of hindsight.'" (135 S. Ct. at 1776-1777) (citations omitted).

- The Court concluded that no robust consensus of cases of persuasive authority existed to guide the officers involved with this case. (135 S. Ct. at 1778).

4. **Constitutional right clarified?** The Court reaffirmed its previous ruling that officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. The Court did not provide guidance as to whether, under the ADA, an officer must accommodate the special needs of a mentally ill subject in such a situation. Rather, the Court concluded that the law was not clearly established on this point in August, 2008; thus qualified immunity applied.

E. *Mullenix v. Luna*, 577 U.S. ____ (2015) (per curiam).

1. **Procedural posture and decision date:** *Mullenix* was decided on November 9, 2015, on appeal from the Fifth Circuit. The Supreme Court issued a per curiam decision granting Officer Mullenix the protection of qualified immunity.

2. **Summary of facts:** This case stems from a police pursuit on the Texas interstate on March 23, 2010. An individual fleeing from the police led officers on an 18-minute chase, reaching speeds between 85 and 110 miles per hour. Twice during the chase, the fleeing subject, Israel Leija, Jr., called the police dispatcher, claiming to have a gun and threatening to shoot at officers if they did not abandon their pursuit. The dispatcher relayed these threats, together with a report that Leija might be intoxicated, to all of the involved officers. As two officers maintained their pursuit of Mr. Leija, others set up tire spikes at three locations. Texas Trooper Chadrin Mullenix responded to the situation. He drove to an overpass, initially intending to set up a spike strip there. However, upon learning of other spike strip locations, Mullenix considered the alternative tactic of shooting at Leija's car in order to disable it. Trooper Mullenix did not receive training in employing this tactic, and he had not attempted it before. He relayed his idea to another officer, who agreed with it. Trooper Mullenix then asked the DPS dispatcher to inform his supervisor of his plan. Mullenix got out of his vehicle with his service rifle and positioned himself on the overpass, about twenty feet above the interstate. The respondents alleged that from this position, Mullenix could hear his supervisor respond with the words "stand by" and "see if the spikes work first." (577 U.S. ___) (Slip op. at pg. 2).

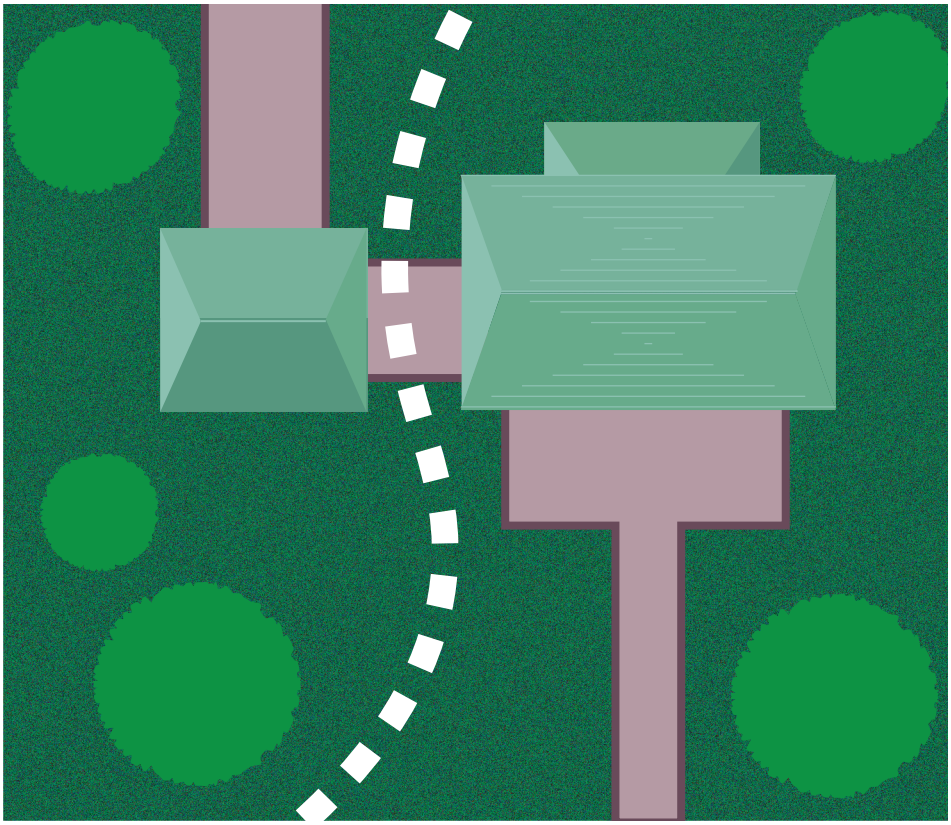
Approximately three minutes after Mullenix took up his shooting position, he spotted Leija's vehicle, and also observed that another officer was in pursuit. Mullenix explained that he feared that Leija might attempt to shoot at or run over the officers manning the spike strips located below him, and also that if Leija hit the spike strips, he might still be able to continue driving in the direction of other officers. As Leija approached the overpass, the trooper fired six shots. Mr. Leija's vehicle continued forward and engaged a spike strip that was located beneath the overpass, hit the median, and rolled 2 ½ times. It was later determined that Leija had been killed by Mullenix's shots, four of which

continued on page 36


INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
PRESENTS
ATL2019
IMLA'S 84TH ANNUAL CONFERENCE ATLANTA, GA 2019
HILTON HOTEL
ATLANTA SEPTEMBER 18-22, 2019
PARTNERING WITH THE 2019
INSTITUTE FOR
CITY AND COUNTY
ATTORNEYS
RESURGENS
1871
1965
ATLANTA, GA.
IMLA

Lot Mergers and Takings Claims After *Murr v. Wisconsin*

By: Derek Howard, Monroe County, Florida Attorney's Office



INTRODUCTION

On June 23, 2017, the Supreme Court issued its opinion in *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017). The property at issue included two adjacent lots—Lot E and Lot F—under common ownership along the protected St. Croix River that were subject to merger regulations barring their separate sale or development. After the Murrs were denied a variance to sell Lot E as part of development plan to improve Lot F, they filed their taking suit. In a 5-3 opinion by Justice Kennedy, the Court held that the Court of Appeals of Wisconsin was correct to analyze the two lots as a single unit in finding that there was no regulatory taking.

The Supreme Court announced an objective, three-factor balancing test for identifying the proper unit of property against which to assess the effect of the challenged governmental action. The factors "include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land." The test hinges on "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition."

This article examines the *Murr* decision and provides practice and planning tips in the wake of the decision.

I. Three-Factor Balancing Test for Identifying the Proper Unit of Property

A. Factor One - Treatment Under State and Local Law

Under the first factor, "courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law." The Supreme Court emphasized that "reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property."

The Court found the lot merger ordinance at issue to be a legitimate land use restriction, "consistent with the widespread understanding that lot lines are not dominant or controlling in every case," and the merger regulations "indicate[ ] petitioners' property should be treated as one when considering the effects of the restrictions." The Court noted that the property was subject to the merger regulatory burden "only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted." "As a result, the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property."

B. Factor Two - Physical Characteristics

The physical characteristics of property the Supreme Court identified as relevant to the inquiry include (a) "physical relationship of any distinguishable tracts;" (b) "the parcel's topography;" (c) "the surrounding human and ecological environment;" and (d) whether "the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation." Applying these factors, the Court found that they support the property's treatment as a unified parcel:

> The lots are contiguous along their longest edge. Their rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited.. . . The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.

C. Factor Three - Value

Under *Murr's* third factor, "courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings." The Court explained that "[t]hough a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy,

expanding recreational space, or preserving surrounding natural beauty." The Court emphasized that "[t]he absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge." For example, "[a] law that limits use of a landowner's small lot in one part of the city by reason of the landowner's nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion." "On the other hand, if the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law."

Applying this factor, the Court found that "the prospective value that Lot E brings to Lot F supports considering the two as one parcel for purposes of determining if there is a regulatory taking." The Court elaborated as follows:

> Petitioners are prohibited from selling Lots E and F separately or from building separate residential structures on each. Yet this restriction is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements.. . .
>
> The special relationship of the lots is further shown by their combined valuation. Were Lot E separately saleable but still subject to the development restriction, petitioners' appraiser would value the property at only $40,000. We express no opinion on the validity of this figure. We also note the number is not particularly helpful for understanding petitioners' retained value in the properties because Lot E, under the regulations, cannot be sold without Lot F. The point that is useful for these purposes is that the combined lots are valued at $698,300, which is far greater than the summed value of the separate regulated lots (Lot F with its cabin at $373,000, according to respondents' appraiser, and Lot E as an undevelopable plot at $40,000, according to petitioners' appraiser). The value added by the lots' combination shows their complementarity and supports their treatment as one parcel.

D. Rejection of "Formalistic Rules"

The Supreme Court favored the multi-factor test for guiding the denominator parcel inquiry over the "formalistic" rules advocated by the parties. The Court affirmed that "[a] central dynamic of the Court's regulatory takings jurisprudence . . . is its flexibility." This flexibility is needed "to reconcile two competing objectives central to regulatory takings doctrine." The first "is the individual's right to retain the interests and exercise the freedoms at the core of private property ownership . . .." The second is "the government's well-established power to 'adjus[t] rights for the public good.'" A proper balancing of these principles requires a careful inquiry informed by the specifics of the case. "In all instances, the analysis must be driven by the purpose of the Takings Clause, which is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

1. Wisconsin's Proposed Rule

Wisconsin attempted to tie the definition of the parcel to state law, but the Court opined that it is necessary to weigh "whether the state enactments at issue accord with other indicia of reasonable expectations about property." The Court explained:

> [D]efining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations. For example, a State might enact a law that consolidates nonadjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value.

2. Petitioners' Proposed Rule

Petitioners urged the Court to adopt a presumption that lot lines define the relevant parcel in every instance. "In effect, petitioners ask this Court to credit the aspect of state law that favors their preferred result (lot lines) and ignore that which does not (merger provision)." The Court rejected the proposed presumption as "flawed" and ignoring "the fact that lot lines are themselves creatures of state law, which can be overridden by the State in the reasonable exercise of its power." The Court affirmed its case law, "which recognizes that reasonable land-use regulations do not work a taking."

II. PRACTICE AND PLANNING TIPS FOLLOWING MURR

In the wake of *Murr*, local governments now have a better of understanding of how to go about lot merger and retire development rights while assessing and avoiding takings liability.

A. Lot Inventory

The first step that a local government should consider making is evaluating its inventory of lots to determine which are (a) contiguous and under common ownership and (b) located in an area where specific environmental regulations may be applied.

Murr made it clear that lot contiguity and common ownership are factors that can lead to property being treated as one parcel, instead of separate lots, in evaluating whether there has been a

continued on page 16



Derek Howard is an Assistant County Attorney with the Monroe County, Florida Attorney's Office. For over a decade, he has led the County's environmental and land use litigation, including issues under the Clean Water Act, Coastal Barrier Resources System Act, and the Endangered Species Act. He is certified as an expert in City, County & Local Government Law through the Florida Bar and has made conference presentations on a wide range of land use and environmental issues. His published articles include "Local Regulatory Taking Claims: Accounting for State and Federal Regulations to Minimize Liability and Damages Exposure." Derek earned his J.D. from the American University Washington College of Law with honors in 2003 and he obtained a Master's degree in Community Planning from the University of Maryland in 2012. He previously worked as an associate with Paul Hastings LLP.

taking of the property. This broader approach minimizes potential takings liability and may inform how the local government regulates the lots and makes final decisions on applications for their development.

Murr also determined that a property's location in an area that is subject to environmental or other regulation is one of the factors that a court should consider in weighing whether a landowner could anticipate that his holdings would be treated as one parcel, or as separate lots. In addition to identifying lots that are contiguous and under common ownership, local governments should ascertain whether the lots are also located in an area where specific environmental regulations are applied. These areas include (a) habitat for endangered species that are regulated under the Endangered Species Act (ESA); (b) units of the Coastal Barrier Resources System (CBRS) where development in discouraged and made ineligible for Federal Flood Insurance under the National Flood Insurance Program (NFIP) pursuant to the Coastal Barrier Resources Act (CBRA); and (c) waterfront protected areas such as the Lower St. Croix area at issue in *Murr*. As *Murr* opined, purchasers of property in these areas are essentially on notice that regulation might affect their use and enjoyment of the property, and the purchasers will have a more difficult time establishing reasonable investment-backed expectations under *Penn Central v. New York City*, 438 U.S. 104 (1978).

B. Adoption of Merger Ordinances

If a local government determines that it has a substantial inventory of contiguous lots under common ownership, then it should consider adopting a merger ordinance to retire development rights and minimize takings liability. After *Murr*, it cannot be disputed that merger provisions are generally "a legitimate exercise of government power" to establish "a minimum lot size in order to preserve open space while still allowing orderly development." The Court provided a strong endorsement for merger provisions, citing the Amicus Brief filed by the National Association of Counties, *et. al.* that discussed the long history and rationale for merger provisions and provided over 100 examples of such provisions. The Court even declined to follow the rule proposed by Petitioners in part because it "would frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today."

1. "Contiguous substandard lots under common ownership"

In adopting a merger ordinance, local governments should be mindful of the specific provisions that the *Murr* court deemed proper (or in the words of the court, "classic"). First, the merger ordinance should only combine "contiguous substandard lots under common ownership." In its decision, the Supreme Court disapproves of the adoption of merger provisions that seeks to consolidate nonadjacent property. The Court cautioned that "[t]he absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge."

What is a "substandard lot"?

The lots at issue in *Murr* were "substandard" because they did not meet minimum lot size requirements. Merger ordinances such as the one at issue in *Murr* are typically lot size oriented. "When States or localities first set a minimum lot size, there often are existing lots that do not meet the new requirements, and so local governments will strive to reduce substandard lots in a gradual manner." The court did not discuss other factors that might make a lot "substandard" and therefore subject to merger. For example, local governments may adopt environmental criteria for lots, seeking to limit development on environmentally sensitive lots. If two contiguous lots are environmentally sensitive, then it may be in the interest of the local government to merge the lots to advance conservation goals. Although the theory of merger approved by *Murr* arguably applies to environmentally sensitive lands or other "substandard" situations, the Court's focus on lot size leaves open the question of how the Court might treat those other situations.

Grandfather Clauses

Second, the merger ordinance should include "a grandfather clause, which preserves adjacent substandard lots that are in separate ownership." For the area where the Murr property is located, Wisconsin state rules prohibited the use of lots as separate building sites unless they had at least one acre of land suitable for development. However, the rules included a grandfather clause that relaxed this restriction for substandard lots which were "in separate ownership from abutting lands" on January 1, 1976, the effective date of the regulation. Consistent with state rules, the St. Croix County zoning ordinance contained an identical restriction.

Variance Procedures

Finally, the merger ordinance should include a variance procedure "for landowners in special circumstances." The *Murr* court found that the variance procedure that was available to the Murrs "ameliorated" "the harshness" of the merger provision.

Developer Avoidance of Merger Provisions

In response to *Murr*, local governments should be aware that developers may take steps to avoid triggering merger provisions. For example, developers may avoid holding adjacent property under common ownership by having family members or shell entities hold title to individual lots. If property is being acquired purely for investment purposes, investors may also seek to purchase only non-adjacent lots.

In seeking to address situations where developers attempt to avoid "common ownership" by having family members hold title to individual lots, the 1980's litigation of *W.A. Perkins, et. al. v. Monroe County, et. al.* provides a cautionary tale for local governments. The litigation sought to invalidate sections of the Monroe County (Florida) Code that limited development on contiguous lots under common ownership. "Common ownership" was defined to mean "a shared interest in real property by the same person or any persons related by marriage or blood within an immediate family including parents, spouses, siblings

and children." The trial court summarized the impact of the regulations as follows:

> Under the contiguous lot provisions of the Monroe County Code . . . the right of a property owner to build upon his lot in an improved subdivision is determined by whether or not he or one of his immediate family, by blood or marriage, owns an adjacent lot. Thus if a brother or sister own adjacent lots in an improved subdivision falling within the contiguous lot definitions, only one may build on his or her lots. However, if two unrelated persons owned the identical lots, both would be able to build.

Not surprisingly, the court found the regulations to violate due process and enjoined their enforcement:

> The regulation of use of property under the guise of police power based upon who owns the property rather than the nature or quality of the property advances no recognized benefit to the public.. . .

The contiguous lot provisions as adopted are discriminatory in substance and operation. The regulations require identification of family members and definition of their relationships for equitable enforcement. This identification and definition is impossible for the building, zoning and taxing officials as there is no way to determine who are "immediate family members" for relatives with different last names. It is clear that these provisions fail to establish any means by which their enforcement could be reasonably or impartially accomplished. The provisions can only be enforced in an arbitrary and capricious manner.

> Even if the government officials could identify immediate family members owning adjacent lots, the provisions fail to provide a procedure for determining which of the two family members owns the buildable lot and which the non-buildable lot. Thus, if a brother and sister own two adjacent lots subject to the contiguous lot restrictions, the County must discriminate against one by prohibiting building while rewarding the other with building rights. The contiguous lot provisions fail to provide procedures for making this discriminatory determination.
>
> The contiguous lot provisions are ultimately discriminatory because there is no just basis for the classifications created by the provisions. The classifications are arbitrary and capricious.

Under *Murr*, Monroe County's attempt to limit development on commonly owned contiguous lots would likely have survived constitutional challenge. However, the County's now deleted definition of "common ownership" to include immediate family remains legally flawed, and should serve as a cautionary example for local governments seeking to stay ahead of developers that may put adjacent holdings in the names of their family members.

C. Beyond Merger—Strengthening the Defense to Reasonable Investment-Backed Expectations.

Murr is an important decision for local governments beyond the merger context. In addition to approving merger provisions as a legitimate exercise of government power and determining that the Murr property should be evaluated as a single parcel, the decision found that no regulatory taking of the property occurred under *Lucas v. South Carolina Coastal Council* or *Penn Central v. New York City*. The Court's evaluation of the claim under *Penn Central* is significant because it strengthens a local government's defense against alleged interference with reasonable investment-backed expectations where the landowner purchases property after the adoption of the complained of regulation.

The Murrs did not suffer a compensable taking under *Lucas*, "as they have not been deprived of all economically beneficial use of their property.. . . They can use the property for residential purposes, including an enhanced, larger residential improvement.. . . The property has not lost all economic value, as its value has decreased by less than 10 percent."

The Court also found that that the Murrs did not suffer a taking "under the more general test of *Penn Central*." As to the economic impact prong, the Court stated: "The expert appraisal relied upon by the state courts refutes any claim that the economic impact of the regulation is severe." As to the "character of government action" prong, the Court found that "the governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land." It is the following statement under the "reasonable investment-backed expectations" prong that is a significant development in case law for local governments: "Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots."

Previously in *Palazzolo v. Rhode Island*, the Supreme Court rejected the "notice rule" that holds "[a] purchaser or a successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Palazzolo* provided the following rationale for rejecting the "notice rule":

> The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. See, *e.g., Phillips v. Washington Legal Foundation,* 524 U.S. 156, 163, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998). So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning

continued on page 18

and land-use restrictions. See *Pennsylvania Coal Co.*, 260 U.S., at 413, 43 S.Ct. 158 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the proposed rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all. The State›s rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation"); cf. Ellickson, Property in Land, 102 Yale L.J. 1315, 1368-1369 (1993) (right to transfer interest in land is a defining characteristic of the fee simple estate). The proposed rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.

Palazzolo's rejection of the "notice rule" left uncertain the issue of whether the acquisition of title after the adoption of the complained of regulation could still be considered as a factor in weighing the reasonableness of the landowner's investment-backed expectations. *Murr* resolves this uncertainty in the government's favor. While the Court cited *Palazzolo* for the proposition that "[a] valid takings claims will not evaporate just because a purchaser took title after the law was enacted," it went on to state "[a] reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property." Applying this factor, the Court concluded that "Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots."

Local governments should also be aware that the reverse is true—the purchase of property *before* a regulatory restriction can also be a factor in weighing reasonable investment-backed expectations.

D. Monitor the Legislative Response

"We spent 10 years in the courts and 4 months in the Wisconsin legislature! Crazy, right?"

In response to *Murr*, local governments can expect legislative attempts to preempt their authority to adopt merger ordinances. In November 2017, for example, Wisconsin Governor Scott Walker signed into law legislation that places new limitations on the authority of local governments and state agencies to enact or enforce lot merger provisions similar to the one found in the St. Croix County Zoning Ordinance.

Act 67 "prohibits cities, villages, towns, and counties from enacting or enforcing ordinances or taking any other action that prohibits a property owner from conveying an ownership interest in a substandard lot or from using a substandard lot as a building site if the substandard lot does not have any structures placed partly upon an adjacent lot and the substandard lot is developed to comply with all other ordinances of the political subdivision."

Act 67 also "prohibits cities, villages, towns, counties, and state agencies from enacting or enforcing any ordinance or administrative rule or taking any other action that requires one or more lots to be merged with another lot, for any purpose, without the consent of the owners of the lots that are to be merged."

Governor Walker signed the bill into law with Donna Murr by his side. As a result, it is expected that the Murr lots can be developed separately.

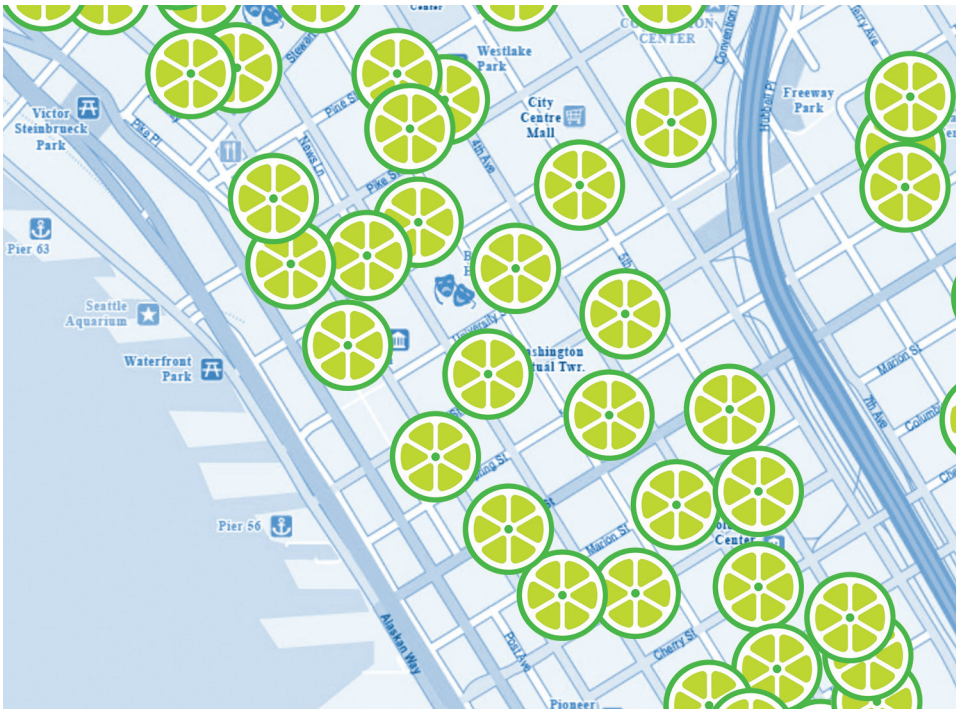
CONCLUSION

On one level, *Murr v. Wisconsin* is the Supreme Court's confirmation that localities have the authority to craft laws restricting the development of adjoining parcels, and that the enforcement of such rules does not illegally undermine investment expectations or effect an unconstitutional taking. However, the actions after *Murr* by the Wisconsin statehouse illustrates the prerogative of a legislature to remediate, in short order, what it perceives to be now-outdated overreach, and to assert its preemptive authority over localities that might wish to limit development through the merger of adjoining parcels. ML


IMLA'S 2019 MID-YEAR SEMINAR WASHINGTON, D.C. MARCH 29 - APRIL 1, 2019

"$1 TO START"–The Municipal Shared-Mobility Ride

By: Erich Eiselt, IMLA Assistant General Counsel



INTRODUCTION

Last month, IMLA inaugurated its Disruptive Transportation work group, formed to serve as a collaborative source of answers to common questions about another innovation rapidly rolling into cities across the country: dockless bikes and scooters. To be sure, inquiries abound as local government lawyers are called upon to craft sensible and effective regulations for this new species in the shared mobility ecosystem.

This article is intended to provide an overview of the bikeshare phenomenon, to look at some municipalities' responses, and to suggest some elements to be considered when drafting bike share ordinances and operating agreements.

The Bicycle: Historians attribute the birth of the bicycle to a Frenchman in the late 18th century, who aligned two wooden wheels and a simple board on which to sit–without pedals or steering mechanism. The first steerable such device was developed in 1816 by a German; it too required feet on the ground, much like the pedal-less "balance-bikes" used by pre-kindergarteners today. A Scottish blacksmith introduced a pedaled, link-driven contraption in 1839, but it weighed nearly 60 pounds. The less-massive *velocipede*, which attached pedals to the cycle's front wheel, emerged on the streets of Paris in the 1860's, thanks to the brothers Michaux. That innovation was borrowed by a colleague of the brothers, who brought it to the United States and obtained a patent in 1863.

In 1885, John Kemp Starley introduced America to his device that combined pedals and a chain to transfer power to the rear wheel. It was a technologic leap that would see the nation's thoroughfares swarming with bicycles as the twentieth century began. Starley's basic configuration continues today, enhanced with tubed rubber tires, highly engineered brakes and gears, electronics and other gadgetry—not to mention leaps in material science that allow the modern bicycle to weigh less than 15 pounds.

As with many other types of human conveyance, whether traveling on tracks, rails or rivers, and whether wind-driven, horse-drawn or coal-powered, the bicycle was rapidly overtaken by the internal combustion engine. Following World War Two, cyclists took a back seat to drivers as massive freeways and expansive city avenues proliferated, accommodating millions of ever-more comfortable personal cocoons travelling at previously unimaginable velocities.

But that miracle would eventually reach its limits, victimized by its own success. After an automobile golden age which saw many modes of public transportation starved out of existence, the empirical evidence today suggests that in many of America's cities and exurbs, vehicular traffic moves at near single-digit speeds. That crawl, plus concerns about pollution, parking headaches, a desire for exercise in otherwise cubicle-confined employment, a simpler and cheaper way to travel from point A to point B, even an unspoken want for greater social connectedness—all contributed to the gradual re-emergence of the bicycle as a significant mode of transport in many of the nation's urban areas.

The Technology: Fast-forward to the "sharing economy." Why take a cab or use one's own bike for short-distance city travel if inexpensive, reliable alternatives are readily available? Early in this decade, the first large experiments in public-use bicycles emerged on American streets. These were municipally-funded public-private partnerships offering docked bicycles, secured in stations around town. The kiosks required credit card payment before releasing a bike and tallied minutes elapsed until the cycle was re-docked. New York City's Citi Bikes (12,000 bikes at 500 stations)[1] and Washington DC's Capital Bikeshare (4,300 bikes across six jurisdictions)[2] were early examples of this genre. They have been overwhelmingly successful in those cities, adding thousands of new cyclists to the urban landscape.

Further innovation has led to further disruption. Entrepreneurs recognized that the power of GPS, the smartphone, versatility in bicycle design, and proliferation of other species of personal street mobility—driven by ever-more convenient and personalized applications–could enable second- and third-generation advances. The "dockless" or "stationless" bike was born. This new evolution did not require the infrastructure used by docked programs; in theory, no real estate needed to be developed and no guesses were required as to the best location for bike aggregation—consumers would park bikes where they desired and follow-on riders would locate them, rent them, and continue onward. Convenience triumphed over all: the phone-based "app" would render an Uber-like interaction, giving today's users the autonomy they so intensely crave. (Clearly, every inch of their usage could be assiduously tracked by the service providers and easily linked to their personalized consumer information; adding to the surrender of privacy to the Googles and Amazons of our time).

Today, then, "bikeshare" technology–a subset of "shared mobility"– encompasses a spectrum: cycles which must be docked at permanent stations, cycles which are designed to be docked or locked to bike stands (or to signposts and similar vertical supports) but can also self-lock, and bikes which are totally self-locking and will not

affix to any support. And, as most city dwellers will attest, another "bike" varietal has sprouted, almost overnight--low-slung "Razor"-type scooters. It seems likely that future mobility sharing may encompass other one-, two-, three-or more wheeled conveyances, some built for two riders and/or accommodating child seats, with the potential for "hovering" or "airborne" devices somewhere down the road. (Other vehicular forms including "electric personal assistive mobility devices" (EPMDs such as "Rascals") and that most disruptive of transport modalities, the bizarre combination of group carousing while exercising on the open road known as the "Pedal Tavern," make the taxonomy even more challenging.)

As usual, it's as much about the "app" as the modality itself, with providers delivering ever-more innovative and personalized smartphone software. Today, your bikeshare app will: locate available bikes; allow you to reserve a specific bike, making it off-limits to other users; tell you which e-bikes have power--and alert you as power diminishes; let you "hold" your bike while you disembark to eat or take in a landmark; tell you where you can or cannot ride or park the bike; provide you with a map tracking where you've ridden; tell you how many carbon units you saved by foregoing vehicular travel; seamlessly bill your credit card (or more likely your app-within-an-app like ApplePay); penalize (or reward) you based on where you leave the bike; and credit you for bringing others into a given program. It is inevitable that the app will connect your other personal likes and dislikes to your cycling experience, creating "loyalty" purchase credits, and perhaps tracking calories burned and linking to nearby eateries with the perfect farm-to-table offerings.

In addition to financial metrics, which will be vigorously protected by the operating companies, the volumes of data produced by bikeshare systems will provide near real-time information about bike traffic, indicate which stations or parking zones have a surfeit or deficit of bikes, show the impact—positive or negative—on other public transportation options, and generate related statistics which should be of significant value to transportation and planning departments. In that context, the industry has developed its own open data specification, General Bikeshare Feed Specification (GBFS),[3] which is currently the gold protocol for such aggregation (and should be the standard required and adopted by municipal clients).

The Money: As with disruptive car share and short-term housing invasions discussed in previous issues of *Municipal Lawyer*, the dockless newcomers are more nimble than their predecessors. They can enter markets surreptitiously, with little fanfare or governmental interference, not needing to secure real estate or build infrastructure as a precursor to their arrival. And whereas the original docking programs required substantial up-front public money, these newer disruptors can emerge with far less initial funding—only to be subsequently backed by hugely successful enterprises: For example, Bloomberg reports that Ofo and Mobikes have deployed 13 million bicycles worldwide after raising billions from Chinese internet giants Alibaba and Tencent.[4] Other programs are attracting similar financing; Silicon Valley funders recently poured $300 million into Bay Area e-scooter startup Skip[5] and, as described below, Google, Uber and Lyft are all heavily involved in bikeshare.

As with disruptive car share and short-term housing invasions discussed in previous issues of *Municipal Lawyer*, the dockless newcomers are more nimble than their predecessors. They can enter markets surreptitiously, with little fanfare or governmental interference, not needing to secure real estate or build infrastructure as a precursor to their arrival. And whereas the original docking programs required substantial up-front public money, these newer disruptors can emerge with far less initial funding—only to be subsequently backed by hugely successful enterprises.

The meteoric rise of these companies, particularly in China, is mind-boggling. Mobikes wasn't even conceived of until 2015, when Hu Weiwei--a former journalist--devised with her cohorts the idea of a system that would allow Chinese commuters to ride to work for pennies per ride. In April of this year, Mobikes was sold for $3.4 billion, with Hu and other founders and investors pocketing more than $1 billion in cash.[6] That trajectory is moderate when compared to newer-newcomers Bird and Lime, each of which began operations in 2017 and had already achieved "unicorn" status (having a valuation of more than $1 Billion) earlier this year.[7]

Investors in bikeshare are not simply looking to be involved in the next big thing (think Bitcoin and marijuana enterprises)—they smell monetary reward. While there are no doubt hurdles, not the least of which is vandalism to equipment, or competition as five or more providers enter a given market, venture capital financiers are bullish on American prospects.[8] When purchased by the thousands, mass-produced e-scooters should be available for as little as $300 each, perhaps less, even after giving effect to tariffs. They are enticingly inexpensive to enjoy, as illustrated by Lime's "$1 TO START" invitation embossed in large letters on the floorboard of each scooter. Docked bikes seem more expensive, typically requiring a minimum 30-minute commitment of from $1.75 (Metro Bikes in Los Angeles) to $3.50 (Biki Bikeshare in Honolulu). But on e-scooter rides, the meter begins to run immediately, generally costing $ .15 per minute, meaning that ten minutes of travel costs $2.50. If rented only twice per day for 20 minutes total, the devices would generate their purchase price in two or three months' time. Reliable sources cite even higher e-scooter numbers for various cities: $11 per day for Bird in Santa Monica and upwards of $20 per day for Lime in San Francisco. At least one company, Skip, has bragged that its e-scooters are being ridden a hard-to-believe seven times per day.[10] Even using far lower ridership projections, figuring reduced pricing for daily/weekly/monthly programs, and adding a considerable overhead factor, it's evident that a significant payback could occur by the first year of dockless operation. "Do the math," as they say.

Along those lines, the "sharing" in these new programs extends beyond mere riding of rented bikes. Companies have found ways to expand their labor pool, relatively cost-free: the Limebike app, for example, seeks members of the public willing to serve as so-called "Juicers" who are compensated for locating e-cycles and scooters that are low on power and recharging them. Bird offers similar rewards for charging and returning stray scooters to a "Bird's Nest." To induce good behavior, Hamilton, Ontario's "SoBi"--a hybrid docked/dockless program--charges $1 if users don't leave bikes at designated locked parking hubs, giving subsequent riders a $ .75 credit if they return an "out-of-hub" bike to one of 100-plus geo-fenced parking locations.[11] New Orleans' Blue Bikes program exacts a larger fee to help defray the cost of retrieving dockless strays, charging users $10 for locking a Blue Bike outside of system boundaries.[12] These programs have themselves developed enthusiastic followings, with millennial devotees comparing the experience of hunting for

continued on page 22

$1 TO START Cont'd from page 21

"dead" devices to a *Pokemon Go* search—one that pays decent money. It is inevitable that similar tactics and incentives will be used to boost the bottom line, which will be fattened further as advertising opportunities are exploited.

In contrast, docked bikes pose a far more daunting financial challenge. One source posits that in New York City, for example, they cost $5200 per bike, including docking stations.[13] That price tag inhibits expansion throughout all New York City boroughs and requires an exceedingly disciplined approach: the city's Department of Transportation has reportedly calculated that it would take 80,000 bikes to fully serve all parts of the metropolis.[14] Whether that $5200 estimate includes the cost of litigation is unclear, but fisticuffs should be anticipated whenever big-city real estate is being appropriated for public use. Consider *Matter of Fraydun Realty Co. v New York City Department of Transportation*,[15] wherein Manhattan merchants fought to preserve metered parking in front of their establishments. The city listened to their complaints and reduced the bikeshare docking footprint significantly, from 48 bikes down to 27. Undeterred, the real estate and commercial interests attacked the move as reckless:

> Petitioners now move for an Order pursuant to Article 78 of the CPLR declaring that respondents have acted arbitrarily, capriciously, irrationally and contrary to law by installing the Bike Share Station in its location on Third Avenue near the tenant petitioners' commercial establishments and that respondents violated their legal duties under SEQRA and CEQR by failing to properly consider the socioeconomic impact the Program would have on their businesses."[16]

The merchants lost the fight, and the bikes went into service. New York was resoundingly vindicated in its decision to place the bike station on that particular stretch of Third Avenue: among more than 600 stations around the city, it now ranks among the top ten in usage.

Given these headwinds, venture capital is not typically attracted to the docked bike value proposition. As a result, docked bikeshare programs have routinely required significant public-private funding mechanisms and/or massive corporate sponsorships: examples include Citibank and Goldman Sachs' sponsorship of New York's Citi Bike program and Blue Cross and Blue Shield of Illinois' help in funding Chicago's Divvy bike share.[17]

The Statistics: One of the most comprehensive sources of data about US bikeshare programs is the National Association of City Transportation Officials (NACTO).[18] NACTO's report "Bikeshare in the U.S.: 2017" states that there were 35 million bikeshare trips last year, a 25% increase over 2016.[19] 2017 saw the true emergence of the dockless bike phenomenon, with five major providers operating in 25 cities by the end of last year (a number which has clearly accelerated tremendously during 2018)—but it would be misguided to think that the new technology has put an abrupt end to the older docked systems. NACTO says that docked programs generated more than 90% of all rides in 2017, with the legacy systems in New York (Citi Bikes), Washington DC (Capital Bikeshare), Chicago (Divvy) and Boston (Blue Bikes—formerly Hubway) garnering the largest share. And last year, new docked programs took to the streets of Honolulu (Biki-already an overwhelmingly successful venture), Detroit (MoGo), New Orleans (Blue Bikes) and Charleston (Holy Spokes),[20] while San Francisco relaunched its Ford GoBike docked system, increasing its 700 bikes by ten-fold, to 7,000 units.[21]

But the growth in dockless bikes, and their implications for the future, is virtually undeniable. NACTO states that the number of shared bikes in the US more than doubled in 2017, from 42,500 to over 100,000. Only 14,000 of the newcomers were the docked variety, while three times that number were stationless.[22] The growth in 2018 will undoubtedly exceed last year's figures, with the vast majority being completely dockless or at least allowing self-locking: the variety of options, the flexibility, and the rider's certitude that there will be a place to disembark – as opposed to the phenomenon most feared by docking bike users, being "dock-blocked" because no spaces are available at the end of the journey – portend rapid and continuing growth for the dockless newcomers. The bikes are appearing in new cities at a breakaway pace, and are now being surpassed by e-scooters which are proliferating even more rapidly. While reliable data is difficult to come by, the number of municipalities with bikeshare and/or e-scooter systems must already be in the several-hundreds, extrapolating from year-old industry data.[23]

Data is also emerging about how these bikes are being used. While the companies themselves are tight-fisted with their own information, citing competitive concerns, a Seattle bikeshare study conducted by the University of Washington indicates that the majority of docked bike rides in Seattle's program are by commuters, at traditional work hours. In contrast, dockless bike usage spikes at night and on weekends.[24] The statistics also show the current dominance, likely evanescent, of stationed bikes over dockless: while Seattle's docked cycles averaged 1.7 trips per day, their dockless relatives generated less than 1/3 ride in that time.[25] And the Seattle data confirms that bikeshare is oftentimes part of longer journey, with the cycles being used to connect to or from other public transportation modes.

Mobility for More of Us: The new cycle programs can overlap with bus and subway systems in other ways, by being structured to add more mobility—and opportunity—to disadvantaged residents and neighborhoods. Although the most innovative features require a user to carry a smartphone linked to a payment mechanism, programs can be tweaked to serve a broader constituency. Old-school docked systems have long allowed eligible users to enjoy greatly reduced pricing. For example, Philadelphia's "Indego" program gives PA ACCESS card holders the right to purchase cards which will allow unlimited docked bike rides of up to an hour each, for $5 a month.[26]

Washington DC's "Capital Bikeshare" with its diaspora of adjoining municipalities is equally ambitious, accommodating users who don't have credit cards or who cannot complete online access to obtain low-cost usage via a phone call; neighboring Montgomery County, Maryland provides free access to Capital Bikeshare for its low-income residents and students.[27] Virtually all the major docked systems offer such discounted programs.

The new dockless entrants also accommodate low-income participants. Among these is Lime, which allows users who "demonstrate eligibility or participation in any state or federally-run assistance program" to join "LimeAccess," obtaining a 95% price reduction in the company's pedal-powered cycles and a 50% cut for their electric-assist bikes and scooters, and to pay cash for access at more than 27,000 "PayNearMe" locations, including 7-Eleven and CVS stores, nationwide.[28] LimeAccess allows users to unlock bikes and scooters at the reduced pricing

via a simple text, meaning a fully-featured smartphone is not needed.

These features will further allow disadvantaged users to jump the "last-mile" gap, enabling them to travel to other modes of transport, likely also subsidized, and to be employable in a larger geographic arc. In that regard, the legacy docked programs and the new dockless vehicles need not be mutually exclusive: Chicago is now piloting a dockless program in the city's far south side, specifically intended to expand the shared bike envelope beyond the boundaries of the Chicago Divvy docked program.[29]

Bad Behavior: As has been widely publicized, the bikeshare companies are frequently discovered moving into communities without adequate (or any) prior notice, making money before making concessions about safety and parking. But residents are also capable of unsociable acts, beyond thoughtless parking and irresponsible riding on sidewalks and against traffic—including those who use their apps to enable young children to ride scooters on city streets. One of the biggest impediments to bikeshare success in some markets has been theft and vandalism, with private citizens stealing, disposing of and/or destroying millions of dollars in high-tech conveyances. These crimes generally go unreported and unsanctioned.

More inventive commercial subterfuges have emerged. Because the e-device companies will pay ordinary people to round up and charge the devices, cutthroat competition has sometimes arisen, with entrepreneurial types fighting over nearly-depleted devices. The programs pay from $5 to $20 for the retrieval and replenishing of a missing and inactive scooter–so underhanded middlemen now kidnap the conveyances, keeping them out of service until the companies post a reward.[30] It also seems likely that the highly-discounted rental rates intended for underprivileged users will be abused, generating a cottage industry of unscrupulous resellers. These growing pains, although troubling, will not put the brakes on the new mobility revolution.

Nor will an ancillary problem referenced above, one already being eagerly tackled by ambitious personal injury lawyers: damage to person and property being caused by careless riders. As a Bloomberg article headlines, "Accidents by scooter riders in San Francisco and Los Angeles have law firms salivating over potential payouts."[31] This not-unexpected development makes it even more important for municipalities to require solid indemnifications and insurance coverages from the shared mobility companies.

The Programs: America's bikeshare map is populated by a spectrum of providers, some of which are global giants and some of which are home-grown upstarts. While the legacy bikeshare companies' websites list the cities where they operate, some newcomers are moving so rapidly—and their legal status in many cities is still so uncertain—that their websites do not always name participating jurisdictions. The more noteworthy operators, beginning with bike purveyors followed by scooter companies, include:

Motivate is the vertically-integrated provider behind the non-electric docked programs in (from smallest to largest) Twin Cities, MN; Columbus, OH; Jersey City, NJ; Portland, OR; San Francisco, CA; Boston, MA; Washington D.C.; Chicago, IL, and New York, NY. Gotham's one-month tally of nearly two million Motivate rides in June 2018 exceeded June rides for all other Motivate cities put together, dwarfing totals for the same period in Chicago (460,000) and the Nation's Capital (390,000). Motivate is the biggest and oldest provider of shared bikes in the US. Lyft, the global ridesharing behemoth that competes head-on against Uber, acquired Motivate in July 2018. Lyft now labels itself the largest bikeshare company in America,[32] and plans to re-brand its cycles as LyftBikes.

Social is the purveyor of red "Jump" bikes in more than 50 US locations, from Charlotte, NC to Magnolia, AR and Ketchum, ID, including numerous college campuses. Every cycle in this New York start up's portfolio is electric, helping riders up hills and travelling roughly 20 miles on one charge. It claims to offer the best-quality bike in the business, including hidden cabling and "buttery smooth" shifting. Jump is dockless but is designed to be locked to bike racks and other vertical supports, reducing the free-for-all of some other providers. Indicative of the significant role that dockless bikes will assumedly play in the transportation ecosystem, Uber acquired Jump in April 2018 for many millions of dollars,[33] prompting one source to ask "Is Uber disrupting itself with its bike share investment?" [34]

BCycle is owned by US bicycle maker Trek, and headquartered in Waterloo, WI. All BCycle bikes are electric; some feature the latest in handlebar-mounted smart screens. BCycle offers bikes designed for docking in the company's stations as well as "DASH" bikes ~ fully dockless versions which lock themselves and can be parked anywhere. BCycle is now powering programs in more than 50 US cities, including many middle- and smaller-sized municipalities like recent additions Tulsa, OK and Jackson, WY. [35]

Ofo, based in Beijing, bills itself as "the world's first and largest station-free bike sharing platform." It claims to have to have put more than 10 million of its yellow bikes into service in more than 20 countries: Australia, Austria, China, Czech Republic, France, Germany, Hungary, India, Israel, Italy, Japan, Kazakhstan, Malaysia, Portugal, Russia, Singapore, Spain, Thailand, the Netherlands, the UK-and the US, and purports to generate more than 32 million transactions each day.[36] The company's growth may be reversing, however; it has departed several countries[37] and many US markets. It recently exited Washington DC after regulators would not allow it to expand the size of its fleet and a significant percentage of its existing inventory was vandalized; in late August it sold several hundred cycles (which had the self-locking feature removed) to buyers in Arlington, Virginia for a bargain price of $100 each.[38]

Mobike, referenced earlier for its amazing growth story, calls itself "The Perfect First & Last Mile Solution." Headquartered in Beijing, it is the world's largest bikeshare company. The company's silver and orange cycles have appeared in many cities unannounced, triggering legal action and, in some communities such as Dallas, outright warfare by residents. Despite its sometimes-unwelcome market entry, the company continues to innovate, now linking to Apple iWatches, offering "curated" rides through Mobike cities, and promoting its environmental responsibility and carbon reduction impact. Mobike appears to have been more disciplined in its growth outside China than Ofo and is not reported to be abandoning markets wholesale—although it too left Washington DC in late July because the nation's capital would only allow 400 bikes per provider in the city. [39]

Lime offers a "Smart Mobility Fleet"

continued on page 24

$1 TO START Cont'd from page 23

comprising bikes and scooters. It has been among the most aggressive of dockless species, placing its neon-green e-scooters and cycles (pedaled and/or e-assisted, with one, three or eight gear varieties)[40] in cities across the country, often without any notice. San Francisco, Charlotte, Indianapolis, San Jose and other localities have issued cease and desist orders to Lime, with mixed results. The company's apparent premise that it is better to apologize than ask for permission seems unlikely to wane, based on its newest collaborators—Lime received a $335 million investment from serial disruptors Uber and Google in April.[41] As of July, the company's devices had popped up in more than 70 cities across the US and Europe.[42]

Bird's flat-black e-scooters are as ubiquitous as Lime's, and it has often found itself in the same posture after sneaking into city streets uninvited. The Santa Monica-based operator has already placed its scooters in at least 15 cities, invoking threats of litigation, sometimes acted upon, in San Francisco, Nashville, Milwaukee, Washington D.C., Austin and Denver.[43] Bird is also emblematic of the new technology's "act first, negotiate later" strategy: "We enter markets where scooters aren't prohibited, and we follow the laws on the books," says Kenneth Baer, a Bird spokesman. "But in most cities, the laws never anticipated this technology."[44]

Skip was funded by Silicon Valley investors and promotes its electric scooters as a safer, more durable alternative to other companies' devices, offering a wider riding surface and shock cushioning.[45] And the Speedway Mini4 scooters which Skip modifies can go up to 30 miles per charge at an average of 10 mph—50% farther than the scooters used by competitors like Lime--meaning that they are less likely to be useless by mid-afternoon.[46] The company's website includes rules applicable to various cities (in Portland, Oregon, no riding on sidewalks or in parks; helmets required; 15 types of no-parking areas) and actively seeks to be notified about irresponsible parking or other scooter problems.[47]

There are many other entrants in the global shared mobility market, including Hello Bike, Bluegogo, Goat, NextBike, VBike, OBike and more. Some have entered the US, securing small niches; others have abandoned their aspirations for the American market.[48]

The Existing Laws: While federal laws respecting e-scooters are yet to emerge, the bicycle has been fully defined by Congress in 16 CFR 1512, recent iterations of which address arcane issues such as seat posts, wheel hubs and brake grip dimensions. Localities wanting to craft their own ordinances to address these new modalities will obviously have to conform to such federal standards and to applicable state regulations. Washington State's legislative history is illustrative. In 1997 Washington had defined electric-assisted bicycles as those with two or three wheels, a saddle, fully operative pedals for human propulsion, and an electric motor with a power output of no more than 1,000 watts. It was to be incapable of propelling the device at more than 20 mph on level ground, whether operating alone or assisting the human pedaling rider.

A 2002 federal law amended the Consumer Product Safety Commission definition of electric-assisted bicycles and defined a low-speed bicycle as "A two-or three-wheeled vehicle with fully operable pedals and an electric motor of less than 750 watts, whose maximum speed on a paved level surface, when powered solely by such a motor while ridden by an operator who weighs 170 pounds, is less than 20 mph."[49]

On June 7, 2018, Washington updated its e-bike provisions, via SB 6434. The law took effect July 1, 2018. As the House Bill Report states, "While the federal government regulates the manufacturing and first sale of an electric-assisted bicycle, the operation on roadways and paths is under a state's control." Washington reduced permissible e-power, and established three categories of e-bikes:

> Summary of Bill: The definition of a bicycle is updated to include electric-assisted bicycles.
>
> An electric-assisted bicycle's motor must have a power output of no more than 750 watts and the electric-assisted bicycle must meet the requirements of one of three classifications:
>
> 1. Class 1 electric-assisted bicycle in which the motor provides assistance only when the rider is pedaling and ceases to provide assistance when the bicycle reaches the speed of 20 mph;
> 2. Class 2 electric-assisted bicycle in which the motor may be used exclusively to propel the bicycle and is not capable of providing assistance when the bicycle reaches the speed of 20 mph; or
> 3. Class 3 electric-assisted bicycle in which the motor provides assistance only when the rider is pedaling and ceases to provide assistance when the bicycle reaches the speed of 28 mph and is equipped with a speedometer.[50]

(To put these specifications into perspective, Lime's e-assist bikes have a power output of 250 watts and will augment the rider's pedaling up to a top speed of 15 mph; they would be Class 1 devices). The Washington law also requires motorized scooter riders to wear a helmet if under 18 years of age.

This federal-state matrix has not entirely deprived Washington localities of their own regulatory powers. SB6434 says that Class 1 and 2 bikes can be ridden on sidewalks but allows municipalities to prevent them. (Seattle recently decided that the 20 mph-and-under e-bikes will henceforth be permitted on city walks, given that bicycles already have that status). SB6434 also permits local authorities to allow e-bikes on highways having speed limits of up to 35 miles per hour-- and would allow them on higher-speed highways if operated within a Class II or Class IV bikeway.

California is considering legislation that would apply similar provisions to "motorized scooters," defined as "a 2-wheeled device that has handlebars, has a floorboard that is designed to be stood upon when riding, and is powered by an electric motor or by a source other than electric power." Local authorities could allow motorized scooters to operate in a Class II bike lane on highways with a speed limit up to 35 mph, replacing the prior 25 mph limit; however, the maximum speed of the scooter would remain capped at 15 mph.

Under AB 2989, localities would still be bound by California requirements that scooter riders carry a valid driver's license; that they not carry additional passengers-- or parcels preventing at least one hand on the handlebars; that they not operate a scooter on a sidewalk; and that they not leave a scooter parked on its side or obstructing passers-by. But the provision, passed by the California legislature on August 29, 2018, would eliminate the helmet requirement for riders above 18 years old.

The War Stories: The need for municipalities to meet bikeshare entrants with a preemptive shield, a well-conceived regulatory scheme, and sound business assumptions is evidenced in some recent history:

Coronado-Taking the Offensive: Coronado, California's municipal code requires businesses that use the city's public right of way to obtain a permit. In the spring of 2018, Lime, Ofo and Mobike's cycles began to appear in the locality without the requisite permits. This triggered the city's right to impound. As of the end of June 2018, it had collected 106 bikes, according to Coronado's Director of Public Works and Engineering. The offending companies are charged a $45 impound fee and a $1 per day storage fee. Most of the impounded cycles belong to Lime, which proclaims its innocence: "Lime has never deployed bikes in Coronado, our smartphone app actively warns riders against parking in Coronado, and we collect and redistribute most of our bikes on a nightly basis."[51] Until reclaimed, the bikes remain locked, unusable-and unsaleable. Accordingly, the city now plans to recycle them as scrap metal.

Dallas-Caught in the Deluge: "Big D's" foray into the bike share experience is cautionary. Dallas became a bikeshare epicenter virtually overnight in late 2017 as five companies (VBike, Lime, Spin, Ofo and Mobike) converged on the metropolis. The city did not yet have in place a regulatory scheme to keep the bikes out or to control them once they arrived. By February 2018, one of the largest American municipalities without any bike share system had suddenly been morphed into the city with the largest share bike fleet anywhere in North America—some 18,000 cycles. It was even deemed "the bike-share capital of America" in *D Magazine*.

The subsequent history was fairly predictable given the absence of protections for such an onslaught. Residents jammed 311 phone numbers, complaining about the swarms of brightly-colored cycles, many of which were not moved for weeks on end, clogging their sidewalks and encroaching on open spaces. War against the uninvited vehicles seemed to become a local pastime. Many were tossed aside, vandalized and even conscripted into ad hoc artistic installations. Far from being a cost-free enhancement to the city, as promised by the companies, the dockless bikes were a political and economic liability.

In June 2018, the Dallas City Council passed an ordinance imposing an $808 permitting fee any company seeking entry into their market, coupled with a $21 per bike charge. That step was too much for three of the five companies, who rapidly departed.[52] Only Lime and VBike now remain, with a much smaller population of roughly 3,500 bikes. Much of the remaining inventory was simply abandoned, and hundreds of cycles now await destruction at Dallas recycling centers—a colossal waste of resources. The city's shared mobility challenges are hardly over; as the bicycle programs were shrinking, a new horde of e-scooters began invading.

Seattle-Lessons Learned: Seattle also suffered a collapse of its initial bike share experiment, "Pronto!" Started in 2014 as another Motivate docked-bike program, it was funded via a massive municipal budget. Alaska Air signed on as a primary sponsor, committing to a whopping $1,000 per bike for five years; with an initial population of 500 bikes, the airline was committing to $2,500,000. Unfortunately, that largesse—buttressed with another $7 million in city funding—was insufficient. Seattle had too few docking stations and not enough bikes, a flaw that prevented the program from achieving critical mass.[53] Ridership—and income-was well below the city's projections, and the bike share experiment soon became prohibitively expensive. Added to that, a transportation executive appointed by Seattle's mayor became embroiled an ethics controversy for his undisclosed interest in the Pronto! Venture. Faced with many other fiscal realities, the city council and ultimately the mayor, who had won office partly because of his outspoken enthusiasm for more bicycle paths in the city, reluctantly defunded the program in late 2016.

But the Emerald City tried again, this time under the auspices of the new bike share companies. Armed with more resources, better technology, experience gained in markets around the world, and perhaps most importantly, dockless bikes, these entities took the risk in 2017. They now seem to be succeeding.

Seattle's recently-updated bike share program is one of the nation's most developed—and most progressive. Following a one-year pilot period, the city passed its amended "free-floating" bike ordinance on July 30, 2018. It projects a doubling of the city's already-ambitious program, from 10,000 cycles to 20,000. Instead of relatively modest initial payments (fees, bonds and/or deposits) specified under most other city's policies, Seattle envisions a hefty ante totaling $1 million for the 20,000 bikes in its program—assumed to be $250,000 from 4 primary vendors, each providing 5,000 bikes at $50 apiece. These funds will enable the city, in theory, to host a bike program without consuming its own taxpayer dollars. Of the $1 million in up-front payments, $400,000 will be used to fund Seattle traffic personnel responsible for overseeing the program and another $400,000 will be used to create designated parking areas for bikeshare cycles (the city has identified the 30-foot buffer zones around stop signs as fertile ground for such deployment, estimating that it can repurpose such areas at a cost of $2,000 to $3,000 each, providing 10 to 15 spaces in each).

The $250,000 per vendor target has caused some repercussions. While Spin, Ofo and Limebike had participated in the pilot since July 2017; Ofo announced that it was not willing to foot such a large up-front bill and is dropping out of Seattle. In contrast, Limebike is enthusiastic about remaining, and cites the following data:

- In the last 13 months, Limebike has sold six million rides on its bikes around the world, of which more than one million were taken in Seattle, it's most successful market. Seattle was the first market to hit one million rides on a dockless bikeshare program;
- 715,000 pounds of CO2 have been saved by Seattleites using its bikes, more than any other city;
- 74 percent of Seattle residents have a favorable opinion of dockless bikesharing;
- Of the one-third of Seattle residents who have tried Limebike: 36 percent were Hispanic and African American; 32 percent Asian; and 32 percent Caucasian; and
- A rider using Limebike products in conjunction with public transit would pay, on average, 80 percent less than the cost of owning and operating a personal vehicle.[54]

The revised program expanded beyond what the Seattle Department of Transportation had initially envisioned. The city's sharing program now includes "shareable mobility devices, such as tricycles, handcycles, tandem cycles, electric scooters, and others," intended in part to provide sharable transportation for disabled residents.

Oklahoma City-Give the Public What they Want

One of the latest jurisdictions to see an overnight invasion by this new technology is Oklahoma City. In mid-July 2018, Bird placed several hundred electric scooters

continued on page 26

on the city's sidewalks and open spaces, without any advance notice or discussion with officials. Although Oklahoma City apparently did not already have in place a Coronado, California-type ordinance on its books allowing the seizure of unauthorized objects in its public right of way, it rapidly passed such a regulation. In an emergency session, the City Council unanimously enacted a measure giving Public Safety workers the latitude to confiscate Bird scooters and charge the company for collection and storage costs.

That solidarity did not last. A day later, a single councilman pressed for, and achieved, a one-week reprieve to allow the parties to discuss the situation and derive a mutually-acceptable compromise. A more telling barometer of the ultimate outcome was provided by the city's mayor, who acknowledged openly that the city's residents wanted the devices.

As one local media outlet describes it, the onslaught is not bad for the city, and is actually forcing it to move towards a new paradigm that it might not otherwise have achieved:

> The upside of these operators is great for cities like Oklahoma City that is attempting to reverse decades of heavily auto-centric design. The city sprawled to 221 square miles for 40 years without any sidewalk requirements.
> The city is just now figuring out how to properly design bike lanes after attempting the derided sharrow lanes that make bicyclists feel no safer sharing lanes with vehicles. The Oklahoma City Planning Department unveiled a comprehensive plan for improving pedestrian and bicycle infrastructure throughout the city.
> The timing couldn't be better for a company like Bird to approach the city, as did their competitor, Lime, to adapt the plan so bike lanes and infrastructure can accommodate scooters. Oklahoma City, with ample downtown plazas, new sidewalks and embrace of efforts to reduce reliance on vehicles is a perfect test case for these companies to come up with a template for the country.[55]

On August 23, the city announced that it had granted Bird the right to place its e-scooters at 15 locations after having received "no objection" letters from nearby property owners.[56] Oklahoma City has now drafted a proposed "shared vehicle ordinance" for consideration at a city council meeting on September 11 and adoption by September 25.[57]

The Ordinances: These case studies, and many more, merely reveal what is hiding in plain sight: although some cities have not successfully launched bikeshare programs, in most places the public wants to enjoy this new modality. Rebuffing that enthusiasm will not garner votes for an elected official--and will not result in compliments to his municipal legal team. The government attorney's mission, in the vast majority of jurisdictions, will not be to squelch shared bikes but to find a way to get to yes. Many noteworthy examples can be found—Austin, Boulder,[58] Chicago and Washington DC each have useful precedents, for example. They address many of the items flagged below.

1. <u>Preliminary issues:</u>

- **<u>What does the statehouse say?</u>** While it might seem intuitively obvious that local voters and officials can best determine how and where bicycles should operate within their municipality, it would be unwise to develop a local bikeshare program without considering preemption. As indicated in the Washington State legislative activity described above, the definition of what constitutes a "bicycle" is likely to be a matter of federal and/or state prerogative. Defining "e-bicycle" or "e-scooter" (or "motorized skateboard" for that matter) may not have been well defined yet at the statehouse, but will likely be decided there. So may issues such as required bike safety features, allowable ages of bike share users, mandated insurance coverages, parameters of bike usage data programs, spacing necessary for ADA compliance, and much more. Checking for appropriate state—and occasionally federal—preemptive regulations is essential before spinning municipal wheels drafting unenforceable home-grown provisions.

  One somewhat surprising ally in the preemption inquiry is the North American Bike Share Association (NABSA),[59] a one-year old industry trade group headquartered in Maine. Unlike trade associations representing many other innovations which have elbowed their way into the municipal cosmos (fracking, drones, Uber, and Airbnb come to mind), NABSA has not sought to end-around local autonomy by cutting deals with overreaching state legislators. In fact, the NABSA website specifically affirms its support of local governments, listing by bill number a variety of attempted preemptive regulations around the country that NABSA has helped to scuttle.[60] Moreover, NABSA provides its own useful list of provisions to consider when drafting bike share ordinances.

- **<u>Keeping the barbarians outside the gate</u>:** Municipal lawyers around the country have witnessed bikeshare companies placing their profit-generating devices, in now-familiar orange, green, yellow or black trade dress, in an unsuspecting town. The companies are hardly bashful about such an approach, as indicated in the Bird spokesman's comment above. Without a preexisting defensive strategy, municipalities can be sitting ducks for such app-driven incursions. One elemental mechanism that would seem useful is a blanket prohibition against stealth placement of unlicensed or unpermitted bikes and the like on a municipality's public spaces--with the locality having the authority to confiscate and hold such items for redemption without further notice, pending negotiation of a mutually-acceptable agreement. Cities with these pre-existing shields such as Coronado have the upper hand in subsequent discussions. Without such provisions, emergency regulations and cease and desist demands become a necessary predicate for confiscatory steps—an approach that has also ultimately led to success in many jurisdictions. albeit not as immediate. Legal maneuvering can easily become complicated: in July, Milwaukee sued Bird for penalties of $200 per infraction for some 6900 instances of illegal Bird scooter rentals in the city; that case has been removed to federal court. And the city's effort to put the onus on riders by threatening fines of $98.80 for using unauthorized e-scooters was objected to by local residents.[61]

- **<u>Avoid the bleeding edge</u>:** The pressure to provide constituents with access to this high-profile innovation may impel rapid action. But localities will require a cost-benefit analysis before significant resources are allocated to such an initiative. On the expense side of the ledger, a comprehensive understanding of the manpower and logistics involved in a bike share program—including enforcement, once ordinances are drafted–is needed in order to avoid understating potential costs (both economic and political) to the municipality. On the income side of things, a survey of pricing paid by bike share companies in other

communities will reveal a wide range; it will be useful to gauge the market before settling for a paltry fixed sum or unnecessarily low per-bike figure. Where such data cannot easily be discerned on day one, latitude can be preserved in pricing provisions, allowing for future increases. Flexibility may also be important in the context of another early-mover deal tendency: exclusivity. Ample room should be allowed for other programs and next-generation innovations.

- **Engagement before marriage:** While many municipal regulatory schemes will include similar terms, each locality has different topologies, demographics, public transport infrastructure-and culture. It will be critical, while preventing unauthorized invasion onto a city's streets, to have a well-defined pilot program giving the municipality time to test one or more bikeshare candidates: what impact is the program having on traffic, safety, sidewalk congestion, and business; is the company making good on its commitments; do residents and tourists like and use the service; and so on.

  In that regard, Baltimore provides a good example. On August 15, 2018 it signed a six-month pilot program agreement with Bird. It calls for 1,000 e-scooters to be placed around the city, allocated to low-income neighborhoods as well as affluent. Riders must be apprised of rules, including a prohibition against riding on sidewalks. The city receives $20,000 up-front, followed by $1 per day for each of Bird's "dockless vehicles" operating in Baltimore—a pricing scheme that Bird has followed in Memphis[62] and other cities. The package could conceivably bring a total of $200,000 to city coffers—presumably enough to cover resulting enforcement costs—and indicative of the profit opportunities sensed by the e-scooter companies. Baltimore is held harmless and indemnified against virtually any type of loss or expense arising from the use or presence of Bird's devices and has ample rights to curtail the Bird relationship in the event of noncompliance.
- **The Ordinance need not answer every question:** While the immediate pressure is to create a barrier to overnight intrusion and unregulated activity, ordinance drafters need not feel the compulsion to address every nuance in their initial codification, particularly until pilot programs are evaluated. They can defer the crafting of more specific elements until later—or, as Tucson recently did, simply provide that any agreement signed by the municipality with a bikeshare provider will address those elements, many of which are described below.

2. **Defining the Program:** As data from pilot programs is harvested and analyzed, the scope of a longer-term programs can be better-defined: how many bikes will be needed or allowed (while too many will result in glut and clutter, too few will prevent critical mass); where should they be dispersed (commercial areas and neighborhoods in the center city may welcome them, while wealthy enclaves may have less interest); will bikes, scooters, and other conveyances be included; will they be docked and/or dockless; must bikes lock to a structure; will the program be limited to specific providers or open to virtually any qualified entrant; will the program need to be self-sustaining or can the municipality expend funds to add this amenity; will the operators be required to allocate devices and free use time to non-profits and low-income communities; will the program serve those without smartphones and credit cards; will employment of local low-income residents be mandatory; and so on. As NACTO stresses, bikeshare is not merely a recreational or peripheral feature to be viewed in its own silo; it should be assessed as part of the larger municipal transportation environment.

3. **Defining the "Bikes":** How will the conveyances in the program be defined—much of which may already be answered by federal and state codification as described above; will Segways, single-wheel devices, handcycles, tandem cycles and other iterations be covered; will foot-powered, battery/electric powered (and potentially, internal combustion devices) be included; and so on. The specifications and attributes of permitted cycles and scooters must be established: beyond complying with federal, state and industry standards for strength/sturdiness/dimensions/braking power; how many gears must bikes have; what signage or labels must be affixed; what lighting, cargo baskets, bells or warning devices and the like must be included; and so on.
4. **Licensing and Permits:** The standards and qualifications for licensing must be determined: what financial attributes must be shown via audited financial statements, if any; in addition to having a permit to operate its bike share program, must the operator be qualified as a foreign corporation with the state, must an agent for service of process be designated and must it register with the municipality for a business license; must each bike have an individual permit and be separately registered; must permitting be renewed annually or on some other periodic basis; how and when can permits be revoked; and so on.

5. **Fees, Bonds, Deposits, Insurance:** The financial elements must be determined: how much will the permitting fee be; what fee structure will be needed to cover the municipality's costs; will the fee include a base amount plus per-bike fees or some other mechanism; how large of a bond will be required, and how will it be calculated; what sort of property, casualty and comprehensive coverages will be necessary; and so on.

6. **Rider Qualification and Safety:** Rider qualifications and responsibilities must be addressed: must they carry drivers' licenses; will riders below the age of [18] (or below [16] if accompanied by an adult) be allowed; must riders view a tutorial, acknowledge that they will not perform stunts, carry additional people or operate the devices while under the influence; must they agree to ride and park only where permitted; must they wear helmets; and so on.

7. **Tracking, Identification and Data:** The ability to identify and track bikes must be addressed: must each bike be equipped with its own individual electronic identifier and GPS tracking capability; must each transmit continuously its path and position, allowing the capture of aggregated data regarding bike share traffic patterns; must that data be shared (in real time/promptly) with city transportation and planning personnel (subject to confidentiality protections from other bike share competitors); what steps will be taken to avoid capture of personally-identifiable information associable with specific bike trips; what data storage, open meetings and FOIA implications must be considered; what communication protocols will be required (the current industry standard is the aforementioned

continued on page 28

$1 TO START Cont'd from page 27

GBFS protocol, but legacy systems still abound); and so on.

8. **Logistics:** Bicycle flow, parking, maintenance and charging (where applicable) must be determined: will riding and/or parking bikes be prohibited in some areas (or heavily discouraged, such as via the $10 charge that New Orleans' Blue Bike program charges noncompliant parkers); will geo-fencing be required in the bikes' GPS/app interface to alert riders to no ride/no park areas (and apprise them of additional fees if they do so); will operators be required to "re-balance" bike availability (moving them back up hilly areas or to outlying or low-income areas from center-city aggregation points); will operators be required to retrieve damaged, "dead," and impermissibly parked bikes; will operators be allowed to pay the public to move and/or recharge bikes; how will Uber-and Lyft-type food and parcel delivery services be incorporated; what policies will be needed for snow and weather emergencies; what scope of customer service and repair staff will be required; and so on.

9. **Fines, Confiscation, and Disposal:** The municipality's policing authority must be spelled out: what fines will be assessed if damaged, dead and/or impermissibly parked bicycles are not timely retrieved by the operator; what labor charges will be assessed if the municipality has to undertake such retrieval; what sort of notice to the operator will be required; what sort of legal process will be necessary; how long will the operator have to redeem confiscated bikes from the municipality before they can be sold or disposed of; will the municipality have the authority to (or authority to require the operator to) disable the app within its jurisdiction; what will the penalties be for using municipal facilities to recharge bikes; and so on.

CONCLUSION

The above elements, and others, can be woven into an effective regulatory scheme allowing municipalities and their residents to experience the continuing evolution of shared mobility. The impact of bikeshare seems overwhelmingly positive; removing cars from city streets should ultimately benefit everyone. Bikeshare-fueled tourism, with people journeying to places previously thought to be too costly or out of the way, is undoubtedly bringing new dollars to our communities. And anyone who has seen the delighted expressions of people riding electric bikes and scooters around our cities (in particular those of an age who might never have envisioned themselves again being so insouciant) must acknowledge that they are here to stay. The challenge is to devise rules which allow this innovation while maintaining order and not abdicating safety. It is a mission to which municipal lawyers are well-suited, and one which IMLA and its members are already pursuing.

Notes

1. www.citibikenyc.com/
2. www.capitalbikeshare.com/
3. Adam Russell, *New bikeshare data standard opens doors for apps and analysis,* Mobilitylab, May 4, 2016 https://mobilitylab.org/2016/05/04/new-bikeshare-data-standard-gbfs/
4. Carol Matlack, Stefan Nicola, and Ania Nussbaum, *Bike-Sharing Upstarts are Flooding Europe with Cheap Cycles*, Bloomberg Businessweek, November 10, 2017.
5. Heather Somerville, *Scooter Startup Bird Raises $300 Million in Latest Round,* US News & World Report, June 28, 2018, https://www.usnews.com/news/technology/articles/2018-06-28/scooter-startup-bird-raises-300-million-in-latest-funding-round
6. https://www.bloomberg.com/news/articles/2018-04-04/mobike-turned-crazy-idea-into-3-billion-startup-in-three-years
7.https://www.cnet.com/news/google-and-uber-invest-335-million-in-lime-scooters/
8. Rob Nikolewski, *How can dockless bike and scooter companies make money?,* San Diego Tribune, April 15, 2018, http://www.sandiegouniontribune.com/business/energy-green/sd-fi-dockless-profitable-20180415-story.html
9. Tom Huddleston, Jr., *Uber and Alphabet just invested $335 million in Lime – here's why scooter start-ups are suddenly worth billions*, July 13, 2018 https://www.cnbc.com/2018/07/11/lime-bird-spin-why-scooter-start-ups-are-suddenly-worth-billions.html
10. Josh Constine, *Boosted Boards founders launch heavy-duty scooter renter Skip, May 7, 2018* https://techcrunch.com/2018/05/17/skip-scooters/
11. https://hamilton.socialbicycles.com/
12. https://bluebikesnola.com
13. Colin K. Hughes, *Bike Share: The Dawn of the Dockless Bike (and the Death of Dock-Blocking), May 7, 2017* https://medium.com/social-bicycles/bikeshare-the-dawn-of-the-smartbike-and-the-death-of-dock-blocking-9f52bb642ae
14. *Id.*
15. No. 158295 (Sup.Ct. NY Co., May 17, 2017).
16. *Id.*
17. https://www.divvybikes.com/partners
18. https://NACTO.org/bike-share-statistics-2017 ("NACTO Report")
19. *Id.*
20. *Id.*
21. https://www.fordgobike.com/about
22. NACTO Report, *supra note 18.*
23. The North American Bike Share Association (NABSA-www.NABSA.net) states that there are 130 bikeshare locations in the US; that data is more than a year old.
24. NACTO Report, *supra note 18.*
25. *Id.*
26. www.rideindego.com. The regular price is $17 per month.
27. www.capitalbikeshare.com
28. www.li.me.com
29. https://www.cityofchicago.org/city/en/depts/cdot/provdrs/bike/news/2018/may/city-of-chicago-pilot-project-for--dockless--bike-rental-starts-.html
30. Taylor Lorenz, *Electric Scotter Charging Culture is Out of Control*, Atlantic, May 20, 2018 https://www.theatlantic.com/technology/archive/2018/05/charging-electric-scooters-is-a-cutthroat-business/560747/
31. Anousha Sakoui and Edvard Petterssen, *Now the Personal Injury Lawyers Have Scooters in their Sights*, Bloomberg.com, June 12, 2018 https://www.bloomberg.com/news/articles/2018-06-12/now-the-personal-injury-lawyers-have-scooters-in-their-sights
32. Andrew Small, *Lyft Just Became America's Biggest Bikeshare Company,* Citylab, July 2, 2018 https://www.citylab.com/transportation/2018/07/lyft-buys-motivate-bikesharing-systems/564347/
33. www.socialcycles.com; www.jumpbikes.com
34. Molly Wood, Stephanie Hughes and Shaheen Ainpour, *Is Uber disrupting itself with its bike share investment?,* Marketplace Tech, May 21, 2018 https://www.marketplace.org/2018/05/21/tech/

uber-disrupting-itself-bike-share-investment
35. https://www.bcycle.com/
36. https://www.ofo.com/us/en
37. Eliot, *Why China Bikeshare Giant Ofo is Scaling Back Operations in the US*, WALL STREET JOURNAL, July 21, 2018
38. Taameen Mohammad, *Surplus of Dockless Bikes for Sale in Virginia After Company Had to Leave DC, July 21, 2018.*
39. Chris Cioffi, *2 Dockless Bike Companies Leaving DC, Citing Regulations, nbcwashington.com, July 25, 2018* https://www.nbcwashington.com/news/local/Second-Dockless-Bike-share-Company-Rolls-Out-of-DC-Citing-Stringent--489149941.html
40. https://www.li.me/smart-mobility-fleet
41. Dara Kerr, *Uber's next big thing is Lime scooters to get around town*, Cnet, July 9, 2018, https://www.cnet.com/news/google-and-uber-invest-335-million-in-lime-scooters/
42. *Id.*
43. Jamie McGee, *In Nashville's electric scooter debate, residents question ability to enforce violations*, THE TENNESSEAN, July 11, 2018 https://www.jsonline.com/story/news/2018/07/11/bird-electric-scooters-nashville-enforcement-violations/772852002/
44. https://www.washingtonpost.com/news/innovations/wp/2018/06/22/electric-scooter-companies-conquer-with-a-simple-strategy-act-first-answer-questions-later/?utm_term=.8eafb0e56a25
45. https://skipscotters.com/
46. Josh Constine, *Boosted Boards founders launch heavy-duty scooter renter Skip*, https://techcrunch.com/2018/05/17/skip-scooters/, May 7, 2018.
47. Skipscooters, *supra note 45. The website's form requests "Tell us there's a problem with a Skip scooter!"*
48. Bluegogo, another Chinese startup, attempted to enter the San Francisco market in late 2016 without notifying local authorities. It was rebuffed and removed its cycles from the city.
49. 15 U.S.C. §1585.
50. http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bill%20Reports/House/6434-S.E%20HBR%20APH%2018.pdf
51. Gustavo Solis, *Dockless bicycles impounded in Coronado headed for scrap pile, latimes.com*, Jul. 4, 2018.
52. Leif Reigstad, *The Rise and Fall of Dockless Bike Sharing in Dallas, texasmonthly.com*, Aug. 8, 2018.
53. Andrew Small, *The Four Horsemen of the Apocalypse, Citylab.com*, Jan. 31, 2017 https://www.citylab.com/transportation/2017/01/seattle-bike-share-pronto-goes-under/513575/
54. http://mynorthwest.com/1064250/council-official-bikeshare-ordinance/
55. Steve Lackmeyer, *Company's Scooter Drop Raises Questions Here and in Other Cities*, THE OKLAHOMAN, Aug. 7, 2018, https://newsok.com/article/5603893/companys-scooter-drop-raises-questions-here-and-in-other-cities
56. *Oklahoma City permits rental locations for electric scooters, the republic.com*, August 23, 2018 http://www.therepublic.com/2018/08/23/ok-electric-scooters-oklahoma-city-2/
57. *City leaders propose ordinance for rental motorized scooters, kfor-tv*, August 28, 2018 https://kfor.com/2018/08/28/city-leaders-propose-ordinance-regarding-rental-motorized-scooters/; the ordinance is described at https://agenda.okc.gov/sirepub/cache/2/ajn5ammwcjnpmbyxl1urcpa0/41653940829201807491267l.pdf#xml=http://agenda.okc.gov/SIREPub/cache\2\ajn5ammwcjnpmbyxl1urcpa0\41653940829201807491267l.xml
58. https://www-static.bouldercolorado.gov/docs/Errata_Sheet_Ord_8246_6.12.18_mtg_dockless_bike_share-2830-1-201806121602.pdf?_ga=2.264682383.1630609599.1535590012-931799064.1535590012
59. www.NABSA.net
60. *Id.*
61. Suzanne Spencer and Katie Delong, *'Pure arrogance:' City officials warn Bird scooters illegal in Milwaukee; operators subject to $98 fine*, fox6now, June 28, 2018, https://fox6now.com/2018/06/28/city-officials-warn-bird-scooters-illegal-in-milwaukee-operators-subject-to-98-fine/
62. The Memphis-Bird interim operating agreement was signed on June 15, 2018 by Mayor Jim Strickland https://drive.google.com/file/d/1uorfIj1XxI0fGwnzkQHJGIxo6Br_4SvC/view.

M.



HAVE A JOB POSITION THAT YOU NEED TO FILL?

Use IMLA's job board to reach top quality candidates. Take advantage of our 20% discount until October 31, 2018. Promo code: WH6DW99Z.

Phone: 202.466.5424
Fax: 202. 785.0152
E-mail: info@imla.org
Website: www.imla.org



'But I Had a Prescription!"

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

I was slapped right in the face again this past week, given another example of the realities of life and the repercussions of growing less young. I received a note from the wife of a very old friend, "John." She advised me that John had passed away last week.

I was floored. John and I go all the way back to first grade – Mrs. Pittman's class at Bruce Drysdale Elementary School in Hendersonville, NC. I still remember the day that first year when we had to sit in the hall because we had decided to engage in a belching contest. Then there was the time we had a skit on the Constitutional Convention, and during contentious debate with "Ben Franklin," John adlibbed a line telling him to "Go Fly a Kite."

Those kind of laughs could go on and on as well as the memories. However, one of the roots of John's issues was something we all face as we operate our various municipal governments today. John had an opioid problem, so I am told.

It all started back during his service to the country in the United States Air Force. John was injured following a parachute operation, and spent time in the hospital to recover. When discharged, he had to continue on pain prescriptions. This continued longer than he had wished. I'm not sure it ever actually ended.

A little background look into this area reveals 10 interesting statistics regarding opioid addiction, contained in the following report from addiction.com)

1. Prescribed medications, not thefts from pharmacies, account for the vast majority of all overdose incidents caused by prescription pain medications. As many as three out of four people abusing prescription drugs obtained them from a friend or family member.
2. An estimated 80 percent of the prescription pain killers are prescribed by 20 percent of prescribers. The majority of scripts come from primary care and internal medicine physicians. Very few originate from physician specialists.
3. Medicaid enrollees receive pain prescriptions at twice the rate of non-Medicaid patients. Results from a Washington study show Medicaid enrollees accounted for 45 percent of overdose fatalities in the state.
4. While drug overdose rates vary from state to state, the highest rate of overdose fatality incidents occurred in New Mexico and West Virginia in a recent study. Opiate addiction rates in these two states were five times more than in Nebraska, the state with the lowest rate.
5. Data collected by the National Institute on Drug Abuse show as many as 4.2 million Americans reported using heroin at least once in their lives. Of this number, an estimated 23 percent became addicted to the drug.
6. For an eleven-year period in the early 2000s, sales of prescription painkillers to hospitals, doctors and pharmacies increased by 400 percent. At the end of this period, the number of pain medications prescribed was enough to keep every single American medicated for one month's time.
7. Since the end of 1999, the number of overdose deaths from pain medication has increased by 300 percent. In 2008, opiate addiction numbers show deaths resulting from pain meds totaled 14,800. (And this has only gotten worse)
8. In 2009, the abuse of prescription painkiller drugs accounted for more than 475,000 emergency room visits. This number represents a 200 percent increase in the same type visits from only three years earlier.
9. As of 2010, opiate addiction statistics show over 12 million Americans reported using prescription pain medications for non-medical purposes without having obtained an actual prescription.
10. In 2010, an estimated two million people reported abusing prescription pain medication for the first time within the previous 12-month period. This number amounts to 5,500 people a day abusing prescription pain meds for the first time.

I have personally prosecuted DUI cases where drugs were at issue. Quite often the first defense is "But, I had a prescription." Too many people, including some very good defense lawyers, can't see that a prescription isn't a magic wand that makes everything OK... See above... Ever wondered why the drug labels almost always bear a sticker containing a warning such as "CAUTION: Do not drive or operate machinery after taking this product." Well, now you know why!

What does all this have to do with the operation of local government, one might ask? Well, as recited above it has created a "novel" area of expertise for DUI enforcement. Here in little old Lexington, SC, we had been forced to send several of our officers to attend Drug Recognition Training, and many of them have become certified as Drug Recognition Experts. Their testimony comes in handy during a DUI trial where drugs are suspected to be involved.

I can't tell you how many times on a suspected DUI case, I have heard "Well, she blew a 0.0 on the machine, so you have to dismiss this case. What? Drugs? Oh yeah, well she had a prescription. So, you have to dismiss this case."

Really? Since when did having a prescription negate the side effects? Wake up!!! Prescription or not – IT IS STILL DANGEROUS TO DRIVE WHILE IMPAIRED. PERIOD.....

This summer, an article in the *Orange County Register* delved into the problems created by the opioid epidemic for county and municipal governments. In response to the problem, cities in the area have started moving to seek damages from the companies that make and market the drugs. This is to combat fiscal problems following an alarmingly increasing number of emergency calls, hospital visits and homeless issues attributed to opioid abuse.

Once unnamed city, according to the article, hired an area law firm that specializes in drug company litigation to "pursue all civil remedies" against opioid makers, according to the Register article. Several other cities followed suit, and began looking into ways to recover costs.

A reported "several hundred" U.S. cities and more than 20 states are suing Purdue Pharma, according to the article. This company, as well Janssen Pharmaceuticals, is a maker of Oxycontin. According to the suit, the companies are alleged to have made billions of dollars by marketing painkillers to patients with chronic pain and downplaying the risk of addiction.

According to the mayor of the unnamed city, "We've seen a significant uptick in the issues with respect to mental health and addiction" such as overdoses and suicides. "We want to make sure that the costs of these are appropriately borne by those responsible, as opposed to the taxpayers."

According the Register article, citing an Orange County Health Care Agency Report, the rate of opioid related visits to the county emergency rooms more than doubled from 2005 to 2015, from more than 20 visits per 100,000 people to 50 visits per 100,000 people. More than 1,200 county residents died of opioid related overdoses from 2011 to 2015, the report said.

In early summer, Los Angeles announced a lawsuit against nine drug companies in the same month the San Francisco Chronicle reported 30 California counties were filing similar suits. Some of the suits allege opioid makers engaged in false and misleading marketing. One city councilmember claims extra city expenses also include social workers, code enforcement and consultant fees in excess of five million dollars. (Orange Cunty Register.)

One of the legal theories (Common Nuisance) used to attempt financial recovery by an area law firm is the same theory used in litigation against big tobacco companies which resulted in a 1998 settlement. In that settlement, companies were barred from engaging in advertising that targeted youths, limited where and how they could advertise and required to pay states more than $200 Billion over 25 years.

We have a long way to go in this opioid battle, but I would urge everyone to take seriously measures to combat it. One interesting measure is where some cities have begun to initiate "give back" programs for prescription drugs. Drugs that are no longer needed, have expired or for other reasons have been abandoned and left behind are eligible to be placed in "safe drug disposal bins" at area police departments where they can then be disposed of safely. This lowers the risk of children, addicts or other vulnerable parties from finding "Grandpa's old cough medicine" and trying it for a thrill.

Here in Lexington, our officers have been trained in the use of *Narcan*, a nasal spray used to combat opioid overdoses. Narcan is easily administered, and can be an instant life saver. I, myself, have seen this happen on video following a case where one of our newly trained officers received a lifesaving award in an incident where she had to administer Narcan.

I am encouraged that states, municipalities and groups like IMLA are increasingly looking for ways to combat this issue. Frankly, I am more worried that it is happening than the fact that it is very expensive to combat. Let's spend some resources fighting it, instead of just "affording it." But, as with most issues we face in local government, this is easier said than done. Stay tuned...

Back to my old buddy, John. His life didn't end with an opioid overdose or issue, and he did not take his own life. But, apparently, his downfall began with an opioid issue following his injury. Nobody intended for it to happen, but accidents can hurt just as bad as incidents of purpose.

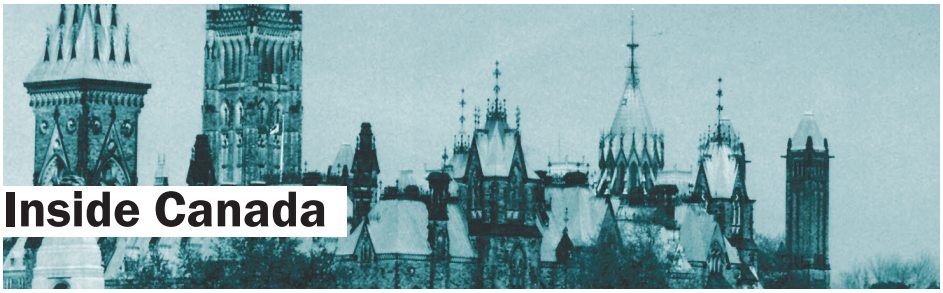
John was a good man, a talented singer, a funny man, and a starting punter on the football team. He had a great wife and wonderful daughter. He lost all of this because of a substance. He didn't intend for it to end this way. And, to be clear, opioids did not actually bring about the end of his life, they only brought about the beginning of the end. The fight for freedom from addiction consumed his life, and took its toll in other health related ways.

Please for heaven's sake, go without that prescription renewal if you can. If you need help stopping, go get it. Properly dispose of medicines that are no longer required, and discuss matters carefully with your doctor when you are prescribed these medications. Get help from a friend if needed, and don't try to do it alone. We are all in this together.

I hadn't intended to write this issue's column on opioids, but after last week I couldn't help but think of any other topic. And, pardon me for departing from my usual practice of ending the column with a joke. I'm not going to do it this time, as it just doesn't seem appropriate. There isn't anything funny about this topic at all.

The prosecution rests, your honor. **ML**





Inside Canada

Appeals Dismissed: Late, Vexatious, and Otherwise Unsuccessful Litigants

By: Monica Ciriello, Assistant Barrister and Solicitor, Middlesex County, Ontario

If You're Going to be Late to Court, Call

City of Winnipeg v. Innocent Vision, Inc., 2018 MBCA 76 http://canlii.ca/t/htltv

The Appellant was charged and convicted for contravening the City of Winnipeg's *Neighborhoods Liveability By-law* for allowing garbage to accumulate on his property and fined $3,700. The Appellant filed a summary conviction appeal and the presiding judge directed the Appellant to file a factum and reappear before the Court the following month. No factum was filed, and the Appellant was not present when his matter was called at 9:00 am; it was stood down until 9:15 am and when he was still not in attendance, Court dismissed the appeal. The Appellant appeared before the Court later in the day; when asked by the Court why he was late the Appellant stated that his sister's ex-husband died had recently died and he also had other garbage cases to attend to. The Court did not change its decision and the Appellant seeks leave to appeal the summary conviction to the Court of Appeal.

HELD: Appeal is dismissed.

DISCUSSION: As stated in *R v. McCorriston (GJ),* 2010 MBCA 3 the criteria for leave to appeal a summary conviction pursuance to subsection 839(1) of *Criminal Code,* RSC 1985, c. C-46 (*Code)* requires the appeal to involve a question of law. Furthermore, even if a question of law exists, leave should only be granted if the question raises an arguable case of substance which is of sufficient importance to the Court. In addition, there should be a compelling reason for such review--One compelling reason would be that the issue raises matters that are of significance to the administration of justice or the development of the law. Subsection 825(b) of the *Criminal Code,* RSC 1985, c C-46 provides the Court jurisdiction to dismiss a summary conviction appeal for failure to appear or want of prosecution:

> **Dismissal for failure to appear or want of prosecution**
> 825. The appeal court may, on proof that notice of an appeal has been given and that
> ...
> (b) the appeal has not been proceeded with or has been abandoned, order that the appeal is dismissed.

Furthermore, the Court has authority to dismiss a summary conviction appeal if a party fails to file the required documents, pursuant to Rule 20.18 of the *Criminal Proceedings Rules of the Manitoba Court of Queen's Bench,* SI/2016-34. Rule 20.18 does not provide for an automatic dismissal of an Appellant's right to appeal a summary conviction. As seen in *R v. Sopko*¸ 1994 CarswellMan 118, an appeal may be granted where the contravention is minor, or there is a satisfactory explanation, or there is limited prejudice to the public interest in the timely finalization. When applying its jurisdiction to dismiss, the Court held that the Appellant had taken no steps to comply with the contravention before the Court. Furthermore, there was no evidence provided to establish that the Appellant was rectifying the garbage accumulation. Finally, the Appellant did not provide a satisfactory explanation and by no means did this matter rise to the level of importance to the administration of justice. Appeal dismissed.

Are Supervisors or the Employer Liable for Discrimination?

Klewchuk v. City of Burnaby and others, 2018 BCHRT 200 http://canlii.ca/t/htltr

An Employee at the City of Burnaby (City) filed a human rights complaint against the City and three immediate supervisors (collectively, Supervisors) alleging discrimination on the basis of an allergy to latex contrary to section 13 of the *Human Rights Code*, RSBC 1996, c 210 (*Code*). The Employee works in various recreation centres located throughout the City, and at times she has been exposed to latex balloons on those premises. In 2007, the Employee informed each of the Supervisors of her allergy and requested that latex balloons stop being used at City recreation centres. She alleges that balloons remained on the premises and that, as a result of her request she received fewer scheduled shifts. The Supervisors sought to have the complaint against them dismissed on the basis that it did not further the purposes of the *Code*.

HELD: Complaint dismissed against Supervisors.

DISCUSSION: Pursuant to subclause 27(1)(d)(ii) the Human Rights Tribunal (Tribunal) has the authority to dismiss all or part of a complaint if proceeding with it would not further the purpose of the *Code.* Despite the authority, the Tribunal must review the facts of the matter in light of two interpretations. First, case law states that the purpose of the Code is to require that individual perpetrators of discrimination are held accountable for their actions, and as a result a complaint against individuals furthers the purpose of the *Code (British Columbia Human Rights Tribunal v. Schrenk,* 2017SCC 62). Second, by

contrast, *Daley v. BC (Ministry of Health) and others,* 2006 BCHRT 341 highlights that naming individuals in a complaint has the potential to cause distress, increase personal animosity and delay any resolution proposed by the Tribunal. The Employee argued that the Supervisors failed to reasonably accommodate her latex allergy. In reviewing the facts, the Tribunal held that the Supervisors were merely doing their job at the City, although it recognized that in doing so it could have resulted in a finding of discrimination. The Tribunal was satisfied that the purpose of the *Code* was better served by dismissing the complaint against the individual Supervisors and that the City would be able to fulfill any remedy that the Tribunal may order.

Turning Back a Vexatious Litigant
Dick v. City of Coquitlam, 2018 BCSC 1402 http://canlii.ca/t/htkqk

For years the Petitioner has submitted applications to the City of Coquitlam (City) to obtain the necessary permits to develop his property. The City denied all applications and permits. There were two separate applications before the Court; New Westminster Registry, Action No. S128222 (128 Action) and Action No. S198971 (198 Action). The Petitioner applied to amend the notice of civil claim regarding the 128 Action. The City applied to have the 198 Action dismissed and a declaration that the Petitioner is a vexatious litigant, and an order that requires the Petitioner to obtain leave of this Court to proceed with any further proceedings with the City.

HELD: Petitioner's matter dismissed, the City's matter granted.

DISCUSSION: In addressing the 128 Action, the Court confirmed this was not the first time that the Petitioner has brought up the matter, which had already been dealt with and dismissed: the Court of Appeal already upheld the dismissal of both the application and the judicial review. As a result, the Court held that 128 Action is over and the Court is *functus officio*.

The Court next turned its attention to the 198 Action–the more recent application filed by the Petitioner. The Petitioner had sought a conservation permit for his property, whereupon the City outlined the deficiencies with the property and advised that it did not meet the City's Conservation Bylaw. The Conservation Bylaw provides the City with discretion to determine whether or not the permit should be issued. To date, there was no evidence before the Court that the deficiencies had been remedied by the Petitioner. The Court held that the 198 Action was disposed of based on *estoppel* and the City's application for summary trial was granted.

As found in *Carten v. Carten*, 2015 BCCA 201, the City provided a non-exhaustive list of principles to support its application that the Petitioner is a vexatious litigant. The Court was satisfied that the principles support the designation in respect to the Petitioner. The City was granted a declaration and an order that the Petitioner shall not institute any further proceedings against the City without further leave of the court, however, the Court declined to expand the required leave of the court to all legal proceedings in the Provincial Court.

No Individualized Duty for Correct Delivery of Trash Bill
2188160 Ontario Limited v. City of Toronto, 2018 ONSC 4653 http://canlii.ca/t/ht7q8

The Appellant, a numbered corporation, owns an apartment building in the City of Toronto (City) that was subject to the City's 2008 by-law amendment that imposed increased fees on all property owners who received solid waste services by the City. Notice of the by-law amendment and increased fees, which were designed to encourage greater recycling efforts, was mailed to the property owner. However, due to an internal error by the City, the Applicant was never billed for the garbage pickup services until August 2010. The City subsequently charged the Appellant fees for the services in the amount of $17,625.48. The Appellant requested an explanation of the charges and sought a credit, claiming that had it been aware of the additional city-imposed costs, Appellant could have contracted with a private trash hauler for approximately $11,000 less than the City's charges. It commenced a small claim action for that amount, submitting that the City had a duty of care to provide accurate account statements on a timely basis, which it breached when failing to provide statements over a 25-month period. Relying on the principles in *Maritime Electric Co. Limited v. General Dairies Limited*, [1937] 1 All E.R. 749 (J.C.P.C) the Deputy Judge held that the Appellant failed to demonstrate that a common law duty of care existed. The Appellant appealed.

HELD: Appeal is dismissed.

DISCUSSION: The Appellant's appeal pursuant to section 31 of the *Courts of Justice Act,* R.S.O. 1990, c. C. 43, suggested that the Deputy Judge erred in finding that Appellant had failed to demonstrate the necessary elements to establish a common law duty of care. The Appellant incorrectly suggested that the City's failure to deliver the accurate statements gave rise to an alleged duty of care.

The Court cited *Williams v. Toronto (City)*, 2016 ONSC 42 to summarize the three requirements that must be satisfied by the Appellant to establish a common law duty of care owed by a City, at para. 61:

> (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficient to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any prima facie duty established by foreseeability and proximity.

In a short analysis the Court concluded that there was no evidence before it indicating that the City had a special or direct "individualized" relationship with the Appellant which would create a common law duty of care to ensure that Appellant actually received the trash pickup notices. It awarded the City costs of $4350 plus HST.

ML



Amicus Corner

Alaska's Spring Break Ends Up at the High Court

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

This time last year, many of us (myself included) speculated that the 2017 Term could be Justice Kennedy's last before retiring. It turns out we were right, and he penned his last majority decision in June 2018 in *South Dakota v. Wayfair*. In the meantime, Judge Kavanaugh, a former Kennedy clerk, is poised to join the Supreme Court bench, possibly by the time the October 2018 Term starts.

Although the 2017 Term looked like it was going to be chock-full of blockbusters, many of the issues in the biggest cases were sidestepped, such as the issue of partisan gerrymandering in *Gill v. Whitford* and *Benisek v. Lamone* and the clash of anti-discrimination laws and the First Amendment in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*. These issues are sure to make their way back to the Court at some point in the near future. In fact, the Justices have already decided they want a do-over on one of the cases they punted on last Term.

The issue in *Nieves v. Bartlett* is whether probable cause defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983. This was precisely the issue presented in *Lozman v. City of Riviera Beach*. However, instead of deciding that issue, the Supreme Court held 8-1 in *Lozman* that under the particular facts of the case involving evidence that a City Council allegedly used its powers to intimidate him, *Lozman* could pursue his claim against the City for an "official municipal policy" of intimidation / retaliation under the First Amendment, even though probable cause existed for his arrest. The *Lozman* case was remanded to the Eleventh Circuit with instructions to apply *Mt. Healthy's* framework to his claim. Under *Mt. Healthy*, a plaintiff establishes speech-based retaliation by demonstrating that the defendants would not have taken the challenged action "but for" their retaliatory motive.

The *Lozman* decision is significant for local governments, but its holding is inapplicable to the torrent of cases involving a police officer's on-the-spot arrest in circumstances that implicate the First Amendment. The Court emphasized that this was a unique case and that there was "little risk of a flood of retaliatory arrest suits against high level policymakers" as a result of its ruling. That will not be the case, however, if the Court decides, when it hears *Nieves* this fall, that probable cause does not defeat a retaliatory arrest claim as a matter of law in most arrest cases.

Lozman actually wasn't the first time the Court had heard argument on this precise issue. The question was also presented in *Reichle v. Howards*, 566 U.S. 658 (2012), but the Court ultimately skipped over the First Amendment question in that case too and instead found in favor of the Secret Service agent on the basis of qualified immunity. Now we are hoping that the third time is the charm, and the Supreme Court will finally decide the issue (hopefully in the officers' favor).

Nieves involves an incident at the "Artic Man" festival, which is a multi-day event centered around high-speed ski and snowmobile races that attracts thousands of people to a remote portion of Alaska every year. Picture "spring break meets extreme skiing in negative ten degrees." To set the scene a bit more, here's Matt White with SB Nation:

> Arctic Man is a weeklong, booze and fossil-fueled Sledneck Revival bookended around the world's craziest ski race... Over the course of a week, something like 10,000 partiers and their snowmachines disgorge onto Camp Isabel's 300-acre pad to drink, grill, fight, drink and, at least while the sun is out, blast their sleds through the ear-deep powder in the surrounding hills one last time before it all melts away. Then on Friday morning, anyone not hopelessly hungover or already drunk by noon swarms up the valley south of camp to watch the damnedest ski race on earth.[1]

What could possibly go wrong, you ask?

Russell Bartlett was attending Arctic Man in 2014. Trooper Nieves encountered him at a large outdoor party where it appeared that minors were drinking, but Bartlett refused to converse with Nieves. Meanwhile, Trooper Weight spotted an underage attendee drinking alcohol and began to speak with the minor. Bartlett, who was intoxicated and weighs 240 lbs, then moved over to Trooper Weight and the minor. The video footage shows that all three individuals were standing very closely together exchanging words and that Bartlett's right hand was roughly at shoulder height and within inches of Trooper Weight.

Trooper Weight, who interpreted Bartlett's actions as hostile and aggressive, "created space for himself" by pushing Bartlett back. Trooper Nieves saw all this and ran over. The troopers subdued Bartlett and he was arrested for disorderly conduct and resisting arrest. Bartlett alleges that after the arrest, Trooper Nieves said: "bet you wish you would have talked to me now."

The prosecutor determined there was probable cause for the arrest, but dismissed the charges against Bartlett for budgetary reasons. Bartlett then brought suit under §1983 claiming excessive force, malicious prosecution, false imprisonment, and retaliatory arrest. The district court found in favor of the officers on all the charges on summary judgment, but the Ninth Circuit reversed on the retaliatory arrest charge.

The Circuit reiterated that within its jurisdiction, a plaintiff can prevail on a retaliatory arrest claim even if the officers

had probable cause to arrest. In this case, because Bartlett alleged that Nieves said: "bet you wish you would have talked to me now," a reasonable jury could have found that the arrest was in retaliation for his refusal to answer questions earlier in the evening and summary judgment was therefore inappropriate.

IMLA filed an amicus brief in the *Lozman* case and will file another one in *Nieves*. We believe a bright line rule is appropriate in this context or else police officers will be paralyzed in making arrests anytime someone exercises any First Amendment rights. It is not hard to think of examples of how challenging arrests would become for police officers if they have to worry about personal liability for First Amendment violations even where probable cause exists to arrest. Protesters who become violent and people at a political rally who violate the law could claim their arrests were in violation of their First Amendment rights. Even making an arrest at a bar fight (or the Arctic Man festival) could become problematic for police officers depending on what is said in the heat of the moment. It's not hard to imagine a situation getting out of hand at the festival in this case if the police officers had hesitated to make an arrest based on worries of personal liability under the First Amendment.

And then there is the example of how easy it would be to manufacture these claims that Chief Justice Roberts gave during the *Reichle* oral argument:

> So, what you have, under your theory, a person should put on his car a bumper sticker that says "I hate the police" and then every time they're pulled over, they will have – certainly a plausible case is you violated my First Amendment rights. It's not because I was going 60 miles an hour; it's because of my bumper sticker...And the police officer – at that point, he says, you know, I can't give a ticket to this guy without being hauled into court on personal liability because he's got a credible case that it was for First Amendment grounds... And then all of a sudden – I don't know why everybody doesn't have a bumper sticker.[2]

IMLA believes a police officer in these situations should not have to balance a potentially amorphous First Amendment test when that officer is making the determination of whether probable cause exists to make an arrest. Further as the *Nieves* case demonstrates, one bare allegation made by a plaintiff in this context is enough to defeat summary judgment, all but ensuring that these claims will always be tried by a jury. If the Court finds in favor of Bartlett in this case, virtually any arrestee will be able to manufacture a First Amendment retaliatory arrest claim.

Even though the Court in *Lozman* and *Reichle* skirted the issue presented in *Nieves,* we have some information to try to forecast the outcome in *Nieves* based on these decisions and how the oral arguments went. Although trying to count Supreme Court votes is always a challenging (and sometimes fruitless) endeavor, we can at the very least count on Justice Thomas' vote as he made it clear in his dissent in *Lozman* that he would have answered the question presented and concluded that the lack of probable cause is a necessary element to pursue a First Amendment retaliatory arrest claim. So, going into *Nieves,* local governments know we have at least one vote.

From there it becomes more of a guessing game. Based on the oral arguments in both cases, it seems likely that Chief Justice Roberts and Justice Alito would both likely agree with Justice Thomas. Each of them had concerns that there were not adequate protections in place to prevent law enforcement officers from being dragged into court on frivolous claims. One could surmise that Justice Gorsuch might agree as would perhaps Judge Kavanaugh, assuming he is confirmed in time to hear the case. Those guesses are based purely on inferences about the Justices' ideology and pro-law enforcement / qualified immunity decisions they have authored.[3]

During the *Lozman* oral argument, Justice Kennedy and Justice Breyer were both concerned about the impact of retaliatory arrest liability on law enforcement during protests or bar fights. Specifically, Justice Breyer stated during the *Lozman* oral argument:

> Of course, your case is quite different from what's worrying me and what's worrying me and I think Justice Kennedy perhaps, and that is imagine a serious riot situation. They exist. And in that riot situation, where the police have a problem because there's a sub-gang and the sub-gang is going around breaking windows and setting fire to things, they can't arrest everybody in the sub-gang. There are too many of them. Okay? So it's not going to be true that the Mt. Healthy 'it would have happened anyway,' works because it doesn't work... There are six members of the gang and four policemen with affidavits saying we could only arrest four people. Then we have seven more affidavits which say, I saw the look on that policeman's face as soon as we called him a pig. All right? And I am certain that he would never have arrested this person for – who after all was just lighting a match. He might have had a cigarette. And – and I'm certain he wouldn't have arrested him had it not been for the words that he heard. And the policeman had to make a split-second decision, and I don't know. Now that's a – that's the subset that he means, I think, by a bar. Okay? So is there some words in this opinion that would favor you hypothetically that would wall off that case from decision now?[4]

Based on the foregoing, it might seem Justice Breyer will be on the police officers' side. However, we cannot fully count on his vote (and Justice Kennedy will no longer be on the bench), because in *Reichel,* Justice Breyer seemed more concerned about the fact that police officers can easily manufacture probable cause to arrest for any number of things (like jaywalking or speeding) even if the real motivation was retaliatory animus. In fact, in *Reichel,* Justice Breyer joined Justice Ginsburg's concurrence, noting that in her view a "no-probable cause requirement would be inapplicable." *See Reichel,* 566 U.S. at 671 (Ginsburg, J. concurring). Said another way, Justices Ginsburg and Breyer believe that even where probable cause exists, a First Amendment retaliation claim is not necessarily precluded. In *Reichel,* Justice Ginsburg went on to say that that she nevertheless concurred in the judgment because "officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy." *Id.*

Based on his comments at oral argument and his concurrence in *Reichel,* it seems likely that Justice Breyer and perhaps some of the other more liberal Justices would like to find a middle ground. Where in "serious" situations

continued on page 39

had struck his upper body. There was no evidence that any of Trooper Mullenix's shots hit the car's radiator, hood, or engine block. The estate sued Trooper Mullenix under 42 U.S.C. § 1983, alleging that he had violated the Fourth Amendment by using excessive force against Mr. Leija.

The District Court denied Mullenix's motion for summary judgment, finding that there were genuine issues of fact as to whether or not he acted recklessly or unreasonably, and denied qualified immunity. The Fifth Circuit Court of Appeals affirmed, agreeing with the District Court that the immediacy of the risk posed by Mr. Leija was a disputed fact, and that this factual issue precluded the court from reaching a conclusion as to whether or not Mullenix acted objectively reasonably as a matter of law. The Fifth Circuit denied a Motion to Rehear En Banc. The Supreme Court addressed only the qualified immunity question, and reversed the Fifth Circuit.

3. Significant aspects of decision:

- The Court noted that the Fifth Circuit held that "Mullenix violated the clearly established rule that a police officer may not 'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.' 773 F. 3d, at 725. Yet this Court has previously considered – and rejected – almost that exact formulation of the qualified immunity question in the Fourth Amendment context. In *Brosseau*, which also involved the shooting of a suspect fleeing by car, the Ninth Circuit denied qualified immunity on the ground that the officer had violated the clearly established rule, set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985), that 'deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' *Haugen v. Brosseau*, 339 F. 3d 857, 873 (CA9 2003) (internal quotation marks omitted). The Court summarily reversed, holding that use of *Garner's* "general" test for excessive force was "mistaken." *Brosseau*, 543 U.S., at 199. The correct inquiry, the Court explained, was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the 'situation [she] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicle flight, when persons in the immediate area are at risk from that flight.' *Id.*, at 199-200. The Court considered three court of appeals cases discussed by the parties, noted that 'this area is one in which the result depends very much on the facts of each case,' and concluded that the officer was entitled to qualified immunity because '[n]one of [the cases] *squarely governs* the case here.' *Id.*, at 201 (emphasis added)." (577 U.S. _____) (Slip op. at pp. 5 and 6).

- The Court reminded that "*Anderson v. Creighton*, 483 U.S. 635 (1987), is also instructive on the required degree of specificity. There, the lower court had denied qualified immunity based on the clearly established 'right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances.' *Id.*, at 640. This Court faulted that formulation for failing to address the actual question at issue: whether 'the circumstances with which Anderson was confronted . . . constitute[d] probable cause and exigent circumstances.' *Id.*, at 64-641. Without answering that question, the Court explained, the conclusion that Anderson's search was objectively unreasonable did not 'follow immediately' from – and thus was not clearly established by – the principle that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment. *Id.*, at 641. "(577 U.S. _____) (Slip op. at pp. 6 and 7).

- The Court held that "[f]ar from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted." (577 U.S. _____) (Slip op. at p. 7).

- The Court held that it had "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity. . . . [and that] none of our precedents 'squarely governs' the facts here. Given Leija's conduct, we cannot say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have perceived a sufficient threat and acted as Mullenix did. *Malley*, 475 U.S., at 341." (577 U.S. _____) (Slip op. at p. 8).

- The Court stated that the "dissent can cite no case from this Court denying qualified immunity because officers entitled to terminate a high speed chase selected one dangerous alternative over another." (577 U.S. _____) (Slip op. at p. 9).

- The Court held that Fifth Circuit caselaw did not "clearly dictate the conclusion that Mullenix was unjustified in perceiving grave danger and responding accordingly, given that Leija was speeding towards a confrontation with officers he had threatened to kill." (577 U.S. _____) (Slip op. at p. 10).

- The Court concluded that "[t]he fact is that when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards Officer Ducheneaux's position. Even accepting that these circumstances fall somewhere between the two sets of cases respondents discuss, qualified immunity protects actions in the 'hazy border between excessive and acceptable force.' *Brosseau, supra*, at 201 (quoting *Saucier*, 533 U.S., at 206; some internal quotation marks omitted)." (577 U.S. _____) (Slip op. at p. 12).

4. Constitutional right clarified? The Supreme Court only addressed the qualified immunity issue, so it did not take on the Fourth Amendment seizure issue addressed by the lower courts. However, the Court discussed the issue of whether a police officer may "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officers or others," and reminded that in *Brosseau*, it had "previously considered – and rejected – almost that exact formulation of the qualified immunity question in the Fourth Amendment context, " and that the Court had already clarified in that case that the "correct inquiry . . . was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the 'situation [she] confronted':

whether to shoot a disturbed felon, set on avoiding capture through vehicle flight, when persons in the immediate area are at risk from that flight.'"

F. White v. Pauly, 580 U.S. _____ (2017) (per curiam)

1. **Lower court and decision date:** This case was decided on January 9, 2017, on appeal from the Tenth Circuit. The Supreme Court issued a per curiam decision overturning the decisions of both lower courts, which had denied Officer White qualified immunity.

2. **Summary of facts:** This case stemmed from a road-rage incident which occurred on a highway near Santa Fe, New Mexico in October of 2011. Motorists reported what appeared to be drunk driving and road rage behavior and provided the responding officers with a license plate number. That license plate number led officers to the address for Daniel and Samual Pauly. Upon arrival at their home, there was some verbal interaction between the two responding officers and the two Pauly brothers. Officer White also responded to the Pauly brothers' home, arriving just as one of the brothers said "we have guns." (580 U.S. ___) (Slip op. p. 3) The officers took up defensive positions around the house. One brother fired shotgun blasts out the back door, while another aimed a handgun in Officer White's direction. White shot and killed Samuel Pauly.

   The District Court denied Officer White qualified immunity. A divided panel of the Court of Appeals for the Tenth Circuit affirmed. The Supreme Court vacated and remanded.

3. **Significant aspects of decision:**

- The Court held that the case concerned qualified immunity, and so it would consider "only the facts that were knowable to the defendant officers." (580 U.S. ___) (Slip op. p. 3) (citing *Kingsley*)
- The Court suggested that the Tenth Circuit panel majority properly analyzed Officer White's claim separately from claims against the two other officers, because Officer White did not participate in the events leading up to the armed confrontation, nor was he there to hear the other officers ordering the Pauly brothers to come out of the house. (580 U.S. ___) (Slip op. p. 4)
- Despite the fact that White arrived on scene and heard only the "we-have-guns" statement before he took cover, the Circuit concluded that White's use of deadly force was not reasonable, because the "rule" that "a reasonable officer in White's position would believe that a warning was required despite the threat of serious harm – was clearly established at the time of Samuel's death," (580 U.S. ___) (Slip op. p. 4) and Officer White did not give such a warning. (*Id.*, pp. 4-5).

- The Court reminded that while its previous decisions do not require a case directly on point for a right to be "clearly established," "existing precedent" must have placed the statutory or constitutional question beyond debate." (580 U.S. ___) (Slip op. p. 6).

- The Supreme Court chastised the Tenth Circuit by noting that "[t]oday, it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.' . . .[a]s this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. . .. [o]therwise, '[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violations of extremely abstract rights.'" (580 U.S. ____ (Slip op. p. 6) (citations omitted)

- The Court held that the panel majority misunderstood the "clearly established" analysis, because it "failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment. Instead, the majority relied on *Graham*, *Garner*, and their Court of Appeals progeny, which – as noted above – lay out excessive-force principles at only a general level." (580 U.S. ____) (Slip op. pp. 6-7) The Court reminded that neither *Garner* nor *Graham* by themselves create "clearly established" law outside "an obvious case." (580 U.S. _____) (Slip op. p. 7)

- The Court held that this "is not a case where it is obvious that there was a violation of clearly established law under *Garner* and *Graham*. Of note, the majority did not conclude that [Officer] White's conduct – such as his failure to shout a warning – constituted a run-of-the-mill Fourth Amendment violation. Indeed, it recognized that 'this case presents a unique set of facts and circumstances' in light of [Officer] White's late arrival on the scene. (814 F.3d, at 1077). This alone should have been an important indication to the majority that [Officer] White's conduct did not violate a 'clearly established' right. Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one [Officer] White confronted here." (580 U.S. at _____) (Slip op. p. 7).

- The Court also noted that there was a question as to whether, in light of its holding in this case, the other two officers were entitled to qualified immunity as well. (580 U.S. _____) (Slip op. p. 8). (On remand, the Court of Appeals held that Officers White, Truesdale, and Mariscol were each entitled to qualified immunity, and dismissed the claims against them. (*Pauly v. White*, ____ Fed. 3d ____ (10th Cir. 2017) (decided October 31, 2017)).

4. **Constitutional Right Clarified?** As described above, the Court determined that this case presented a unique set of circumstances not squarely addressed by caselaw, and that therefore, Officer White was entitled to qualified immunity. The Court noted that '[c]learly established federal caselaw does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed."

Conclusion

Although some recent undercurrents seem to advocate narrowing the scope of qualified immunity, it continues to provide a vital defense to municipal actors who have not violated "clearly established" rights. In defending the actions of their local government constituents, municipal lawyers should not hesitate to seek qualified immunity and remain aware of its parameters as applicable to the specific facts confronting them.

ML



Cases

"Only the Plainly Incompetent"-A Federal Judge Takes Qualified Immunity to Task

By IMLA Editorial Staff

"What shall a 'good citizen,' or a 'good police officer,' do when the United States Constitution tells them one thing and their common sense another?" So began the opinion by federal Senior Judge Jack Weinstein of New York's Eastern District earlier this summer in in . The citizen in this instance was Larry Thompson (Thompson), a US Navy veteran, a Post Office supervisor, and a married father of two with a good reputation. In January 2014, his sister in law, Camille Watson (Watson) called 911 to report that Thompson was abusing his two-week old daughter. EMTs arrived. Watson provided no additional corroboration other than to say that she had seen red rashes on her niece's buttocks; to the responders she seemed "strange" and perhaps had "a learning disability." She led them "upstairs" to Thompson's Brooklyn apartment, but he would not let them in, so police were summoned.

The EMTs informed the officers that they had a "report of a child being abused" and they needed to "check the baby out." Police knocked on Thompson's door and requested entry; he responded "[n]ot without a search warrant. I don't agree to you[] coming in without one." Thomson alleges that when officers attempted to enter and he blocked their path, he was knocked to the floor, choked, kicked and punched while handcuffs were applied. The EMTs took the child to a hospital, where the red marks were determined to be diaper rashes.

Thompson was transported to the precinct house, then to a hospital where he was prescribed pain medication and a neck brace. He was held in custody for two days, during which he was arraigned on charges of Obstructing Governmental Administration and Resisting Arrest. He was never charged with child abuse, and all charges were dismissed on motion of the Brooklyn District Attorney.

He sued the officers for: (1) unlawful entry; (2) false arrest; (3) excessive force; (4) malicious prosecution; (5) denial of right to a fair trial; (6) failure to intervene; and (7) denial of medical treatment. Refusing qualified immunity, Judge Weinstein denied the officers' summary judgment motions and ordered that the first six claims proceed to trial:

> Qualified immunity is denied. Its grant, in the instant case, would be inconsistent with the purpose of 42 U.S.C. § 1983. "[Section] 1983 was [created] to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." Courts should be encouraged and "allowed to play their historic role as the guardians of constitutional rights, not prohibited from doing so by a judiciary that elevates its concern for comity above the constitutional rights to which all persons are entitled." The courts, police, and public, will benefit from a clarifying jury decision in this often replicated situation. (citations omitted).

Weinstein's opinion would be relatively unremarkable but for its extended critique of the current Supreme Court interpretation of qualified immunity, and his own explication of the principle. He notes that the doctrine "has recently come under attack as over-protective of police and at odds with the original purpose of section 1983: 'to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.'"

Stating that "the Court's expansion of immunity, specifically in excessive force cases, is particularly troubling," he cites a critic who pointed to the recent *Kisela* decision.

> The Supreme Court's decision [in Kisela v. Hughes, 138 S. Ct. 1148 (2018)] serves to expand qualified immunity for police officers to an unprecedented and dangerous degree, becoming, as Justice Sotomayor aptly noted in her dissent, 'an absolute shield for law enforcement officers' and 'gutting the deterrent effect of the Fourth Amendment.' As the nation continues to mourn the recent deaths of [citizens] at the hands of police, we remain concerned that this ruling will undermine efforts to hold law enforcement officers accountable for their use of excessive force, which has led to the tragic loss of too many innocent lives.

He cites more of Justice Sotomayor's dissent in *Kisela*: "This decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells . . . the public [and officers] that palpably unreasonable conduct will go unpunished." As the Judge articulated (and as thoroughly discussed in our feature on the doctrine in this issue, qualified immunity shields "all but the plainly incompetent." Police officers are immune from liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

He faults the *Harlow* decision as the beginning of retreat from a defensible posture. While *Harlow* noted that "[Q]ualified immunity would [traditionally] be defeated if an official . . . took the action with the malicious intention to cause a deprivation of constitutional rights or other injury," that opinion expanded immunity to any conduct that is not in violation of a "clearly established" law, regardless of whether the official acted in good or bad faith. "The change in the law means that even officers who intentionally or maliciously flout the Fourth Amendment are immune from suit if their actions were "objectively reasonable."

Weinstein's main criticism is with the sequence in which qualified immunity is now examined:

> *Saucier v. Katz,* 533 U.S. 194 (2001) required district courts to first determine whether a constitutional violation had occurred, and if so, proceed to determine whether the law was "clearly established" at the time. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) rejected *Saucier*, allowing courts to grant qualified immunity without

> analyzing whether or not a constitutional violation had occurred, but solely on the finding that the right at issue was not "clearly established." If the law is not "clearly established," an officer's actions, the Court assumes, can only be reasonable. This approach has led to decisions like *Mullenix*, where the Court declined to address the question of whether a plaintiff's constitutional rights were violated, but decided only if the right was "clearly established."

He references with respect the standard originally expressed in *Hope v. Pelzer*, 536 U.S. 730 (2002), which called for defining "clearly established law" at a "high level of generality;" the key inquiry being whether officers are on "notice their conduct is lawful." In *Hope*, the Court overruled the Eleventh Circuit, finding that officers had fair warning that shackling a prisoner to a post for seven hours in a standing position with only two water breaks and no opportunity to use the facilities violated his constitutional rights. Butr the "high level of generality" standard was short-lived: in *Ashcroft v. al-Kidd*, Justice Scalia inserted the word "every" in the operative sentence, so that the new rule of law became that a right is clearly established only when "[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right." (emphasis added).

As Weinstein sees it, the failure to address whether an act is constitutional prevents the creation of "clearly established" law needed to guide law enforcement and courts on narrow issues not yet decided by the Supreme Court, as indicated in this cite from a Michigan Law Review article: "At a time in which it is vital for constitutional law to keep pace with changes in technology, social norms, and political practices, this trend toward granting immunity while failing to articulate constitutional rights will surely have far-reaching, negative repercussions. (Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity,* 113 Mich. L. Rev. 1219, 1250 (2015).

The Supreme Court's policy justifications for qualified immunity, says Weinstein, have evolved over time, but always in the background is the threat of financial cost to government officials. While individuals appear to be at risk, in reality, individual police officers are virtually always indemnified by governmental treasuries. If the immunity springs from a more generalized desire to avoid "unnecessary litigation," that too is suspect: Weinstein cites sources positing that qualified immunity actually may *increase* the costs and delays associated with Section 1983 litigation—he points to a report which found that although only 3.9% of 979 cases studied presented facts in which qualified immunity could be raised, the defense was in fact raised by defendants in more than 37% of these cases–and was sometimes raised multiple times, at the motion to dismiss stage, at summary judgment, and through interlocutory appeals.

He also cites empirical evidence refuting the theory that the time and expense of litigating qualified immunity cases is worthwhile because it protects defendants from discovery and trial:

> But in the five districts in my study, just 8.6% of qualified immunity motions brought by defendants in my docket dataset resulted in case dismissals. The remaining 91.4% of qualified immunity motions brought by defendants required the parties and judges to dedicate time and resources to briefing, arguing, and deciding the motions without shielding defendants from discovery and trial. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 60–61 (2017).

That study found that, even in cases when immunity was granted, it was most often done at summary judgment stage, failing to avoid litigation due to the extensive fact discovery required to litigate a motion for summary judgment.

This is an unacceptable situation for Weinstein. "The Supreme Court's recent emphasis on shielding public officials and federal and local law enforcement means many individuals who suffer a constitutional deprivation will have no redress; state governments are protected by sovereign immunity and municipalities are not liable under *Monell* unless individual liability can be first proven. See, e.g., *Cordero v. City of New York*, 282 F. Supp. 3d 549, 557 (E.D.N.Y. 2017). His solution? "Courts should, when reasonable, follow Saucier's guidance to first analyze whether a constitutional violation occurred, instead of skipping to whether the right at issue was "'clearly established.'"

Applying the law to the facts before him, Weinstein declined to find grounds for qualified immunity, allowing six of the seven counts to go to trial. That proceeding began on September 4, 2018, and will no doubt be followed with interest. ML

Amicus Corner Cont'd from page 35

(in *Lozman* Justice Kagan asked whether the rule should apply to "serious" crimes or felonies) there would be a rule that says probable cause bars a First Amendment retaliation claim; however in less serious cases, perhaps these Justices would allow the suit to go forward even if the officer had probable cause to arrest if there was evidence of retaliatory animus.

Based on all of this, the best case scenario is that there are five votes that would conclude that the probable cause precludes retaliatory arrest claims as a matter of law. However, if the Court is looking for a compromise, it may find in favor of the officers, but fashion a rule that does not totally preclude these cases from going forward in a situation where probable cause to arrest exists. Specifically, the Justices could try to carve out the bar fight or riot / protest examples from less serious arrests. Of course, we won't know for sure until the Court issues its decision, which will be sometime before June 2019.

1. Matt White, Arctic Man: Wild Rides and Crazed Nights at America's Most Extreme Ski Race, SB Nation, July 23, 2014, available at: https://www.sbnation.com/longform/2014/7/23/5923357/arctic-man-alaska-ski-race-profile. The race itself involves a skier barreling down a mountain and linking up with a snowmobiler by grabbing a tow rope (think water skiing) and then speeding behind the snowmobile at 90 mph. To watch a short 2-minute video about the festival, click here: https://www.youtube.com/watch?v=xA8RxM31OzU

2. *See Reichle v. Howards* 566 U.S. 658 (2012), oral argument transcript, available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/11-262.pdf

3. Judge Kavanaugh authored a dissent from the denial of rehearing en banc in *District of Columbia v. Wesby.* In his dissent from denial, he argued the officers should have been granted qualified immunity, making some of the same types of arguments the Chief Justice seems concerned about in terms of personal liability for officers for civil rights claims.

4. *See Lozman v. City of Riviera Beach,* oral argument transcript, available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-21_67ip.pdf ML

International Municipal
Lawyers Association
51 Monroe Street Suite 404
Rockville, Maryland 20850

Nonprofit Organization
U.S. Postage
PAID
WEST

Codification Services
powered by MunicodeNEXT
municode LEGAL

Online hosting
Codification
Supplementation
enCodePlus Zoning Solutions

Government Websites
powered by aHa! Consulting
municode WEB

Stunning design
Outstanding customer support
Easy for citizens and staff
Rich suite of features

Online Payments
powered by Revalocity
municode PAY

Reduce costs
Streamline all payment processing
Improve operational efficiency
Traditional bill printing



Municode has proudly served America's municipalities for over 65 years.

We've done so with a tradition of providing outstanding service and cutting edge solutions for the future. That's how we fulfill our committment to helping our country's towns, cities, and villages realize their full potential while serving their citizens proudly.

municode
Connecting you and your citizens

Talk to us today
800·262·2633
municode.com