Kendall, who had signed the petition, brought a Section 1983 action claiming that the County and its officials, "in interpreting the signature requirements as they did," totally and completely disenfranchised the signatories in violation of the First and Fourteenth Amendments. The defendants asserted the complaint failed to state a claim upon which relief could be granted and the district court agreed, dismissing the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). A plaintiff pursuing a Section 1983 claim was required to plead that the defendants unlawfully deprived him of a right secured by the Constitution and laws of the United States. The court ruled that, while federal law did secure, in a limited sense, the right to referendum, and that the right to vote was fundamental, the state-conferred privilege to undertake ballot initiatives and referenda was not. Such right, also, was permissibly subject to non-discriminatory and content-neutral limitations. The state law, as construed in *Doe* and applied to Kendall, contained only nondiscriminatory, content-neutral regulations, and the statute imposed no unconstitutional restraints on Kendall's ability to petition for a referendum. Dismissal was also appropriate as to his remaining claims (alleging a denial of equal protection of the laws, substantive due process and procedural due process violations).

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed, finding that Maryland Code provision § 6–203 did not violate Kendall's right to freely associate, his right to petition the government, his right to vote, or his First Amendment right to engage in politically protected speech. "We agree with the district court's conclusion that there is no fundamental right to initiate legislation as there is a fundamental right to vote," and signing a petition to initiate legislation was not entitled to the same protection as exercising the right to vote. A state could validly establish non-discriminatory and content-neutral limitations on any referendum or initiative procedure, and, when analyzing state-created restrictions that met these requirements, the state's "important regulatory interests" in maintaining the integrity and fairness of its referendum process were "generally sufficient to justify the restrictions."

There was no denial of equal protection in applying Section 6–203 to Kendall's signature, as there was a rational relationship between separating those signatures which met Section 6–203's requirements from those which did not and the legitimate governmental purpose of detecting fraudulent or otherwise improper signatures upon a referendum petition. Kendall had failed to state a claim that his rights to substantive and procedural due process had been violated. *Kendall v. Balcerzak*, No. 09-2304, 2011 WL 1108257 (4th Cir. March 28, 2011).

First Amendment

Counter-Protesters' Rights

Michael Marcavage was an "open-air" preacher of evangelical Christian principles on the streets of Philadelphia. He and his group, "Repent America," attended gay pride events, held in public parks and streets pursuant to city permits, to condemn homosexuality and encourage the participants to abandon homosexual behavior. Marcavage and his group would preach to a crowd that reacted strongly to his message by shouting at, debating with, trying to surround, and getting physically close to, Marcavage and the others, and the police would relocate Marcavage and his group to the periphery or perimeter of the event. In one incident at City Hall, Marcavage was moved because the crowd was getting upset and the police advised they could not protect him. Marcavage was moved from the middle of the crowd to the outskirts. From their new locations, Marcavage and his group were still allowed to preach to the crowd with amplified sound, speak with participants passing by, hand out leaflets, and carry large signs. When the Marcavage group disobeyed a police directive to move to a less disruptive location, they were arrested.

In another incident, after a shoving match between one of Marcavage's group members and an event attendee, police physically removed the group member from the march and onto the sidewalk. When Marcavage objected, an officer allegedly grabbed Marcavage by the shoulder and physically moved him approximately five feet from the street onto the sidewalk. When Marcavage turned on his video camera, he alleged that an officer placed him in a choke-hold and a short (ten-second) scuffle ensued.

Marcavage initiated a Section 1983 lawsuit against the City of Philadelphia and various police officers as individual defendants, alleging a violation of his civil rights. He claimed that by restricting his movements on public sidewalks at gay pride events, the defendants employed a policy, custom, or practice that violated his First Amendment rights to free speech and free exercise of religion. He claimed that the incidents where officers physically restrained him violated his Fourth Amendment rights and amounted to excessive force. He also alleged a violation of his Fourteenth Amendment right to equal protection under the law, as he claimed he had been treated differently than the gay pride attendees because his movement was restricted, while theirs was not. The City and other defendants applied for summary judgment on the basis that there was no genuine issue of material fact and they were entitled to judgment as a matter of law.

The district court granted the motion for all counts. Open-air religious preaching was speech that was protected by the First Amendment, and all four incidents occurred at locations that qualified as public forums. However, the free speech claim failed because the defendants' actions were content neutral (not aimed at suppressing the plaintiff's message), the relocations were a "narrowly tailored" means of ensuring public order and safety, and the plaintiff was left with alternative adequate channels of communication at the site of his relocation. "Marcavage does not have a First Amendment right without limits and the City has a legitimate interest in preventing Marcavage—as a counter-protestor of a permitted event—from interfering with the message of the permit holder and ensuring the safety of both the participants as well as Marcavage and his group." Based on the valid permitting scheme, the defendants "had authority to reasonably remove, relocate, or exclude counter-protestors" from permitted events. Dealing with

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the physical interactions between the police and the group, the court held that while the grabbing was a "seizure" under the Fourth Amendment, it was not unreasonable and was minimal in scope. There was a reasonable articuable suspicion that a group member was involved in an unlawful act because he was involved in a physical altercation with a march participant, and, when Marcavage approached the group and started arguing with police, the police could reasonably stop Marcavage as well, if for no other reason than to control the situation. The amount of force used (including the "loose choke-hold") was not unreasonable: the force was minimal and "reasonably necessary to protect the [officers'] personal safety and to maintain the status quo." Last, on the equal protection claim, the defendants had a rational basis for treating Marcavage differently "because he was a counter-protestor whose interactions with the participants during the four incidents ... created public safety concerns. For his safety and for the preservation of the expressive activity of others, as a counter-protester, Marcavage's movement may be limited to serve a significant government interest." *Marcavage v. City of Philadelphia*, No. 09–2477, 2011 WL 1196465 (E.D. Pa. March 31, 2011).

Retaliation – Policymaking Whistleblower

Bardzik was a lieutenant in the Orange County Sheriff's Department under the command of Sheriff Carona. Carona appointed Bardzik to the "prestigious" position of Reserve Division Commander, in charge of over 600 reserve officers. As such, because his supervisor was largely absent from the Department, Bardzik often reported directly to Carona. Bardzik disagreed with Carona over some things (e.g., that Carona allegedly appointed political allies to assistant sheriff positions as favors) and in 2005, he supported Carona's opponent in the 2006 Sheriff's election. When this became known, Bardzik was told, on Carona's instructions, that he should "resign from law enforcement." He was transferred to a position that was largely regarded as a dead-end job, which involved less responsibility and less possibility for overtime pay. Carona allegedly continued to retaliate against him: he was denied a pay raise and the chance to apply for better positions, his reviews were less positive, and two internal investigations, found to be unmerited, were instigated against him. Bardzik filed a Section 1983 suit against Carona, claiming retaliation in violation of his rights under the First Amendment. Carona moved for summary judgment, arguing that he was permitted to retaliate against Bardzik for his political activities because Bardzik was a "policymaker" under *Branti v. Finkel*, 445 U.S. 507 (1980), or, at the very least, that Carona was entitled to qualified immunity for his actions. Carona argued that Bardzik was a policymaker as a Reserve Division Commander and because Bardzik proposed and implemented large policy changes in the Reserve Division. The district court denied Carona's motion, finding that Bardzik was not a policymaker. Carona appealed.

The U.S. Court of Appeals for the Ninth Circuit affirmed, in part, and reversed, in part. Carona was entitled to qualified immunity for his actions retaliating against Bardzik while Bardzik was the Reserve Division Commander because Bardzik was a policymaker in that position. However, Carona was not entitled to qualified immunity for any further retaliatory action against Bardzik once Bardzik was transferred to the other position, as under clearly established law, Bardzik was not a policymaker in that job. In general, an elected official could not fire or retaliate against an employee for his political opinions, memberships, or activities, subject to a "policymaker exception" created by the U.S. Supreme Court. This recognized that an elected official had to be able to appoint some high-level, personally and politically loyal, officials to help implement the policies that the public voted for. This permitted so-called "patronage dismissals."

Based on an analysis of his duties (his broad responsibilities, influence on Department programs, frequent and meaningful contact with the elected Sheriff, his skilled leadership role and power to control others), Bardzik occupied a policymaking position as the Reserve Division Commander. Carona was entitled to qualified immunity for demoting him in retaliation for supporting Carona's opponent in the election. The fact that Bardzik may have been acting as a whistleblower was immaterial: "We have never held that an official cannot fire a politically disloyal policymaker because the policymaker has accused the official of corruption." Carona was not entitled to qualified immunity after Bardzik was transferred, because it was clear that he was not a policymaker in his new position, and a reasonable official would have known that. *Bardzik v. County of Orange*, 635 F.3d 1138 (9th Cir. 2011).

Land Use and Zoning

Takings

The County of Santa Fe, New Mexico passed an ordinance requiring affordable housing in new subdivisions. Developers seeking to subdivide land in designated areas had to develop and sell a certain percentage of the lots as affordable housing. These units, which could amount to as much as 30 percent of a development, had to be sold to qualified buyers at prices not to exceed certain maximums. If an affordable housing unit was resold within ten years, the difference between the price paid by the qualified buyer and the resale price was divided between the buyer-reseller and the County. The County's portion of the proceeds was set aside in a trust fund, used to pay for affordable housing. Under the ordinance, developers meeting its conditions were provided with a waiver of certain development fees and a density bonus, which allowed the developers to build more homes in a given area. Developers could seek a waiver of the ordinance's requirements by demonstrating hardship or, in lieu of compliance with the affordable housing requirement, could pay a fee to the County.

Alto Eldorado and other developers challenged the ordinance as unconstitutional, alleging that it effectuated a taking of property and violated their equal protection and due process rights. The County moved to dismiss the complaint for lack of jurisdiction because the claims were not ripe for judicial review, and for failure to state a claim upon which relief could be granted. The district court concluded the developers had standing because they alleged they owned property subject to the ordinance, and their plans to develop those properties were impacted by the ordinance. However, it dismissed