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

the complaint, finding that the developers' takings claim was not ripe, and that the other constitutional claims rested on the same factual foundation and, therefore, were also unripe. The developers appealed.

The U.S. Court of Appeals for the Tenth Circuit affirmed, finding that the takings claim was not ripe, and that the interference with property rights did not constitute a physical per se taking where the regulatory action was a restriction on how developers could use their land should they choose to subdivide it, or payment of a fee in lieu. Applying the ripeness test in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985), the court noted that it was uncontested that the developers had not sought compensation by bringing an inverse condemnation action under state law, and rejected the argument that *Williamson County* did not apply to facial challenges where injunctive relief was sought. The claim the developers brought was not a facial claim challenging the validity of the regulation itself (the complaint was not that the ordinance did not substantially advance a legitimate state interest, but that it failed to provide just compensation). Waiver of *Williamson County* requirements was appropriate in the first instance because no amount of compensation would alter the outcome of a claim that the regulatory action exceeded the scope of government authority. Courts considering claims alleging a regulatory taking without just compensation, even when characterized as facial claims, had applied the second *Williamson County* requirement, and the claim here was unripe because the developers did not utilize the available state procedure to seek compensation for the alleged taking, as required. Addressing the second line of argument advanced by the developers, the court held that neither *Nollan* nor *Dolan* featured a discussion of the ripeness analysis in *Williamson County* and, thus, could not "be the source to create a new breed of facial challenges that [could] be brought in federal court without regard to the *Nollan* requirements." *Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170 (10th Cir. 2011).

Personnel and Employment

Calculation of FLSA Offsets

The plaintiffs were employees of the City of Lowell, Massachusetts, and members of a union. The collective bargaining agreement (CBA) established the terms and conditions of employment and provided for three pay augmentations: employees could receive a $3.00/hour augmentation to their pay for plowing snow, a 5% differential for working undesirable night shifts, and a $150 weekly "standby" payment for employees at a water distribution system. The CBA also allowed employees to earn overtime pay of one-and-one-half times their regular pay if they worked in excess of eight hours in one day, or 40 hours in one week. The crux of this dispute was whether the three pay augmentations had to be included in the employees' regular rate of pay for the purpose of calculating overtime wages and, if so, how the City was permitted to "net out" those augmentations against other "premiums" paid to employees beyond the requirements of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207 *et seq*.

The plaintiffs claimed that the City was under-calculating the "regular rate" of pay used to determine overtime wages. More specifically, section 207(h)(2) of the FLSA provided that: "[e]xtra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section." The parties did not dispute that the extra compensation provided for in the CBA fell within the compensation described in subsection (5), (6) and (7), and could be used to offset the City's underpayment, pursuant to § 207(h)(2). What was in dispute was whether premium compensation earned in one week could be used to offset an underpayment in a different week. The plaintiffs argued that their damages for unpaid overtime should be calculated on a work-week basis, and that any offsets pursuant to § 207(h)(2) could only be attributed to the singular work-weeks in which the premiums and overtime were earned. Accordingly, an underpayment one week could not be offset by a premium payment made in a different week. The City, however, argued that it was entitled to a "cumulative offset," consisting of all premium payments, against any FLSA overtime it owed, regardless of when the premium payments were earned or made. The FLSA did not expressly address this, and the circuit courts of appeal were divided on the issue.

The district court held that, based on the purpose of the FLSA and its interpretation by the Department of Labor (DOL), and the First Circuit's language in *O'Brien v. Town of Agawam*, 350 F.3d 279, 289 (1st Cir. 2003), § 207(h)(2) offsets should be calculated on a work-week, and not cumulative, basis. The FLSA overtime requirement used a single work-week as its basic unit of measurement (29 U.S.C. § 207(a)(1)), and the "focus on the unitary workweek [was] prevalent throughout § 207 and the DOL's interpretation of that section." Similarly, 29 C.F.R. § 778.104 provided that "[t]he Act takes a single workweek as its standard" and that cumulative offsets were not contemplated. "[P]erhaps most importantly, the DOL [had] also issued an opinion letter stating that 'surplus overtime premium payments, which may be credited against overtime pay pursuant to section 7(h) of FLSA, may not be carried forward or applied retroactively to satisfy an employer's overtime pay obligation in future or past pay periods.'" The purpose of the FLSA, to protect workers from "excessive work hours and substandard wages," was also best served by the work-week offset model. Accordingly, the plaintiffs' damages for unpaid overtime were to be calculated on a work-week basis, and any offsets pursuant to § 207(h)(2) were to be attributed only to the singular work-weeks in which both premiums and overtime were earned. Only the premium portions of the extra payments (i.e., the extra one-half of the regular rate) could be used to offset the City's overtime liability. *Rudy v. City of Lowell*, No. 07–11567–NMG, 2011 WL 915334 (D. Mass. March 14, 2011).

Search & Seizure

Overnight Guest and Common Areas

In a ruling of first impression for the circuit, the U.S. Court of Appeals for the Tenth Circuit has ruled that an over-

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