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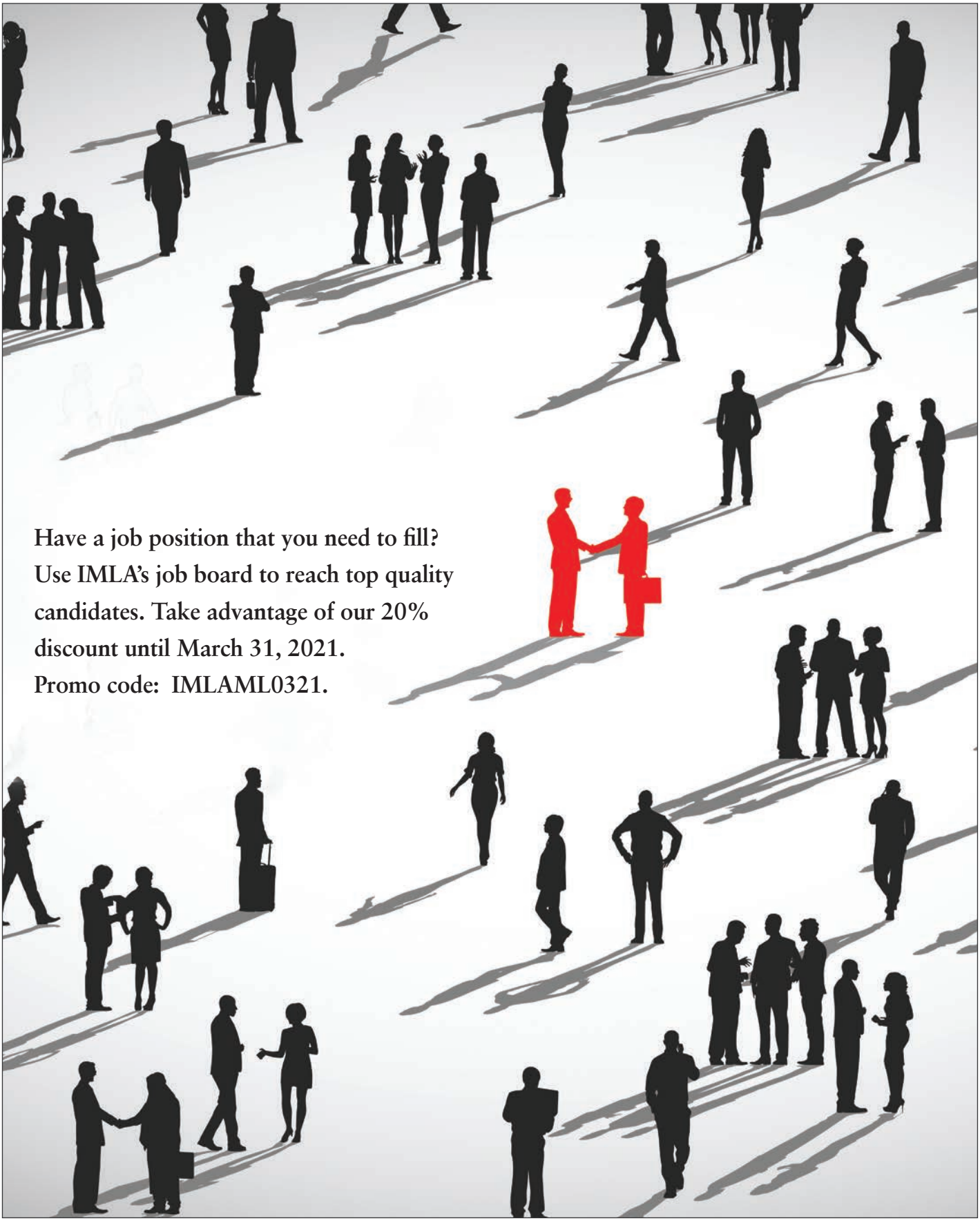
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STAFF

EXECUTIVE EDITOR Charles W. Thompson, Jr.
EDITOR Erich R. Eiselt
EDITORIAL STAFF Deanna Shahnami
ART DIRECTION AND PRODUCTION Trujillo Design
MARKETING Caroline Storer

EDITOR'S NOTE

BY **ERICH EISELT**
IMLA Assistant General Counsel

The Road to Recovery

We began conceptualizing the cover for this January-February 2021 issue of *ML* in mid-November. Pfizer and BioNtech had just announced the amazing 95% efficacy of their COVID vaccine, and our government was projecting that 20 million doses would be available by December, with enough for all Americans by April 2021. The future seemed incontrovertibly brighter, and I discussed with Jose Trujillo, proprietor of IMLA's longtime art production company, illustrations portraying a sunny horizon.

He disagreed, proposing the iteration you now see as our cover. Upon reflection, that was the better choice. As our medical community was predicting, and as Tyrone Cooper emphasizes in his President's Letter, there would be prolonged darkness ahead. Now, with coronavirus deaths obstinately exceeding 3,000 per day, resurgent spread caused by holiday travel, and our ambitious vaccination goals mired in delay, a more nuanced message seems appropriate. Hence the solitary figure seeing a brilliant light in the distance while still very much shrouded in uncertainty.

With that explanation, we introduce January-February 2021. We are not devoid of cheer—in *Inside Canada*, Monica Ciriello provides a yuletide take on municipal COVID policies, and our *International* department, under the auspices of Tyler Wallach, announces a new joint initiative with Spain's counterpart to IMLA. Our *Features* cover the Special Census—a mechanism discussed by Shauna Billingsley and Brad Cunningham that may garner additional funding for growing localities—and, by Cynthia Withers, the elements to be considered in assessing municipal liability to bystanders who witness unconstitutional law enforcement actions.

In *Op-Ed*, Chuck Thompson explains the continuing rationale for the Electoral College, a topic of particular interest in these first days of 2021. Amanda Karras previews upcoming Supreme Court activity of note in *Amicus*, and the aforementioned Brad Cunningham performs double duty with his call to recognize unsung essential workers in *ListServ*. *Practice Tips*, contributed by IEEFA economic analysts Brent Israelsen and Karl Cates, highlights best practices in granting renewable energy tax credits. Finally, your Editor examines the convoluted world of music licensing and its implications for municipal use, in *Federal*.

As we move into a new year and envision the prospect, however far down the road, of a return to normalcy, in many ways we are still in turmoil. The next weeks and months will continue to test our resolve and our democracy. For those who feel that we have been at war—one of our own making—the often-quoted inaugural words of our 16th President, who did not live to see his aspirations come to fruition, may provide substance: "With malice toward none, with charity for all."

At the risk of being overly dramatic, perhaps we can declare that our war is over and begin the year in a common quest for national recovery.

Best regards,
Erich Eiselt

PRESIDENT'S LETTER

BY: **TYRONE COOPER**
IMLA President and City Attorney, Beaumont, Texas

Vigilance Will See Us Through

As we embark upon a new year, passing from the challenges of 2020 into a hopeful 2021, we must be mindful that the Coronavirus pandemic still has its grips on the United States and the world.

The year 2020 forced us to realize a new virtual reality: A world where gathering in large groups for in-person meetings and conferences is no longer advisable and distant communications is the norm, and where the idea of "Stay Home Stay Safe" is the mantra from City Hall and 14-day quarantine the order of the healthcare community. Spring and Fall Mid-Year Seminars and Annual Conventions are typically the times of year when we would meet to network and conduct the business of IMLA. We could do neither in 2020.

If we hope for future in-person gatherings in groups greater than ten, we must be diligent in adhering to the guidelines of the Centers of Disease Control (CDC) in an effort to get control of the ravages of this disease. The guidelines recommend the doing of simple things such as the proper wearing of masks in public settings, properly practicing social distancing, appropriate hand sanitizing with an alcohol-based sanitizer or simply washing your hands with soap and water like your mother taught you, and if you are sick, isolate or quarantine from others.

The good news is that the FDA has authorized Coronavirus vaccines as safe and effective, and distribution has already begun, prioritizing healthcare workers and the most vulnerable among us. The not so good news is that the medical experts are saying that in order for the vaccine to make a significant impact toward controlling the virus, 75-80% of the population will need to be vaccinated. The goal is to reach what has been referred to as "herd immunity" where a high enough percentage of people in the population become immune to the virus so that it can no longer be transmitted.

Having contracted the virus has only been shown create short term immunity. The scientific method of achieving this goal on a long-term basis is through the administering of the vaccine.

There are those who are reluctant to receive the vaccine for the stated reasons that it was developed too quickly and that it was politically motivated.

Let us not get weary in well doing. We have fought too hard to get this far in this battle against this virus. Unfortunately, far too many have needlessly lost the fight. Cases are rising and a post-holiday surge is upon us. The medical community is referring to the near future as a "dark winter."

Let us remain vigilant, steadfast and immovable in our goal to eradicate this adversary which seeks to devour.

I wish you and your loved ones a safe and joyous holiday season and a Happy New Year. ML

Special Census— An Effective Tool in Obtaining Federal and State Funding

BY: SHAUNA BILLINGSLEY, *City Attorney, Franklin, Tennessee and*
BRAD CUNNINGHAM, *Municipal Attorney, Lexington, South Carolina*

Since its inception in 1790, the United States decennial census has determined the apportionment of congressional seats and Electoral College votes among the states and has played a seminal role in the distribution of federal funds across the nation. At the state and local level, however, special censuses can also have a major impact on governmental funding and allocation of resources.

I. The Federal Census.

The United States Constitution requires an "enumeration" of "persons" every 10 years for the purpose of apportioning representatives to Congress and directing taxes among the states according to their respective "numbers."[1] Pursuant to the federal statutory provisions governing censuses,[2] the Secretary of Commerce must, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date will be known as the "decennial census date," in such form and content as the Secretary may determine, including the use of sampling procedures and special surveys.[3] This tabulation of total population by the states as required for the apportionment of representatives in Congress among the several states must be completed within nine months after the census date and reported by the Secretary to the President of the United States.[4]

Although the United States Constitution mandates only that the census be taken for reapportionment, the census data is used for myriad other purposes.[5] The fact that the Enumeration Clause specifically authorizes only enumeration does not prohibit the gathering of other statistics, if necessary and proper for the intelligent exercise of other powers enumerated in the Constitution.[6] Accordingly, Title 13 of the United States Code, in addition to providing for the regular decennial census of population as required for the apportionment of congressional representatives,[7] and providing for the administration of the census statutes,[8] also contains provisions for:

- The taking of a "mid-decade" census;[9]
- The collection and publication of statistics on foreign commerce and trade;[10] cotton;[11] oilseeds, nuts, kernels, fats, oils and greases;[12] apparel and textiles;[13] defective, dependent, and delinquent classes, and crime;[14] and religion;[15]
- Quinquennial (five year) censuses of manufacturers, mineral industries, and other businesses;[16]
- Quinquennial censuses of state and local governments;[17]
- Various offenses relating to the census, such as false returns by census officers and employees,[18] and the refusal or neglect by private individuals and organizations to furnish the required information.[19]

II. Special Census Provisions.

First conducted in 1915, although authorized since 1903, the special census is conducted upon the request of a local government in the interim between two official U.S. Censuses. It tallies a local government's population, number of housing units, and "Group Quarters" (a single location populated by multiple unrelated people, such as a nursing home or college). The local government unit requesting the special census is responsible for the cost.

The Secretary of Commerce may conduct special censuses for the government of any state, or of any county, city, or other political subdivision within a state, for the government of the District of Columbia, and for the government of any possession or area (including political subdivisions thereof) referred to by statute, on subjects covered by the censuses provided for in the federal census laws, upon payment to the Secretary of the actual or estimated cost of each such special census.[20]

The results of each such special census will be designated "Official Census Statistics," and these statistics may be used in the manner provided by applicable law.[21]

The Bureau of the Census is author-ized to conduct special population censuses at the request of and at the expense of the community concerned. To obtain a special population census, an authorized official of the community should write a letter to the Associate Director for Demographic Fields, requesting detailed information and stating the approximate present population. The Associate Director will reply giving an estimate of the cost and other pertinent information. As noted above, the locality is required to pay the Bureau for the actual or estimated cost of each such special census.[22]

A. State Statutes Regarding Special Census.

State law provides additional parameters governing the timing, mechanics and applicability of the special census. Tennessee is emblematic: Tennessee Code provides that a municipality shall have the right to take no more than four special censuses at its own expense between the regular decennial federal census.[23] The census shall be taken by the federal bureau of the census, or in a manner directed by and satisfactory to the department of economic and community development. The population of the municipality shall be revised in accordance with the special census for purposes of distribution of funds, effective on the next July 1, following the certification of the census results by the federal bureau of the census or the department of economic and community development to the commissioner of finance and administration. The aggregate population shall likewise be adjusted in accordance with the special census, effective on the next July 1, following the certification of the census results by the federal bureau of the census or the department of economic and community development to the commissioner of finance and administration; provided, that any other special census of the entire municipality taken in the same manner provided in this section, under any other law, shall be used for the distribution of the funds, and in that case, no additional special census shall be taken under this section.[24]

B. Benefits of Special Census: Considered as Federal Census in Many Situations.

When a local government believes there may have been an unusually large population change in their jurisdictional limits, a special census may be economically beneficial. A certified official population increase resulting from the special census potentially can produce an increase in state revenue sharing or other benefits. In many cases, the cost to the local government is more than offset by the increase in revenue. Similar to the Federal Census, in a special census, the public is protected by Title 13, U.S.C. as to their personally identifiable information. Only authorized U.S. Census Bureau employees may see their personally identifiable information. Results that could be used to identify an individual are not released. Census employees, including those hired on a temporary basis swear an oath that they will not disclose any information gathered about individuals or businesses.

Given this regulatory framework, special censuses have satisfied the requisites for a "federal census" in a variety of instances:

In Alabama, the court applied a special federal census in determining whether a city could conduct a "wet-dry" referendum based on its population as shown by such census.[25] State law permitted a local-option election for the sale of intoxicating liquor in cities with a population of more than 7,000 persons, but the statute was silent as to how such population should be determined.[26] A special federal census of the city taken by the United States Bureau of the Census in September 1986 showed that the city had a population of 7,403.[27]

The city proposed to conduct a "wet-dry" referendum in conjunction with the November 1986 general election based on such census, and the proposed election was challenged.[28] The court permitted the election to be held, at which the sale of intoxicating liquor in the city was approved.[29] The court held that the local-option statute did not require reference to the federal Decennial Census, that the 1986 special federal census was sufficient to establish the city's population thereunder, and that the election founded upon the city's population as shown by such census was therefore valid.[30]

In Arizona, the state supreme court held that a proposed special federal census, and not the federal Decennial Census of 1950, would be applied in determining a city's proper allocation

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Shauna Billingsley has served as City Attorney of Franklin, Tennessee since 2010. She previously worked for the Tennessee Department of Commerce and Insurance and she practiced law in Dallas/Fort Worth, focused on business litigation and family law. She is a graduate of the Texas A&M University School of Law and is licensed to practice in Tennessee and Texas. She serves as the Secretary to the Tennessee Bar Association House of Delegates and previously served as the 21st District Delegate. She is a member of the IMLA Board of Directors and was recently named an IMLA Fellow.

Bradford Cunningham is the Municipal Attorney for Lexington, South Carolina. He earned his B.S. in Finance and J.D. from the University of South Carolina, is licensed to practice in South Carolina and Georgia, and is admitted before the U.S. District Court for South Carolina and the Fourth Circuit. He is Past President of the South Carolina Municipal Lawyer's Association, IMLA State Chair for South Carolina, and received the Joseph I. Mulligan Award for Distinguished Public Service. Brad has presented at numerous IMLA seminars and is a contributor to *Municipal Lawyer*. He is active in community events and is a local radio announcer for high school sports.

of state sales tax revenues.[31] Arizona Rev. Stat. § 1341 required the state treasurer to remit 10 percent of the state's privilege sales-tax revenues to various municipalities in the state in proportion to their population as shown by "the most recent United States census." The taking of a special census by the federal bureau of the census was authorized by federal statute, 13 U.S.C.A. § 8, and the city proposed that such a census be taken. The court held that the phrase "most recent United States census," and the phrase "federal census" as used in a 1956 revision, refers to the most recent census of the Federal Government and not only the most recent federal Decennial Census.[32] Subsequent to 1950, the city had experienced extraordinary growth with the reopening of a local mine and the reactivation of a local military installation.

In California, a court applied a special federal census in determining whether a city was entitled to establish a municipal court according to its population as shown by such census.[33] The state constitution authorized chartered cities with a population of more than 40,000 inhabitants, as ascertained by the "last preceding census taken under the authority of Congress," to establish a municipal court. The court held that a census taken in 1948 by the United States at the request of the city was sufficient under such provision, since it was officially taken and the result was officially announced and certified by the Director of the Bureau, noting that express statutory authority for the taking of the census was not essential when the power is necessarily implied and included in the authority expressly granted, and that, where the legislature had elsewhere intended reference to the federal Decennial Census only, it had expressly so provided.[34]

In Nebraska, the court held that where an area is annexed to a city subsequent to the "most recent federal census" its population must be considered in subsequent redistricting, and where boundary lines between voting districts differ from boundary lines of census enumeration districts, the census figures from the 1974 special census could not be applied directly but must be applied indirectly by interpretation or supplemented by other evidence.[35] In this case, the court applied the census of an annexed housing development taken by the city and expert testimony of its population to supplement figures from the 1974 special census and uphold the city's redistricting plan based on such evidence.[36] In doing so, the court noted that where the most recent federal census does not contain detailed block by block information sufficient to determine the population of a specific portion of a census enumeration district, any material relevant evidence may be admitted to establish that population.[37]

In New York, the court applied a special census of a county taken in 1957, showing a county population of more than 1,000,000, and not the federal Decennial Census of 1950 showing a population of 672,675, in determining the appropriate method of nominating party candidates for municipal office based on the county's population as shown by such census.[38] State election law provided that such local nominations be made by primary election in counties having a population of more than 750,000 inhabitants, but the statute, N.Y. Elec. Law § 131(5), was silent as to how such population should be determined. "Population" was defined in the state's general construction law as that shown "by the latest federal or state census or enumeration preceding the time as of which such population is to be determined."[39] The court concluded that neither the state's election law nor general construction law required that population be ascertained alone by the last federal Decennial Census and noted that there was no challenge as to the accuracy of the special census taken nor was it disputed that it was an official census taken by the United States Bureau of the Census, and that such was clearly the "latest federal census" for purposes of the state's general construction law, and should also be adopted under the state's election law.[40]

In Washington, the court applied a 1954 determination of a city's population made by the state census board, rather than the federal Decennial Census of 1950, in determining whether the city could establish a municipal court based on its population as shown by such determination.[41] A state statute enacted in 1955 provided for the creation of municipal courts in cities of 500,000 or more in population, as shown by the most recent "federal or state census."[42] A later section of the same act provided for an additional municipal-court judge for each additional 150,000 inhabitants, as determined by the most recent federal census or state census as provided by the state census board. State law passed in 1951 created a state census board with the duty to determine the population of each city and town in the state and to file a report of such determination with the Secretary of State, which enumeration would be "final and conclusive."[43] According to a certificate filed by the census board, the city was shown to have a population of 548,000 as of April 1, 1954. Based on such population, the city adopted an ordinance creating a municipal court under the 1955 act, and both the ordinance and the act were challenged. The court held that, in the absence of a contrary legislative intent, the words "state census" in both sections of the 1955 act referred to a finding of population made by the state census board, not the decennial state census provided for in the state constitution, Wash. Const. Art. § 3, but which the legislature had never caused to be

A governmental unit can add questions to the special census questionnaire; however, the questions must be in accordance with subjects covered by the censuses, as provided for in Title 13, United States Code. Areas may benefit from collecting and analyzing information about housing, transportation, or land use.

taken.[44] Thus, the 1954 certificate filed by the census board constituted a "state census" for purposes of the 1955 act and showed sufficient population to permit the city to establish a municipal court under such act, determined the court.

C. Special Census Not Applied as a Federal Census.

In contrast to the above cases, there are also many instances where a special census has been found inadequate for statutory purposes.

In Iowa, the court declined to apply a special federal census in determining a city's portion of state road-tax revenues.[45] State law required the state treasurer to apportion a percentage of the state's road tax to municipalities in the ratio that their population, as shown by the "latest available federal census," bears to the total population of all cities in the state.[46] A special census of a city was taken in 1954 by the United States Bureau of the Census pursuant to federal statute.

The city then requested that subsequent road-tax allocations be based upon such census, and the state treasurer refused, relying instead on the federal Decennial Census of 1950 as the last statewide census for such purpose. In denying the city's claim, the court held that the 1954 special census was a "federal census" but that the "latest available federal census" for purposes of the statute insofar as the total population of all cities and towns in the state was concerned was the 1950 federal Decennial Census.[47]

In Minnesota, the court applied the federal census of 1950, rather than a special federal census taken in 1954, in determining a city's share of state cigarette- and liquor-tax revenues.[48] State law required that such taxes be apportioned to cities according to the relative population of each as determined by each federal census, or by an incorporation census taken of newly incorporated municipalities.[49]

A city filed suit under the above provisions to require the secretary of state to certify results of a special federal census taken of the city in 1954 and to require state officials to apportion and distribute such taxes based on city population as shown by such census. The court concluded that a city's population for purposes of the distribution could not be determined according to a special federal census, noting that the function of the census is to determine the appropriate tax distribution rate, and it can be useful under these statutes only when it provides the population of each political subdivision determined at the same time and for the same purpose, which can be added together to determine the total population of the state.[50]

In Oklahoma, the court applied a census taken by county assessors in 1908, and not a special federal census taken in 1907, in determining the compensation of a county treasurer subsequent to July 1, 1908, based on the county's population as shown by such census.[51] A statute provided the county treasurer an annual compensation of $800 in counties with a population of 10,000 or less, and $1,500 in counties with a population of more than 10,000 and no more than 15,000.[52] A statute also provided for the taking of a biennial census of counties by county assessors.[53] A special federal census was taken of the county in 1907, showing a county population of less than 10,000. Oklahoma was then admitted to statehood, and the first Oklahoma Legislature provided that such census would be controlling "until the next federal census, or until the census should be taken under the laws of the state and of all counties and subdivisions thereof for all official purposes."[54] The first biennial census of the county taken in June 1908 showed a county population of between 10,000 and 15,000 inhabitants. The court held that the county census of June 1908 would apply in determining the compensation of the county treasurer from July 1, 1908, even though his term of office had begun in November 1907 with a compensation as then determined under the federal special census of 1907.[55]

In Wyoming, the court applied the federal Decennial Census of 1950, rather than a special federal census taken in 1957, in determining a city's statutory share of state gasoline-license tax revenues.[56] State law provided that a portion of such tax revenues be apportioned to cities and towns in the state in the ratio which their population bears to the total population of all cities and towns, "according to the last available Federal census."[57] In an action to compel the state treasurer to distribute such revenues to the city based on its population as shown by a special federal census taken in 1957, the court concluded that the term "ratio" in the statute required that the same census

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Special Census *cont'd from page 9*

should apply to all cities and towns.[58] Thus, a special federal census would control as to the internal affairs of a city, but such census could have no effect on the statewide distribution of gasoline taxes, even though it was the last available federal census taken of such city, held the court.[59]

III. How to Conduct a Special Census.
A. Starting the Process and Costs.
The special census program is available to all local and tribal governments that desire a more up to date population count and related statistics. To begin the process, a governmental unit must request an official cost estimate from the Census Bureau. The cost estimate will outline all anticipated costs to the governmental unit for staffing, materials, data processing, and tabulation. Included with the cost estimate will be a Memorandum of Understanding. If the governmental unit decides to conduct the special census in its community, a signed Memorandum of Understanding and initial payment must be transmitted to the Census Bureau. Upon receipt, the special census process begins.

The local government is responsible for the cost of conducting a special census. The new data provided by a special census is designated as Official Census Statistics and may be used in a manner provided for by applicable law, including achieving an increase in revenue sharing. The special census questionnaire is virtually the same as the Census short form.

The special census cost estimate request packet asks if the governmental unit prefers to conduct a full or partial special census. A full special census means that the governmental unit desires its entire jurisdiction, including newly annexed areas, be included in the count. For a full special census, the governmental unit must include its estimated population and housing unit counts for the entire jurisdiction as of the projected date of enumeration. A partial special census means that the governmental unit desires only a portion of the governmental unit included in the count. Partial special census cost estimates require that the governmental unit identifies the specific geography the governmental unit desires to be included in the count using Census block and tract numbers.

The special census program has been totally redesigned in the past 20 years. In 2000 the program began to use the update/enumerate methodology. The update/enumerate methodology improved the quality of the data by using the Census Bureau's Master Address File (MAF). The MAF is kept current through periodic updates from the United States Postal Services' Delivery Sequence File. This element is particularly important, because it ensures the quality and timeliness of the address list.

Data collection for a special census is conducted using an update/enumerate methodology. During update/enumerate, enumerators canvass their assignment areas using census maps and address registers that contain addresses and location information for housing units. The enumerators update the address lists and census maps by adding housing units not already listed, making corrections to address information, updating maps with feature changes, and deleting listings that do not exist. The Special Census Enumerator Questionnaire is similar to the 2010 Census short form. The Special Census Enumerator Questionnaire is used to collect data on all persons living in a household.

If requested on the Special Census Cost Estimate Form, during Special Census operations the Census Bureau will also enumerate people living in Group Quarters--as referenced above, structures housing multiple unrelated people. Some examples of Group Quarters include colleges, hospitals, correctional facilities, nursing homes, and military installations. Group Quarters may contain regular housing units as well.

For Group Quarters enumeration, governmental units complete an Individual Census Report (questionnaire) for each individual housed in a particular unit. The questionnaire used is also similar to the 2010 Census short form, except there is only one person's data on each form. After the 2020 Census, special census forms will be similar to the 2020 Census short form. People living in Transitory Locations are also counted. Transitory Locations are places inhabited by people who have no usual home elsewhere. Transitory Locations are Recreational Vehicle (RV) parks (not mobile home parks), Marinas, Commercial and/or public Campgrounds, Racetracks, Carnivals, and some Hotels or Motels (with long term residents).

A governmental unit can add questions to the special census questionnaire; however, the questions must be in accordance with subjects covered by the censuses, as provided for in Title 13, United States Code. Areas may benefit from collecting and analyzing information about housing, transportation, or land use. The fee to conduct a special census with added questions would increase, to allow for collection and processing of those questions. Also, new questions added to the questionnaire will be subject to the Office of Management and Budget (OMB) form approval process.

The state, local, or tribal government will be responsible for recruiting candidates for the special census. Hiring will be accomplished similar to the way the Census Bureau hires field representatives for surveys. Special Census Program staff will provide procedures and support in publicizing and recruiting for the special census. Testing, hiring, and training candidates will be the responsibility of the Special Census

The Decennial Census is comprised of a very complex series of operations that demand a significant amount of work and staff resources. As a result, staffing critical to the success of the Special Census Program are unavailable during the two years immediately before and after a Decennial Census.

Program staff. Paychecks will be issued by the sponsoring government entity at prevailing pay rates. Pay rates are currently proposed to be 65 percent of local Bureau of Labor Statistics average wage for the county where the special census is located; these rates may, however, be raised or lowered depending on local conditions.

Typically a community conducts its own census of its residents, but some seek the assistance of the special census section at the U.S. Census Bureau.[60] For self-enumeration, typical tasks can include:

- Advance outreach and marketing to inform residents;
- Developing address lists;
- Contacting residents; and
- Door-to-door follow-up to non-respondents.

The special census is typically on hiatus two years before and two years after the Decennial Census. During this time program materials and systems are updated. The Decennial Census is comprised of a very complex series of operations that demand a significant amount of work and staff resources. As a result, staffing critical to the success of the Special Census Program are unavailable during the two years immediately before and after a Decennial Census.

The governmental unit will receive a signed letter from the Director of the U.S. Census Bureau confirming that the jurisdiction's Special Census population and housing counts are "Official Census Statistics." In addition to this letter, the governmental unit also receives electronic files that show population and housing counts by block, and one-page demographic profiles for the governmental unit and associated tracts or part tracts. Standard information includes age, sex, relationship, race, Hispanic origin, occupancy or vacancy status, type of vacancy, and tenure for housing units. Most governmental units prefer these data in electronic Excel or PDF formats, although paper reports can be provided upon request. Additional data at the tract level are provided in ASCII format that allows the governmental unit to import the data into other software programs that allow the creation of customized reports.

B. Lexington, South Carolina's Story. The Town of Lexington began to consider its special census in the spring of 2005 and made its official request of the U.S. Census Bureau in June of 2005. Final updated population statistics were received in June of 2006, constituting a period of almost exactly one year from onset to finish. (Of course, larger jurisdictions may take longer to enumerate, and smaller ones may not take as long).

Here is a timeline of the Town of Lexington's experience:

June 2005:
Council approved special census by ordinance and sent payment to Census Bureau (approximately $220,000);

July 2005:
Received preliminary maps from Census Bureau and returned them;

August 2005:
Received final maps, approved and returned them to Census Bureau;

September 2005:
Began recruitment;

November 2005:
Applicant training;

January 2006:
Opened Census Office;

February 2006:
Launched educational campaign for residents and began enumeration;

March 2006:
Received preliminary population count;

June 2006:
Received final certified population count;

July 2006:
Deadline for funding for FY 2007.

The special census revealed a population increase of around 47%. From the increase in "Aid to Subdivisions" alone, the Town recovered the entire cost of conducting the special census in five quarters: the special census data increased "Aid to Subdivisions" income by a net amount of at least $550,000. The other sources of income also increased but not as significantly.

C. Franklin, Tennessee's Story. Tennessee statutes permit a city to conduct up to four citywide special censuses each decade.[61] A county may conduct up to two countywide censuses during the same time frame.[62] Depending on the purpose of the special census, additional restrictions on the number of special censuses may apply.

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Defending Bystander Excessive Force Claims: Is It Really Plaintiff's Personal Right?

BY: CYNTHIA WITHERS, *Assistant City Attorney, Arlington, Texas*

It is well settled that a civil rights claim for excessive force must be based on a violation of plaintiff's personal rights secured by the Constitution. So, when there are multiple people present at the scene of an incident involving police action, do bystanders have a claim?

Constitutional Framework.
The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated."[1] Bystander liability claims generally include allegations of witnessing excessive force in violation of Fourth Amendment rights or substantive due process rights under the Fourteenth Amendment. Since there is no constitutional right to be free from merely witnessing police action, what analysis must a court make to determine if a bystander claim under 42 U.S.C. §1983 withstands a Rule 12(b)(6) motion to dismiss? Circuit and district courts have tackled this issue in various fact scenarios involving police action, including a crowded store, a car loaded with passengers, and at houses with multiple family members present.

The Supreme Court has said many times that § 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred."[2] Analysis of an excessive force claim under § 1983 begins by identifying the specific constitutional right alleged to have been infringed.[3] The Court has held that all claims that law enforcement officers used excessive force— deadly or not—whether in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment's reasonableness standard,[4] which has arisen in a spectrum of fact patterns.

Supreme Court.
In *Tennessee v. Garner*, the Supreme Court addressed the constitutionality of police using deadly force, concluding that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[5] In that regard, "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[6] The question of whether the force used was reasonable "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[7] The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[8] The calculus of reasonableness" must take into account that police officers are "often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation."[9]

Twenty-five years after the Court decided *Graham v. Connor*, it issued a unanimous decision in *Plumhoff v. Rickard*, concluding that the officers acted reasonably in using deadly force while attempting to terminate a dangerous car chase that threatened the lives of innocent bystanders.[10] Donald Rickard led officers on a high-speed pursuit and the officers fired a total of 15 shots into his vehicle, striking Rickard and his passenger, Kelly Allen, both of whom died from

a combination of gunshot wounds and injuries sustained when their car crashed. Rickard's surviving daughter filed a § 1983 lawsuit alleging the officers used excessive force in violation of the Fourth and Fourteenth Amendments. No claim was made on behalf of passenger Allen, but Rickard's daughter argued that the officers acted unreasonably by firing too many shots at the car, in part because of Allen's presence in the front seat of the vehicle. The Court rejected this argument, determining Allen's presence did not change the analysis because "Fourth Amendment rights are personal rights which…may not be vicariously asserted."[11] The Court stated "the question before us is whether petitioners violated Rickard's Fourth Amendment rights, not Allen's. If a suit were brought on behalf of Allen under either § 1983 or state tort law, the risk to Allen would be of central concern."[12] The Court noted that lower courts seemed to disagree about whether a passenger in Allen's situation could recover under a Fourth Amendment theory, but it expressed no view on this question.[13]

Fifth Circuit.

1. ***Grandstaff v. City of Borger.***

In 1985, the Fifth Circuit decided *Grandstaff v. City of Borger,* a case involving highly peculiar, extraordinary facts giving rise to claims asserted by bystanders to the deadly force used against Grandstaff.[14] Multiple police officers exchanged gunfire with a fugitive who had driven his pickup truck into the ranch where Grandstaff and his family lived. The gunfire awakened Grandstaff, along with his wife, minor daughter and two stepsons. He drove towards the scene to investigate after seeing police car emergency lights and hearing commands over a loudspeaker, and upon realizing the officers were searching for someone, he headed back towards his house to warn his family. Police then opened fire on his truck. Grandstaff was fatally shot in the back while trying to exit his vehicle.

The Fifth Circuit concluded that the officers were liable under Texas law for the wrongful death of Grandstaff and for the federal civil rights claim authorized by § 1983, given that he had been deprived of rights protected under the Constitution or federal statute by persons acting under color of law.[15] With respect to the City, the court concluded that because Borger enjoyed governmental immunity from the state law claim, liability depended on the scope of § 1983.[16] The court found a deprivation of a constitutional right when the officers took Grandstaff's life without due process of law and affirmed the jury's finding that the City's consciously indifferent training of its officers was found to be a proximate cause of Grandstaff's death. Grandstaff's widow and stepsons recovered damages from the City and the officers for the emotional injuries suffered as bystanders when witnessing the gunfire directed at Grandstaff. The Fifth Circuit concluded that under Texas law, bystander recovery was proper against the officers but was not permitted under § 1983 and therefore could not be recovered from the City. The court stated, "We fail to see, however, that these bystanders have proved an independent cause of action under § 1983. Negligent infliction of emotional distress is a state common law tort; there is no constitutional right to be free from witnessing this police action. 'Section 1983 imposes liability for violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law.' "[17] The Fifth Circuit held the bystander plaintiffs could not recover damages for emotional injuries from the City.

"Negligent infliction of emotional distress is a state common law tort; there is no constitutional right to be free from witnessing this police action. 'Section 1983 imposes liability for violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law.' " The Fifth Circuit held the bystander plaintiffs could not recover damages for emotional injuries from the City.

2. Coon v. Ledbetter.

A year later, the Fifth Circuit decided another case involving an innocent bystander claim. In *Coon v. Ledbetter*, sheriff's deputies went to the trailer home of Billy Dan Coon, who was suspected of being involved in a tavern shooting as well as a subsequent hit and run accident.[18] Just as the deputies were leaving the property, Coon drove up from behind the family's trailer. He then headed toward the neighbor's trailer, eventually arming himself with a shotgun. The deputy saw the gun and shouted a warning, after which Coon fired at least two shots as he ran around to the front of his trailer and struggled to get inside. One or more of the deputies fired into the trailer. Coon was treated for a wound at the hospital, his wife Dana received therapy for emotional problems, and their four-year old daughter Racheal, who was inside the trailer during the shoot-out, experienced sleeplessness and nightmares after the incident.

Continued on page 14

Cynthia Withers is a Senior Assistant City Attorney for the City of Arlington, Texas where she works in the Litigation/Employment Section of the City Attorney's Office. Her practice focuses on civil litigation. Before joining the City of Arlington in December of 2016, Cynthia was in private practice for 22 years and represented governmental entities in federal and state courts. She received a Bachelor of Science in Political Science from Texas Christian University and her Juris Doctor from Baylor University School of Law. She is an IMLA Local Government Law Fellow.

Coon, Dana, and Racheal filed suit against the sheriff, deputies, and Jackson County alleging claims under § 1983. Following a jury trial, directed verdicts were entered in favor of the County and three of the deputies.[19] A verdict against the sheriff and three additional deputies awarded damages to each of the plaintiffs.[20] On appeal, the defendants argued that Coon's wife and daughter had not proved any deprivation of their own constitutional rights.

As to Dana and Racheal's bystander claims, the court stated that they, "like all persons who claim a deprivation of constitutional rights, were required to prove some violation of their personal rights."[21] The Fifth Circuit was persuaded that Racheal proved the personal loss required for a constitutional claim but that Coon's wife Dana had not. The court found:

> [T]here was no evidence that any act of the deputies was directed toward Dana; she was not directly involved in the shooting and was with the deputies when it occurred. Racheal, however, was in the trailer. There was evidence that Coon staggered into his trailer and while he was there attempted to protect Racheal from the gunfire, and there was evidence that deputy Gussberry fired a round of heavy buckshot into the trailer at that time. Further, the jury could have concluded that the deputies knew or should have known that other persons besides Billy Dan Coon were in the trailer, so that the requisite level of reckless conduct…was met.[22]

3. Petta v. Rivera.

Petta v. Rivera concerned the high-speed pursuit of Melinda Petta, who had fled the scene of a traffic stop with her two children inside the vehicle.[23] Texas Department of Public Safety (TDPS) Officer Rivera pulled Petta over for speeding, and after arguing with her about her speed, ordered her to get out of the vehicle, but she refused and rolled up her window. Officer Rivera allegedly became verbally and physically abusive to Petta, including attempting to jerk her car door open, smashing her driver's window, threatening to have her car towed, and menacing his handgun at her. Petta claimed Rivera shot at her car as she drove away and again during the chase, trying to blow out her vehicle's tires. Petta's children were never taken into custody when she was arrested nor were they ever touched by the officers when the pursuit ended at Petta's apartment.

Petta, on behalf of her two minor children sued the TDPS and Officer Rivera asserting state law claims and § 1983 claims for use of excessive force under the Fourth and Fourteenth Amendments.[24] All claims against TDPS and Officer Rivera in his official capacity were dismissed and the district court granted summary judgment on plaintiffs' § 1983 Fourth Amendment claim, finding that no "seizure" of the children had occurred that would trigger Fourth Amendment protections.[25]

While plaintiffs did not appeal the district court's dismissal of their Fourth Amendment claims,[26] the Petta children further claimed that Officer Rivera's "abusive behavior and use of excessive force during the initial stop and ensuing chase caused them severe emotional harm and thus deprived them of liberty without due process in violation of the Fourteenth Amendment."[27] The Circuit concluded that the children had asserted a valid claim under §1983 for a constitutional violation of excessive force under the Fourteenth Amendment, acknowledging explicitly that "where a plaintiff's excessive force claim, whether he be a prisoner, arrestee, detainee, or an innocent bystander of tender years, falls outside the specific protections of the Bill of Rights, that plaintiff may still seek redress under the due process clause of the Fourteenth Amendment."[28] The court's inquiry was very narrow, merely asking whether a § 1983 plaintiff at that time had a *clearly established* right under the Fourteenth Amendment to be free from purely emotional harm resulting from an officer's use of excessive force, *not* whether the Petta children's psychological injuries were redressable under the Fourteenth Amendment.

The Fifth Circuit reversed and granted Officer Rivera's motion for summary judgment on the qualified immunity grounds because it was not clearly established in the Circuit at the time of the events on January 15, 1990 that non-physical harm gave rise to a constitutional tort.[29]

The *Petta* court explained that it had previously applied Fourth Amendment standards to excessive force claims that may have in part implicated the Due Process clause. In *Mouille v. City of Live Oak*, 918 F.2d 548 (5th Cir.1990), the Circuit addressed excessive force claims of several plaintiffs who were allegedly terrorized by a police officer bursting into an office building in search of a suspect, with only one of the plaintiffs arrested while the remaining bystanders were subjected to the officer's violent behavior.[35] The court did not consider whether all of the *Mouille* plaintiffs were "seized" within the meaning of the Fourth Amendment, stating, "[i]t is at least arguable, however, that some of the plaintiffs in *Mouille* were not "seized" and that, therefore, their claims would have been more properly analyzed under the due process clause."[30] The *Petta* Court applied the same reasoning to the bystander children's claims, stating:

> We find it impractical and illogical to draw a line between their due process claims and those of an arrestee who claims, under the Fourth Amendment, that a police officer has used excessive force in effecting his arrest. Whether Officer Rivera's use of force was 'objectively reasonable' largely implicates Fourth Amendment concerns, even though the fortuity of his bullet going astray removed this case from the purview of 'seizure' cases."[31]

Tenth Circuit.

Archuletta v. McShan.

The Tenth Circuit has also held that a § 1983 claim for violating Fourteenth Amendment liberty interests could not be maintained without proof that a bystander was an object of the complained-of conduct or that there was any deliberate deprivation of the bystander's rights. In *Archuleta*, the minor plaintiff was a passenger in a truck being driven by his father along with his mother and an adult family friend.[32] Plaintiff's father was pulling the truck into his driveway when he was stopped by a police officer for having a headlight out and not having plaintiff in a child restraint. The officer repeatedly asked plaintiff's father to step out of the car after smelling alcohol on the father's breath but he refused, so the officer attempted to forcibly removed him and an altercation ensued. Plaintiff was being held by the adult friend about 20 feet away and was crying but never physically touched or threatened by the officer.

The minor plaintiff sued the officer and his superiors alleging the officer acted with intentional or reckless disregard and indifference to his emotional well-being during the arrest.[33] The district court granted defendants' summary judgment, holding plaintiff was not deprived of any right secured by the Constitution or laws of the United States: "[S]ection 1983 imposes liability for violations of rights protected by the constitution or laws of the United States, not for violations of duties of care arising out of tort law."[34] On appeal, the Tenth Circuit's analysis of plaintiff's excessive force claim began with identifying the specific constitutional right allegedly infringed upon by the challenged application of force. Given the well-settled principle that a section 1983 claim must be based upon the violation of plaintiff's personal rights, not the rights of someone else, the court's analysis turned upon whether the plaintiff personally suffered any deprivation of a constitutional right possessed by him individually, regardless of what happened to plaintiff's father.[35] Plaintiff asserted a liberty interest under the Due Process Clause of the Fourteenth Amendment to be free from emotional trauma suffered as a result of observing allegedly excessive police force directly entirely at his father. The court held plaintiff had no such liberty interest and therefore the district court correctly granted summary judgment on this ground. The court further stated:

> The problem with plaintiff's claim is that no state conduct was directed at him, and he cannot establish that defendants had the requisite intent to violate *his* rights. He was merely a bystander who was asserting indirect and unintended injury as a result of police conduct directed toward another. We use the term bystander to mean someone who witnesses police action but who is not himself or herself an object of that action. As such, a bystander is unable to assert the kind of deliberate deprivation of his or her rights necessary to state a due process claim under section 1983.[36]

We use the term bystander to mean someone who witnesses police action but who is not himself or herself an object of that action. As such, a bystander is unable to assert the kind of deliberate deprivation of his or her rights necessary to state a due process claim under section 1983.

The Tenth Circuit recognized that it must provide a logical stopping place for §1983 claims and that line requires a plaintiff who asserts a due process claim under §1983 to prove that he or she is the deliberate object of the state action which caused the injury.[37] The court concluded that there was neither the *required conduct directed* nor *requisite intent to injure plaintiff* that would give rise to a due process claim under § 1983.[38]

Fourth Circuit.

Schultz v. Braga.

In *Schultz v. Braga*, plaintiffs Schultz and Harkum alleged that FBI Special Agent Braga unconstitutionally employed excessive force against them when he shot Shultz, who was seated next to Harkum in the passenger seat of her vehicle after it was stopped by an FBI team investigating a bank robbery.[39] The Fourth Circuit evaluated Agent Braga's use of deadly force from the perspective of what the agent and his colleagues believed at the time they stopped the vehicle, without regard to the fact that it was later discovered that the occupants were an innocent couple tragically mistaken as the suspects being investigated. The district court ruled that plaintiff Harkum could not prevail on her excessive force claim because she was not "seized" by Agent Braga within the meaning of the Fourth Amendment, and the Fourth Circuit agreed: "Because a seizure within the meaning of the Fourth Amendment always 'requires an intentional acquisition of physical control,'it does not extend to 'accidental effects' or 'unintended consequences of government action.' "[40] Further, "[a]lthough a seizure may 'occur[] even when an unintended person or thing is the object of the detention or taking, …the detention or taking [of the person or thing] itself must be willful. This is implicit in the word 'seizure,' which can hardly be applied to an unknowing act."[41]

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INTERNAT

An Opportunity to Compare Local Government Law in Spain and the U S

Take a moment, close your eyes, and picture yourself in Madrid, sitting outside at a café, enjoying a delicious paella, sipping on a creamy café con leche, gazing fondly across the Plaza Mayor, and wondering silently, where do Spanish local governments derive their authority? Now, I know what you're thinking, shouldn't I pair my paella with a dry rosé from Navarra or maybe an inexpensive red Rioja or other medium-bodied tempranillo or garnacha? Although a valid question, the answer is not that simple and, thankfully, you have plenty of time to decide another day.

What we do want you to start thinking about, however, is a new and exciting program that IMLA is putting together through a collaboration between the International Steering Committee and La Asociación de Letrados de Entidades Locales de España, or The Spanish Local Government Lawyers Association (ALEL). ALEL is a Spanish nonprofit organization whose mission is similar to IMLA, to serve the interests of local government lawyers in Spain through the promotion and organization of conferences, seminars, and legal workshops.

For some time, ALEL has been working toward a collaborative program with local government attorneys across Europe and North America. Therefore, it was no surprise when the President of ALEL, Jesús Crespo, reached out to our very own Chuck Thompson way back in 2019 PC (Pre-COVID), inviting IMLA to participate in an international conference in Madrid. The conference included attorneys from France, Italy, England, Austria, USA, and, of course, Spain speaking about each country's legal structure and qualifications to practice law.

That exchange and a year of friendly discussions led to the formation of a working group between IMLA and ALEL, the purpose of which is to identify and publicize legal issues of mutual significance. The IMLA/ALEL working group is composed of the following eight members:

ALEL

Lourdes Morate Martín, Attorney at Law Oviedo City Council; Board Member of ALEL.

Celia Guillot Rabanal, Head of the Administrative and Legal Support Office Barcelona County Council.

Francisco Javier Durán García, Attorney at Law Villafranca de los Barros City Council; Board member of ALEL.

Jesús Ma Royo Crespo, Attorney at Law Zaragoza County Council; Presidnet of ALEL

IMLA

Elsa Jaramillo-Velez, Assistant City Attorney, City of Hialeah, Florida

Deanna Shahnami, Associate Counsel, IMLA

Chris Balch, Principal, Balch Law Group; City Attorney, Brookhaven, Georgia and Member, IMLA Board of Directors

Tyler Wallach, Assistant City Attorney, City of Fort Worth, Texas; Co-Chair of the IMLA International Steering Committee

(Our thanks to Elsa Jaramillo and Deanna Shahnami for their work in translating these articles).

Although not a member of this working group, a special thanks goes out to Ben Griffith, Co-Chair of the IMLA International Steering Committee, who has worked tirelessly over the years to expand the international reach of IMLA and without whom none of this would be possible.

Over the next year, IMLA and ALEL members will be treated to a variety of interesting topics, the first of which will be a primer on the governmental structures of the USA and Spain and the authority that local governments derive from those systems. From there, future topics may include (i) comparative studies of contributory negligence, land use, the protection of natural spaces and parks, governmental immunity and liability, and employment-related issues; and (2) the importance of certain legal duties, including the duty of care and duty to warn. The IMLA/ALEL working group is working closely with each of their respective organizations to determine the best and most effective means of presenting these topics, which may include articles in IMLA's Municipal Lawyer magazine and ALEL's website (http://letradosentidadeslocales.es/), conferences, seminars, published papers, and so on.

If you are interested in collaborating with Spanish attorneys on any of the topics listed above, please contact IMLA. We truly believe that this will be an incredible experience for members of both IMLA and ALEL, and we hope that you take an interest in learning more about international legal issues.

And if you are still wondering, the answer is quite clearly a medium-bodied tempranillo.

IONAL

By: Tyler Wallach, Assistant City Attorney, Fort Worth, Texas
Co-Chair, IMLA International Steering Committee

Tome un momento, cierre los ojos e imagínese en Madrid, sentado afuera de un café, disfrutando de una deliciosa paella, bebiendo un cremoso café con leche, mirando con cariño la Plaza Mayor y preguntándole en silencio, ¿de dónde derivan su autoridad los gobernantes locales españoles? Ya sé lo que está pensando, ¿no debería comer mi paella con un vino rosado seco de Navarra o tal vez con un Rioja tinto barato u otro tempranillo o garnacha de cuerpo medio? Aunque es una pregunta válida, la respuesta no es tan simple y, afortunadamente, tiene mucho tiempo para decidir otro día.

Sin embargo, queremos que empiece a pensar en un programa nuevo y emocionante que IMLA está organizando a través de una colaboración entre el Comité Directivo Internacional y La Asociación de Letrados de Entidades Locales de España, o la Asociación de Abogados de Gobiernos Locales de España (ALEL). ALEL es una organización española sin fines de lucro cuya misión es similar a IMLA, servir los intereses de los abogados de gobiernos locales en España a través de la promoción y organización de conferencias, seminarios y talleres legales.

Durante algún tiempo, ALEL ha estado trabajando en un programa de colaboración con abogados del gobierno local en Europa y América del Norte. Por lo tanto, no fue una sorpresa cuando el presidente de ALEL, Jesús Royo, se acercó a nuestro propio Chuck Thompson en 2019 PC (Pre-COVID), invitando a IMLA a participar en una conferencia internacional en Madrid. La conferencia contó con abogados de Francia, Italia, Inglaterra, Austria, Estados Unidos y, por supuesto, España hablando sobre la estructura legal y las requisitos de cada país para ejercer la abogacía.

Ese intercambio y un año de amistosas discusiones llevaron a la conformación de un grupo de trabajo entre IMLA y ALEL, cuyo propósito es identificar y dar a conocer asuntos legales de importancia mutua. El grupo de trabajo IMLA / ALEL está compuesto por los siguientes ocho miembros:

Aunque no es miembro de este grupo de trabajo, un agradecimiento especial para Ben Griffith, Copresidente del Comité Directivo Internacional de IMLA, quien ha trabajado incansablemente durante años para expandir el alcance internacional de IMLA y sin quien nada de esto sería posible.

Durante el próximo año, los miembros de IMLA y ALEL tratarán una variedad de temas interesantes, el primero de los cuales será una introducción a las estructuras gubernamentales de EE.UU. y España y la autoridad que los gobiernos locales derivan de esos sistemas.

A partir de ahí, los temas futuros pueden incluir (1) estudios comparativos de negligencia contributiva, uso de la tierra, protección de espacios naturales y parques, inmunidad y responsabilidad gubernamental y temas relacionados con el empleo; y (2) la importancia de ciertos deberes legales, incluido el deber de cuidado y el deber de advertir. El grupo de trabajo IMLA / ALEL está en estrecha colaboración con cada una de sus respectivas organizaciones para determinar la mejor y más eficaz forma de presentar estos temas, que pueden incluir artículos en la Revista IMLA y el sitio web de ALEL (http://letradosentidadeslocales.es/), conferencias, seminarios, y publicaciones en revistas especializadas.

Si está interesado en colaborar con abogados españoles en cualquiera de los temas enumerados anteriormente, comuníquese con IMLA. Realmente creemos que esta será una experiencia increíble para los miembros de IMLA y ALEL, y esperamos que se interese en aprender más sobre cuestiones legales internacionales.

Si todavía se lo está preguntando, la respuesta es claramente un tempranillo de cuerpo medio.

ALEL

Lourdes Morate Martín, Abogada del Ayuntamiento de Oviedo; Vocal de la Junta Directiva de ALEL.

Celia Guillot Rabanal, Responsable de la Oficina de Apoyo Administrativo y Jurídico de la Diputación de Barcelona.

Francisco Javier Durán García, Abogado del Ayuntamiento de Villafranca de los Barros; Vocal de la Junta Directiva de ALEL.

Jesús Ma Royo Crespo, Abogado de la Diputación Provincial de Zaragoza; Presidente de ALEL.

IMLA

Elsa Jaramillo-Velez, Abogado Asistente de la Ciudad, Ciudad de Hialeah, Florida.

Deanna Shahnami, Abogada Asociada, IMLA.

Chris Balch, Propietario de Balch Law Group; Abogado de la Ciudad, Brookhaven, Georgia [marcador de posición]; Miembro de la Junta de IMLA.

Tyler Wallach, Abogado Asistente de la Ciudad, Ciudad de Fort Worth, Texas; Copresidente del Comité Directivo Internacional de IMLA.

NEW HOR

Someone once said that dreams don't become true—but they can. And it is true that the thoughts in our head when we sleep are ideas, visions, and places we want to reach, and we want them to flourish over time.

William Shakespeare was right when he said: "We are such stuff as dreams are made on, and our little life is rounded with a sleep."

Since the creation of the **Spanish Local Government Lawyers Association (ALEL),** what we do is dream, think, and draw ideas from thin air that we want to make a reality. And fortunately, we have the possibility of carrying out many of those expectations and transforming them into activities, conferences, seminars, and publications.

In just five years, we have climbed some mountains that were once impossible to climb, seeing the difficulties of the challenge from the valley below and finding our own path to the top.

There are still many dreams that seem impossible to achieve, but we have another tool, a key that allows us to open the box when it is locked. It is precisely this ingredient that has enabled us to celebrate our collaboration with the **International Municipal Lawyers Association (IMLA),** the most prestigious and important association of Local Government Lawyers in the United States and Canada.

Our collaboration will begin by publishing articles that will explain our respective local legal systems and their main characteristics and differences, to enable us to better understand the realities of local administration and to observe the problems of our neighbors and fellow citizens. Although the distance between us is measured in kilometers or miles, our legal systems are more similar than we think when looking at the management and provision of public services.

We want to take advantage of this collaboration through future activities carried out by IMLA and ALEL, allowing Local Government Lawyers to take advantage of the ideas and proposals that may be raised from our associations.

All that remains is to finish these words, thanking the people who have made it possible for this dream to become a reality. To all the associates and members of the ALEL Board of Directors and especially to the working group created specifically to implement this task **Lourdes Morate** (City Council Attorney of the Oviedo City Council), Celia Guillot (Head of the Administrative Office and Legal Support of the Provincial Council de Barcelona) and **Javier Durán** (Town Hall Lawyer of the Villafranca de los Barros City Council).

We also thank those responsible at IMLA for their willingness to work with us, and special mention to **Elsa Jaramillo** (Labor and Employment Attorney, City of Hialeah, Florida), **Deanna Shahnami** (Associate Counsel at IMLA), **Chris Balch** (Principal, Balch Law Group, Brookhaven, Georgia and IMLA Director) and finally to our dear **Tyler Wallach** (Senior Assistant City Attorney, City of Fort Worth, Texas) for his enthusiasm and for believing and promoting this project, our project, from the United States.

We believe that we can safely say that WE HAVE A DREAM.

Zaragoza on December 4th, 2020

Jesús Mª Royo Crespo
President of The Spanish Local Government Lawyers Association

IZONS

Alguien dijo en una ocasión que los sueños no se hacen realidad; son verdaderos. Y es cierto que esos pensamientos que tenemos en nuestra cabeza cuando dormimos son ideas, visiones, lugares a los que queremos llegar y además queremos que existan y se perpetúen en el tiempo.

Qué razón tenía *William Shakespeare cuando decía que: "Somos del mismo material del que se tejen los sueños, nuestra pequeña vida está rodeada de sueños".*

Desde la creación de la **Asociación de Letrados de Entidades Locales de España (ALEL),** lo que hacemos es soñar, pensar, dibujar ideas en el aire que queremos que se conviertan en realidad y afortunadamente tenemos la posibilidad de llevar a cabo muchas de esas expectativas, transformándolas en actividades, jornadas, seminarios, coloquios, publicaciones.

En apenas cinco años hemos subido algunas montañas que eran imposible de ascender, que las veíamos desde el valle viendo la dificultad del reto, pero hemos ido encontrando el camino que nos ha llevado hasta la cima.

Sigue habiendo muchos sueños que parecen imposibles de alcanzar, pero tenemos algo que seguimos teniendo, la llave que permite abrir la caja donde están encerrados y no es otra cosa que ILUSIÓN.

Es precisamente este ingrediente el que ha conseguido que hoy podamos celebrar nuestra colaboración con la **International Municipal Lawyers Association** (IMLA), la asociación más prestigiosa e importante que integra a los más acreditados Letrados Locales de Estados Unidos y Canadá.

Esta colaboración se centrará en una primera fase en la redacción de artículos que explicarán nuestros respectivos ordenamientos jurídicos locales, características principales, diferencias, todo ello con la finalidad de conocer mejor la realidad de las administraciones locales y observando que los problemas de nuestros vecinos y conciudadanos son más parecidos de lo que creemos y que la distancia es únicamente en kilómetros o millas pero no en la gestión y prestación de los servicios públicos.

Por ello, queremos aprovechar esta colaboración para que en futuras actividades que tanto IMLA como ALEL vayan a realizar, las entidades locales en las que los Letrados Públicos Locales desarrollamos nuestras funciones se impliquen y aprovechen las ideas y propuestas que desde nuestras asociaciones se puedan plantear.

No queda sino finalizar estas palabras, agradeciendo a las personas que han hecho posible que este sueño pueda convertirse en realidad. A todos los asociados y miembros de la Junta Directiva de ALEL y especialmente al grupo de trabajo creado específicamente para implementar esta tarea **Lourdes Morate** (Letrada Consistorial del Ayuntamiento de Oviedo), **Celia Guillot** (Responsable de la Oficina Administrativa y de Apoyo Jurídico de la Diputación de Barcelona) y **Javier Durán** (Letrado Consistorial del Ayuntamiento de Villafranca de los Barros).

También agradecer a los responsables de IMLA su disposición a trabajar con nosotros, y mención especial para **Elsa Jaramillo** (Labor and Employment Attorney City of Hialeah, Florida), **Deanna Shahnami** (Associate Counsel at IMLA), **Chris Balch** (Principal, Balch Law Group, Brookhaven, Georgia and IMLA Director) y finalmente a nuestro querido **Tyler Wallach** (Senior Assistant City Attorney, City of Fort Worth, Texas) por su entusiasmo y por creer e impulsar desde Estados Unidos este proyecto, nuestro proyecto. Creemos que podemos decir sin miedo a equivocarnos que WE HAVE A DREAM.

En Zaragoza a 4 de diciembre de 2020

FEDERAL

BY: ERICH EISELT,
IMLA Assistant General Counsel

Music, Money, and Municipalities

The evolution of a musical work, from creative spark through arrangement and enhancement, to rendering by instrumentalists and singers, to recording and digitization, to enjoyment by the public is complex and mysterious to those outside the industry. So too are the laws that govern how that work is protected and made available. This article is a brief look at the elements involved when local governments make music available for their constituents.

Origins of Music Protection: The protection of intellectual property, a principle brought to this country by our English forbears, has enabled American ingenuity to flourish. That foundational concept was enshrined in our own Constitution, which in Article 1, section 8, empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Our national legislature would thereafter fulfill its responsibilities. Federal patent law was enacted for the protection of "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof."[1] More relevant for the scope of this article, authors, artists, composers, designers and other creative sorts would be protected under federal copyright law: Codified at 17 U.S.C. § 100 et seq., the United States Copyright Act (Act) protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." [2] The protected "original works" comprise a breadth of genres: literary, dramatic, choreographic, pictorial, graphic, sculptural, architectural—and include motion pictures and audiovisual works, sound recordings (added to the Act in 1972), as well as compilations and derivative works. [3] And most salient for our purposes, the Act protects musical compositions and lyrics.[4]

Rights of the Copyright Holder: Under the Act, the owner of the copyright is granted exclusive rights for a specified time period to control how, where, and if the original work is used. This includes exclusivity to (or authorize others to) do the following:

- reproduce the copyrighted work in copies or recordings;
- distribute copies or recordings of the copyrighted work to the public via sale or lease;
- produce derivatives based on the copyrighted work;
- display the copyrighted work publicly;
- and, central to this discussion, "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform the copyrighted work publicly;**" which is effected "in the case of sound recordings . . . by means of a digital audio transmission.[5]

"Public Performance" Defined: As the Act makes explicit, to "perform" a work includes not only an actual live performance, but also transmission of the work; the "public" is anything greater than a personal social circle. A "public performance" means:

> (1) to perform… at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit… the work to a place specified by clause (1) or to the public… whether the members of the public… receive it in the same place or in separate places and at the same time or at different times.[6]

Sanctions: The most significant element of the Act in terms of protecting musical creativity (and threatening unauthorized music users) are its sanctions. 17 U.S.C. §504 allows for penalties ranging from $750 to $30,000 *per infringement*, with willful violations increasing to $150,000 (on the other hand, innocent violations may incur a vastly reduced $200 penalty). The Act also allows for the imposition of costs and attorney's fees.[7]

Duration: Unlike patent law, which confers protection for only 20 years after a patent is formally filed with the United States Patent and Trademark Office,[8] the Act protects copyrighted works (which obtain legal legitimacy as soon as they are reduced to any "tangible medium of expression"—often evidenced by publication) for far longer. While the specifics add complexity, it is fair to summarize

that works published from 1924 through 1977 receive copyright protection for 95 years after publication.[9] Thus Jimi Hendrix's "All Along the Watchtower," published in 1968, is protected until 2063. For works published from 1978-on, copyright is based not on publication date but the lifespan of the creator, lasting 70 years after the date of death.[10] The Act will therefore protect "Rehab," the 2006 musical offering by Amy Winehouse, who died in 2011, until 2081.

January 1 is referred to as "public domain day," marking the date that copyrighted works of the statutory age limit lose their protection under the Act.[11] As of New Year's 2021, works published in 1925 became 96 years old, meaning that Fitzgerald's "The Great Gatsby" and Alain Locke's collection "The New Negro" are now in the public domain.[12] So too are musical compositions like "Sweet Georgia Brown" and numerous works by Duke Ellington, Fats Waller and Ma Rainey.[13] (One caveat: it is the words and the specific melodic rendition that is protected; other versions, like George Harrison's much more recent treatment of "Sweet Georgia Brown" retain protection, meaning that, while anyone is free to perform the lyrics or melody, or broadcast the 1925-era version, performance or broadcast of a more recent arrangement or recording may well invoke the Act's proscriptions).

An Aside-"Performance Rights," not Performer Rights: Note that the performance rights guarded by the Act protect the composer and song writer, not the singer. While Gladys Knight's unforgettable vocal talents brought "Midnight Train to Georgia" to life, placing the song at number 15 on the 1973 Billboard 100 (just above Cher's "Half Breed" and three stops behind another railroad rendering, "Love Train" by the O'Jays) and winning Gladys and her Pips a Grammy, the song was actually written by Jim Weatherly, a University of Mississippi quarterback-turned songwriter. Originally titled "Midnight Plane to Houston," he converted the lyric to its more bucolic Peach State sentimentality at the urging of singer Cissy Houston, an Atlanta native and mother of a far more famous musical daughter.

"Midnight Train" now been covered by scores of other singers, from Aretha Franklin to Neil Diamond to Garth Brooks, garnering additional performance royalties to songwriter Weatherly--but none to Gladys Knight. Neither Knight, nor the Pips, nor the thousands of other singers, instrumentalists, sound technicians and the retinue of associated players who bring a musical work to our ears can look to "performance rights" for significant compensation. Surprisingly, the playing of a song on AM/FM radio, whether in Dallas (KSCS for country) or Detroit (WJLB for throwback R&B and Hip-Hop) does not generate a penny of revenue for the voices or musicians we hear. The logic in the formative years of the Act was that radio stations were essentially free advertising, driving "hard copy" sales of the recording, first on shellac, then vinyl, 8-track, CD or other medium.

That rationale may have been valid in the days when listeners rushed to Tower Records or Sam Goody to scoop up "Thriller," generating gold-album income for Michael Jackson. But the arrival of digitization and streaming services drastically reduced the need to purchase music, severely undercutting performers' revenues. Congress set out to rectify the problem via new legislation amending the Act, via the Digital Performance Rights in Sound Recordings Act of 1995 (DPRA),[14] which requires that payments by streaming services go in part to the musicians and vocalists who actually produce the songs and melodies being heard.

Enter the PROs: Clearly, the long-lasting and exclusive performance rights granted under the Act are of immense worth to musical creators. It is equally obvious, however, that in most scenarios, writers and composers have little capacity, acting individually, to generate value from their works. Many sign contracts with publishing houses, who act on behalf of creators to commercialize their lyrics and melodies, licensing titles to performers, negotiating rights to synchronize music to movies and video, and deriving value from various other uses of music. But the musical creators and their publishers then look to another enterprise to collect revenues from the performance of copyrighted works. Enter the Performing Rights Organizations (PROs), who, for a fee from their clients, whether composers, lyricists, or publishers, wield the Act's considerable sanctions to discourage the misappropriation and uncompensated use of music, requiring licenses for the right to perform musical works and remitting royalties among their licensor clients.

From the municipal perspective, four PROs are most likely to play a role. By far the largest share of musical compositions are licensed from two massive and long-standing fixtures, ASCAP and BMI:

ASCAP-The American Society of Composers, Authors, and Publishers (www.ascap.com) originated in 1914. It largely predated musical recordings and was initially engaged in licensing sheet music on behalf of melodists, lyricists, and publishing companies, eventually exercising significant power as the sole PRO. ASCAP instituted the "blanket license," granting the right to perform multiple compositions for a fixed price. Today, it claims to represent nearly 10 million works and 575,000 creators and publishers.

BMI-Broadcast Music Inc. (www.bmi.com) was formed in 1939 by broadcasters, in no small part as a response to the ASCAP megalith. BMI focused on licenses to radio stations, and rapidly attracted its own cohort of composers and publishers. BMI now claims to represent more than 11 million works and over 790,000 copyright holders from 90 countries.

Two other PROs have more recently emerged in the municipal environment, further complicating the licensing picture:

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SESAC-The Society of European Stage Authors and Composers (www.sesac.com), founded in 1930, originally sought to support European creators obtain their US royalties, but migrated to representing American clients beginning in the 1960's. It claims to represent 30,000 copyright holders and one million titles. Evidencing the lucrative potential of PROs, SESAC was acquired by major private equity player Blackstone Group in 2017.

GMR-Global Music Rights (www.globalmusicrights.com) is the newcomer to the PRO family, having been formed in 2013 by industry heavyweight Irving Azoff, who previously managed acts including Bon Jovi and the Eagles and served as CEO of MCA Records and Ticketmaster. GMR's footprint is far smaller than the other PROs; its website promotes a curated collection of only 53,000 titles (including 137 Billboard 100 songs) and 95 high-profile song writers.

(There are numerous additional PROs which play a role in American performance licensing, including Soundexchange and Songtrust, but these occupy niches that will not be of direct impact to municipal users).

Antitrust Considerations: The ability to represent collectives of musical creators confers significant market power, which can be wielded against those who produce music and those who use it. Early in its history ASCAP began to exercise that clout for anticompetitive ends.[15] It refused to sign agreements with some creators, depriving them of representation.[16] For those who became clients, it demanded that all their works be licensed to ASCAP. It created barriers to composers who desired to leave ASCAP for other representation. It sought to require music users to take blanket licenses for an entire library of works rather than making a la carte selections. And its obscure financial terms with composers and users alike were riddled with favoritism and inconsistencies. Ironically, BMI was also accused of similar practices. After investigating these allegations, the Department of Justice sued under the Sherman Act, imposing consent decrees first on ASCAP[17], followed by BMI [18] (Consent Decrees). The Consent Decrees required that BMI and ASCAP allow licensing of selected titles rather than requiring blanket licensing of their complete repertoires. They also injected transparency and a level playing field, and subjected the two PROs' pricing to oversight by a "Rate Court" in the Southern District of New York. While these regulations continue to harness ASCAP and BMI, the newcomer PROs are not subject to the Consent Decrees and their restrictions.

In subsequent years, the PROs and radio station groups have increasingly accused one another of anticompetitive behavior. The Radio Music License Committee (RMLC), which represents roughly 10,000 commercial radio stations across America, has been a prominent adversary. It reached settlements reducing its royalties with SESAC in 2014 and BMI in early 2020, but GMR has not been so accommodating. RMLC alleged that GMR, by combining select key artists (Bruce Springsteen, Bruno Mars, and Smokey Robinson among them) in a single take-it-or-leave-it package, is charging rates far above what any single artist could receive on its own—the same argument that led to dramatically lower performance license rates in the SESAC settlement. As a Pennsylvania federal court summarized the case in an order moving *Radio Music License Committee, Inc. v. Global Music Rights, LLC,* no. 16-6076 (E.D. Pa. March 16, 2019) to the Central District of California:

> Defendant Global Music Rights, LLC ("GMR") is a newly founded PRO that grants public performance licenses to the musical works within its repertory. RMLC claims that GMR has leveraged the competitive vacuum created by judicially-monitored consent decrees over the two largest PROs in the industry - the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") - to poach a strategic group of songwriters and create a repertory that no radio station could succeed without access to. RMLC argues that GMR has created an untenable and illegal situation wherein RMLC's members are forced to either pay overly priced licensee fees to GMR or face copyright infringement claims, which at the tune of $150,000 per infringed work, would quickly bankrupt the infringing member.

Each party's motion to dismiss has been denied and the action is currently moving towards trial in the California court, although significantly delayed due to COVID interruptions.[19]

Implications for Municipalities: The foregoing, from the protections and penalties in the Act, to the Consent Decrees, to the emergence of the new PROs, has implications for municipalities. First, as described earlier, under the terms of the Act it is not legal for a municipality to "perform" copyrighted music without authorization. Governmental entities are specifically included within the Act's proscriptions: "Anyone who violates…the exclusive rights of the copyright owner…is an infringer…. '[A]nyone' includes a State, any instrumentality of a State and any officer or employee…. Any State, and any such instrumentality…shall be subject to the provisions of this title…to the same extent as any nongovernmental entity." [20]

This means that music "performed publicly" on municipal property, whether owned, leased or otherwise controlled, and whether provided by live musicians or singers, or broadcast from recordings, radio, television or via streaming services, is generally subject

to authorization from the copyright holder. Examples include music in public parks, ice skating rinks, pools and exercise facilities. Also covered are marathons and sporting events, on-hold music and classes where yoga instructors or spin leaders bring their own musical selections: if the "performance" to the "public" occurs on municipal territory, the composer, lyricist and/or publisher has rights to be compensated by the municipality unless it has received permission for such use. This is so even if the infringement occurs at the hands of a cover band on a public stage or a well-intentioned modern dance instructor at the local high school—under the Act, the venue is liable. The fact that an individual has purchased a CD or subscribes to iTunes or Pandora for personal use does not confer authority to publicly perform that music. While nominal exceptions in the Act permit fair use (using minor portions of the work, subject to a four-part test including whether such use will undermine sales of the original) and "charitable" uses, allowing live performances where no performer, promoter or organization receives compensation and any admission, if charged, is used "exclusively for educational, religious, or charitable purposes,"[21] those scenarios are vastly limited.

The PROs, wielding the intimidating sanctions threatened in the Act, and driven by their stated mission to ensure that musical creators are properly rewarded while paying themselves for the effort, scour the horizon for violations. Live performances in music venues, bars, and dance clubs, background music in bowling alleys, restaurants, malls and hotels, on-hold accompaniment, songs on radio stations, television, and streaming services, are all subject to PRO scrutiny and a requirement to license. When a violation is detected, most often the result is a request to cease and desist and a notice to the infringer that a contract must be signed, occasionally accompanied by the demand for back payment. For those that flagrantly or repeatedly ignore copyright, however, courtrooms and six-figure penalties await. Municipalities are also on the PROs' radar, sometimes receiving courteous but undisguised reminders that a paid license is required for use of music.

The Commercialization of Obscurity: It is at this juncture—the consideration of a license with a given PRO--that a major irritant appears, for municipalities as much as any other licensee. Put simply, it is extremely difficult to know what titles are being licensed from whom, or to limit musical use to any one PRO. Given the millions of musical works controlled by the PROs as an industry, a centralized mechanism to determine which PRO controls which work would be highly desirable. None exists. In 2016, BMI and ASCAP announced, at long last, that they would produce such a database by 2018. It had still not appeared by 2019 when the Department of Justice solicited comments to the Consent Decrees. IMLA joined 877 others in a litany of opinions, most of which urged continuation of the regulatory handcuffs on the nation's two largest PROs.[22] One of our IMLA comments was that the combined database should be forthcoming, with the aspirational coda that the other PROs should also be required to contribute their data, allowing a rapid overview of who controls what. The omnibus database mirage did not materialize, but ASCAP and BMI did produce their combined dataset in late December 2020, as the appropriately-named "Songview."[23] Their joint press release proclaimed "Groundbreaking collaboration provides detailed copyright information for more than 20 million songs, including reconciled ownership shares, offering greater transparency for the industry."[24]

Songview undoubtedly adds transparency, but it does not capture songs which are fully controlled by other PROs. What Songview does make evident, however, is a further, and ultimately more troublesome, obstacle. A given musical work is often the product of collaboration, with a lyricist and a melodist joining forces. Beyond that, as noted earlier, the copyright is often shared with a publishing house. Each of these entities is free to align with any PRO it chooses. The result is massive fragmentation, and a given PRO rarely owns 100% of the right to grant a performance license for any single work. (The list of "100% BMI Owned" titles on Songview is surprisingly modest). As the GMR website states "When you acquire a Blanket License from Global Music Rights, you get a legal authorization to play shares of the music we represent in your place of business for the duration of your license."

A glance at Songview reveals the phenomenon, in plain sight. Take Pharrell Williams' 2013 blockbuster "Happy." GMR positions Pharrell as one of its featured songwriters, but as Songview discloses, and GMR's own catalog confirms, 50% of the performance rights in "Happy" are owned by publishers. One publisher is EMI Blackwood, a BMI client; the other, Universal Pictures, is an ASCAP client. In other words, three different PROs would likely require performance licenses from a municipality desiring to play "Happy" publicly or have it performed.

Multiply that fractional ownership scenario across thousands (or millions) of titles and the prospects for performance licensing from only one PRO, or even two, is remote.

This detriment is kept somewhat in check in the case of BMI and ASCAP by virtue of the DOJ and the Consent Decrees. The two original PROs are required to provide municipalities virtually identical

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Special Census *cont'd from page 11*

The procedures document provides an overview of other instances and provides references to the relevant portions of the Tennessee Code. In Tennessee, there are three primary deadlines a community must adhere to in order to receive certification from TNECD:

- January 1: Deadline to submit a letter of intent to the Boyd Center for Business and Economic Research (a unit of University of Tennessee-Knoxville);
- March 1: Deadline to submit special census documentation for review and field verification; for review and field verification
- May 15: Deadline to submit special census documentation to the Boyd Center.

Approval of a special census is a multi-layered review involving the program administrators, field checks and ultimately certification by TNECD for incorporation into Certified Population of Tennessee Incorporated Municipalities and Counties that becomes effective each July.

Tennessee's nine Development Districts play in important role in this regard, verifying the completeness and accuracy of a special census. Through arrangements with the community conducting the census, a Development District is contracted to conduct a random check of households; polling at least ten percent of the residents listed in the census to ensure error does not exceed five percent.

The City of Franklin experienced tremendous growth from 2010-2020. According to the 2010 Census, Franklin had a population of 62,487. In 2013, Franklin initiated the steps to begin a special census. Franklin budgeted $80,000 for the special census and entered into a contract in the amount of $3,600 with Comcast to advertise the special census on Franklin's PEG (public, educational or goverrnmental) channel. In that year, for every person counted, Franklin would receive approximately $100 in state shared funding. The special census was completed, and the numbers verified by a third party in 2014. Franklin was able to verify a population of 66,335, which was an increase of 3,848 residents, resulting in an additional $384,800 in funding. While we ran information on our PEG channel, it did not specifically reach out to residents. We learned that citizens were not very trusting of a special census since most had not heard about it, and we encountered particular issues with apartment complexes allowing census takers into the facility.

Due to its continuing growth, in 2016 Franklin decided to conduct another special census, and was much more deliberate in notifying and educating the public, using billboards to disseminate information and providing giveaways to those who participated. Franklin used YouTube[63] and Facebook and ran PSAs (public service announcements) explaining the special census and why Franklin was going through the process.[64] Franklin also asked the local paper to get involved and was able to get an article written about the special census.[65] Franklin budgeted $100,000 for the second special census. In that year, for every person in the county, Franklin would receive approximately $120 in state shared funding. The special census was completed, and the numbers were verified by a third party and City staff in 2017. Franklin was able to verify a population of 71,371, which was an increase of 5,036 residents, resulting in approximately $604,320 in additional funding.

Success required thinking outside the box, and census volunteers went where the people were. Rotarian volunteers set up tables at baseball games and were able to get many families counted. Franklin deployed its own municipal employees to walk neighborhoods, paying them overtime. The PSAs explained that volunteers in the neighborhoods would be wearing certain shirts and were city employees. Once the census numbers were in, Franklin used a third party, Upper Cumberland Development District, to verify the numbers, under a fixed-price contract requiring them to cover all costs.

(Despite the PSAs, many residents were suspicious of those claiming to work for the government and wanting personal information, and gaining access to apartment complexes, especially those that are gated, proved difficult).

D. Key Ingredients to an Economical Special Census

Based on the experiences of Lexington and Franklin, we have concluded the following about a special census:

- The earlier the better in a typical census cycle for a special census to be conducted;
- A significant population growth, approaching 25% or more, may be needed to make a special census economically beneficial; and
- The city or town staff must embark upon a coordinated promotional and educational campaign to help residents understand why the municipality is paying for its own special census and must be prepared for public response once the count is completed.

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Notes

1. U.S. Const. art. I, § 2, cl. 3.
2. 13 U.S.C.A. § 1 to 402.
3. 13 U.S.C.A. § 141(a) (West).
4. 13 U.S.C.A. § 141(b) (West).
5. City of Los Angeles v. U.S. Dep't of Commerce, 307 F.3d 859 (9th Cir. 2002).
6. Morales v. Daley, 116 F. Supp. 2d 801 (S.D. Tex. 2000).
7. 13 U.S.C.A. § 141(a) to (c) (West).
8. 13 U.S.C.A. § 1 to 26.
9. 13 U.S.C.A. § 141(d) (West).
10. 13 U.S.C.A. § 301 to 307.
11. 13 U.S.C.A. § 41 to 45 (West).
12. 13 U.S.C.A. § 61 to 63 (West).
13. 13 U.S.C.A. § 81 (West).
14. 13 U.S.C.A. § 101 (West).
15. 13 U.S.C.A. § 102 (West).
16. 13 U.S.C.A. § 131, 132 (West).
17. 13 U.S.C.A. § 161 (West).
18. 13 U.S.C.A. § 211 to 214 (West).
19. 13 U.S.C.A. § 221 to 225 (West).
20. 13 U.S.C.A. § 196 (West).
21. 13 U.S.C.A. § 196 (West).
22. 15 C.F.R. § 50.10.
23. Tenn. Code Ann. § 6-51-114 (West).
24. *Id.*
25. Dennis v. Pendley, 518 So. 2d 688 (Ala. 1987).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. City of Bisbee v. Williams, 83 Ariz. 141, 317 P.2d 567 (1957).
32. *Id.*
33. City of Compton v. Adams, 33 Cal. 2d 596, 203 P.2d 745 (1949).
34. *Id.*
35. Pelzer v. Bellevue, 200 Neb 541, 264 NW2d 653 (1978).
36. *Id.*
37. *Id.*
38. Application of Burns, 9 Misc. 2d 360, 167 NYS2d 304 (1957).
39. N.Y. Gen. Constr. Law § 37-b.
40. *Application of Burns, supra* note 38.
41. De Grief v. Seattle, 50 Wash 2d 1, 297 P2d 940 (1956).
42. 1955 Wash. Laws 290, §§ 1 et seq.
43. Wash. Rev. Code § 43.62.030.
44. *De Grief, supra* note 47.
45. Harp v. Abrahamson, 248 Iowa 222, 80 N.W.2d 505 (1957).
46. Iowa Code Ann. § 312.3 (West).
47. *Harp, supra* note 45.
48. City of St. Louis Park v. King, 246 Minn. 422, 75 N.W.2d 487 (1956).
49. Minn. Stat. Ann. § 297.13 (West); Minn. Stat. Ann. § 340.60 (West).
50. *City of St. Louis Park, supra* note 48.
51. Bd. of Comm'rs of Delaware County v. Williams, 1913 OK 539, 38 Okla. 738, 135 P. 420 (1913).
52. Wilson's Rev & Ann St. § 3024..
53. Wilson's Rev & Ann St. § 3028.
54. 1907-1908 Okla. Sess. Laws 165.
55. *Bd. of Comm'rs of Delaware County, supra* note 51.
56. State ex rel. City of Casper v. Morgan, 80 Wyo. 1, 336 P.2d 791 (1959).
57. Wyo. Stat. § 32-2408 (1945).
58. *City of Casper, supra* note 56.
59. *Id.*
60. https://www.census.gov/programs-surveys/specialcensus/how_to_conduct.html
61. Tenn. Code Ann. § 6-51-114 (West).
62. https://tnsdc.utk.edu/special-census/
63. https://www.youtube.com/watch?v=6mEON1I3h9k
64. https://www.franklintn.gov/Home/Coomponents/News/News/5790/1354?npage=35&seldept=14&arch=1
65. https://www.tennessean.com/story/news/local/williamson/2017/03/16/special-census-bring-500000- franklin/99250578/

AMICUS CORNER

BY: AMANDA KARRAS,
IMLA Deputy General Counsel and Director of Legal Advocacy

Supreme Court Update

By the time this article goes to print, the Supreme Court's docket will be mostly set for the 2020 October Term, which (if all goes according to plan) will end in June 2021. The Court typically adds cases to its docket for the current Term through the first couple of weeks of January and is about ten cases below its usual number, so we can expect a few more grants before all is said and done this Term. In the meantime, the Court has been busy, adding two new cases to its docket recently that are relevant to local governments and issuing a couple of COVID-19 related emergency decisions. This article summarizes those recent developments.

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Roman Catholic Diocese of Brooklyn v. Cuomo

The Court's first decision with Justice Barrett on the bench involving a Free Exercise challenge to public health restrictions came out differently than the last two decisions it rendered over the summer. In *Roman Catholic Diocese of Brooklyn v. Cuomo* in a per curiam (unsigned) 5-4 opinion, the Court enjoined New York from imposing its 10 and 25-person occupancy limits on religious institutions.[1] Specifically, New York imposed restrictions on attendance at religious services in areas classified as "red" or "orange" zones in the State. In red zones, no more than 10 persons could attend each religious service, and in orange zones, attendance was capped at 25. Religious entities in the state challenged the order, claiming it violated their First Amendment Free Exercise rights because it treated in-person gatherings at religious services less favorably than comparable secular activities. For example, acupuncturists, campgrounds, garages, certain manufacturing plants, liquor stores, and all transportation facilities were all exempt from the 10 and 25-person caps even if located in a red or orange zone.

The Supreme Court agreed with the challengers and issued a preliminary injunction in the case, pending appeal. The majority opinion explained that while "[s]temming the spread of COVID-19 is unquestionably a compelling governmental interest," New York's restrictions were too restrictive and not narrowly tailored. The majority noted:

> Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.

The majority rejected the dissenting opinions' arguments that the case was moot. At the time the Court issued its opinion, the 10 and 25-person caps no longer applied and instead the churches and synagogues challenging the order could hold services at 50% occupancy. The majority explained that the case was not moot because the Governor regularly changes classifications and the religious institutions could once again be subject to the 10 and 25-person caps, making them capable of repetition while evading review.

Justice Gorsuch wrote a separate concurrence taking aim at *Jacobson v. Massachusetts,* noting the case "hardly supports cutting the Constitution loose during a pandemic" particularly with regard to Free Exercise challenges which were not at play in *Jacobson.* He also sent critical barbs at his colleagues for wanting to "stay out of the way in times of crisis," explaining the Court cannot "shelter in place when the Constitution is under attack."

Justice Kavanaugh wrote a concurrence taking a more measured tone,

explaining the New York case was distinguishable from the Court's earlier decisions in *South Bay United Pentecostal Church v. Newsom*, 590 U. S. ___ (2020), and *Calvary Chapel Dayton Valley v. Sisolak*, 591 U. S. ___ (2020) because New York's restrictions were much more severe. Justice Kavanaugh also explained that, in his view:

> [T]he COVID–19 pandemic remains extraordinarily serious and deadly. And at least until vaccines are readily available, the situation may get worse in many parts of the United States. The Constitution "principally entrusts the safety and the health of the people to the politically accountable officials of the States." South Bay, 590 U. S., at ___ (ROBERTS, C. J., concurring in denial of application for injunctive relief) (slip op., at 2) (internal quotation marks and alteration omitted). Federal courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic. See ibid. But judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.

Chief Justice Roberts dissented and would not have granted the injunction, viewing the case as moot, though he did note that he viewed the restrictions as distinguishable (and more severe) than those in which the Court had previously denied injunctions in the *South Bay* and *Cavalry Chapel Dayton Valley* cases. Justice Breyer also dissented and was joined by Justices Sotomayor and Kagan and Justice Sotomayor penned a separate dissent, which Justice Kagan joined.

Following the Court's decision in *Roman Catholic Diocese*, it issued a short (two sentence) order remanding a different case by a church challenging California's restriction in light of *Roman Catholic Diocese*. The Ninth Circuit originally declined to issue an injunction in the case, *Harvest Rock Church v. Newsom,* concluding that under the Governor's order, secular and non-secular activities were treated the same even though in some counties, in-person worship was completely prohibited.[2] However, the dissenting judge at the Ninth Circuit noted that under California's order, someone could go to a nail or hair salon, but could not congregate in the same manner in a religious institution. The Ninth Circuit will now have an opportunity to review the request for an injunction in light of the Supreme Court's *Roman Catholic Diocese* decision.

COVID-19 public health orders are not the only issues on the Court's docket that are relevant to local governments. The Court recently granted certiorari in *Caniglia v. Strom,* a case involving the contours of the community caretaking exception to the Fourth Amendment's warrant requirement.

In this case, Kim Caniglia and her husband got into a fight during which he went and retrieved a gun, threw it on their dining room table and said something like "shoot me now and get it over with." She left the home as a result of the fight and stayed at a hotel. The next morning, she called the Cranston, Rhode Island non-emergency police line and asked law enforcement to accompany her to her residence, recounting the fight from the evening before and her concern about "what she would find" when she got home. The police accompanied her and spoke to her husband, Edward Caniglia, on the porch of their home. The ranking officer determined Edward was "imminently dangerous to himself and others" and convinced him to go to the hospital for a psychiatric evaluation. Edward claims the officers lied to him to induce him to go to the hospital by telling him that if he went, his firearms would not be confiscated.

After Edward went to the hospital, police seized his firearms. Although there are factual disputes surrounding whether the officers had the wife's permission to seize the guns, the parties agree that Edward objected to their confiscation.

Edward sued, claiming that he and his guns were unconstitutionally seized without a warrant in violation of the Fourth Amendment. The City claimed the seizures were valid pursuant to the community caretaking function exception to the warrant requirement. The Supreme Court has never extended the "community caretaking exception" beyond the context of cars. In 1973, in *Cady v. Dombrowski,* the Supreme Court concluded that police did not violate the Fourth Amendment's warrant requirement when they conducted a "caretaking search" of a vehicle for a gun they reasonably believed was in the car's trunk.[3] The Court in *Cady* explained that the community caretaking function occurs when police action is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[4]

On these facts, the First Circuit found no Fourth Amendment violation, extending the community caretaking function beyond the context of motor vehicles and into the home. The court explained that "a police officer — over and above his weighty responsibilities for enforcing the criminal law — must act as a master of all emergencies, who is expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety."[5] Furthermore, the court explained, "threats to individual and community safety are not confined to the highways."[6]
Applying those principles to this case, the court held that sending Edward for a psychiatric evaluation fell within the community caretaker exception because "no rational factfinder could deem unreasonable the officers' conclusion that the plaintiff presented an imminent risk of harming himself or others."[7] In terms

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AMICUS *cont'd from page 27*

of the warrantless entry into Edwards home and seizure of the firearms, the First Circuit also concluded the seizure fell within the community caretaker exception. "We conclude that the officers could reasonably have believed, based on the facts known to them at the time, that leaving the guns in the plaintiff›s home, accessible to him, posed a serious threat of immediate harm."[8] In coming to this conclusion, the court reasoned that police officers must "be granted some measure of discretion when taking plausible steps to protect public safety, particularly when human life may be at stake and the margin for error is slight."

The Supreme Court granted certiorari on the question of whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home. This case will present an intersecting push/pull for the more traditionally conservative Justices who tend to be more pro-police, but also tend to be protective of individuals' privacy rights in their homes. After all, Blackstone's Commentaries, which are often referred to in Fourth Amendment search cases, tell us "every man's house is looked upon by the law to be his castle."[10]

That said, local governments have both fiscal and public safety reasons to support the City and police officers in this case and IMLA intends on filing an amicus brief on their behalf. First, to the extent the community caretaker exception limits Fourth Amendment liability we are in favor of it as it will reduce litigation against local governments and provide a defense to potential claims under Section 1983. In addition to helping prevent Section 1983 lawsuits, the community caretaking function is necessary as a matter of public safety, for example, when police are asked to do wellness checks when a neighbor or family member expresses concern about a person's safety or health. This is a regular occurrence where families are geographically spread out and adult children, for instance, may ask police to check on an elderly parent living alone who has not been heard from. Similarly, as here, assuring that there is a pause in what could become a more volatile and violent situation by acting to buffer both the cause and the means from potential victims is reasonable. As a society we want agencies of government whether police, fire, or social services to be able to act as community servants in protecting lives, safety, the health and welfare of members of the community.

As of this writing, the Supreme Court has not yet set oral argument in this case, but we can expect it to be argued this Term and we should have a decision before the end of June 2021.

Cedar Point Nursery v. Hassid

Another recent grant involves an important Takings issue. *Cedar Point Nursery v. Hassid* involves the California Agriculture Labor Relations Act (ALRA), which allows union organizers access to agricultural employees at employer worksites. The union organizers, under the Act, are given access to employer worksites for certain specified amounts of time during non-working hours. The Act requires that union organizers provide notice to employers if/when they plan to access the property. The employers brought a claim against the California agency in charge of administering the ALRA claiming, among other things, that the Act amounted to an uncompensated per se physical Taking under the Fifth Amendment to the U.S. Constitution.

The issue in the case before the Court is whether the uncompensated appropriation of an easement that is limited in time effects a per se physical taking under the Fifth Amendment. IMLA's interest in this case is not in defending the specific law in question (particularly given the unique nature of the law), but instead, in ensuring that any decision the Court renders, takes into account the fact that local governments conduct all kinds of inspections and investigations involving temporarily accessing private property and such access should not be considered a Taking. For example, local governments access private property for inspections related to child abuse and neglect, schools, restaurants, hospitals, animal cruelty, and tenant issues (health and safety) to name just a few. Additionally, in highly regulated industries like nuclear power and meat processing plants, there may be government inspectors on site regularly. Then, there is also the issue of police investigations. It cannot be that the government has "taken" someone's property within the meaning of the Fifth Amendment when a police officer enters that property in hot pursuit of a suspect or to extract a hostage. IMLA plans to submit an amicus brief in this case highlighting these issues to ensure any holding would not create onerous and expansive constitutional challenges for local governments in their day-to-day work.

As with the *Strom* case, *Cedar Point Nursery* has not yet been set for oral argument, but it will be argued this Term with a decision issued before the end of June. **ML**

Notes

1. 592 U. S. ____ (2020), available at: https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf
2. Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728, 731 (9th Cir. 2020) (O'Scannlain, J., dissenting).
3. 413 U.S. 433, 447-48 (1973)
4. *Id.* at 441.
5. Caniglia v. Strom, 953 F.3d 112, 124 (1st Cir. 2020)
6. *Id.*
7. *Id.* at 133.
8. *Id.* at 131.
9. *Id.* at 132.
10. 3 W. Blackstone, Commentaries on the Laws of England 288 (1768).

OP-ED

BY: CHUCK THOMPSON
IMLA Executive Director and General Counsel

On the Electoral College and the Wisdom of Our Founding Fathers

In his Editor's Letter to our last issue, Erich Eiselt touched on some of the arguments for a direct popular vote in lieu of the Electoral College system for electing our President. Obviously, a significant percentage of Americans hold that position. But there are fundamental contrary views, just as there were in 1789. In fact, with all the hoopla over "Hamilton" during the past few years, it might make sense to elevate his ideas over his current popularity to study our Constitutional history and understand its underpinnings.

Surprising as it may seem to most Americans, the federal government is not and has never been a direct democracy. Rather, it is a republican form of government, protected as such in the Constitution, and designed in its bicameral legislature to throttle factions, whether subject matter specific or arising locally. Madison discusses this in *Federalist 10* in which he distinguishes the benefits of a republic from those of direct democracy. Pertinent to this discussion, Madison writes:

> . . . Hence it is, that such democracies [pure democracies] have ever been spectacles of turbulence and contention; have been found incompatible with personal security, or the rights of property; and have, in general been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronised this species of government, have erroneously supposed, that, by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions, A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.

Turning back to the Electoral College and our friend Hamilton, he writes in *Federalist 68* about the "mode of appointment" of the President. In discussing this "mode of appointment" in the Constitution, he argues that unlike many of the other provisions in the Constitution being debated, few argued in opposition to this form of "election." Indeed, he describes it as if "not perfect, it is at least excellent. It unites in an eminent degree all the advantages, the union of which was to be wished for."

So, why did the Constitution provide for popular vote for the President only to have others choose the person to be appointed. Hamilton writes "It was desirable, that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided." He then describes the original concept for a body of electors who would inquire into the candidates for the office after having gained the sense of the people to determine who among those candidates was fit for the office and then cast their votes accordingly. According to Hamilton:

> This process of election affords a moral certainty, that the office of president will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honours of a single state; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole union, or of so considerable a portion of it, as would be necessary to make him a successful candidate for the distinguished office of President of the United States.

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INSIDE CANADA

BY: MONICA CIRIELLO
Ontario 2015

2020: A Festive Look Back at Enforcing COVID Regulations

On March 17, 2020, the Office of the Premier of Ontario announced an order declaring an emergency across the Province under section 7.0.1(1) of the Emergency Management and Civil Protection Act, R.S.O. 1990, c. E.9 (EMCPA). Section 7.0.1(1) provides,

> the Lieutenant Governor in Council or the Premier, if in the Premier's opinion the urgency of the situation requires that an order be made immediately, may by order declare that an emergency exists throughout Ontario or in any part of Ontario.

The order immediately closed all non-essential businesses and workplaces across Ontario for a minimum of 14 days. Nine months later, we are still in emergency conditions. Given the season, the following is a "festive" look back at the unique circumstances that have challenged municipal lawyers, legal practitioners, and law enforcement staff:

'Twas a night in mid-March when all through the house,
Not a creature was stirring, not even a mouse.
Conventional regulations were being enforced with care,
Until March 17th, when we heard from the Premier.

The children were nestled all snug in their beds.
While visions of classmates danced in their heads;
And me with my yoga mat, and my husband with his skates,
Were all looking forward to a terrific spring break,

When out from the podium there arose such a clatter,
I sprang from the bed to see what was the matter.
Away to the television I flew like a flash,
Turned to the news and let out a great gasp.

When, what to my wondering eyes should appear,
Words from our leader, I never thought I would hear:
A state of emergency was announced for Ontario,
Closing schools, work and businesses—a daunting scenario.

New rules and regulations were passing so quick,
As a municipal lawyer, staying calm was the trick.
More rapid than airplanes and sportscars they came,
Premier Ford whistled, and shouted, and called them by name;

"Now ARENAS! now, SPORTSFIELDS! now, PLAYGROUNDS and PARKS!
On BEACHES! on CHURCHES! on GROCERIES, closed by Dark!
The unthinkable was happening, things changing to and fro,
So was my entire enforcement portfolio!"

Normally focused on licensing, bylaws and complaints about noise,
Municipal officers would now enforce the *EMCPA*, oh joy!
So out to the community our officers went,
To enforce 'physical distancing' -- the public knew not what it meant!

The questions came in faster and furiouser, they'd often repeat,
How far is 2 meters, and how close is 6 feet?
Who can I visit? how many people? and what are the rules?
What about my kids, will they ever see school?

Municipal staff and the public were on the same page,
When *EMCPA* was repealed, *Reopening Ontario* took the stage.
The Province passed measures to bring business back with a roar,
The Premier rolled out stages, and levels, and colors galore.

Politicians and bureaucrats, how their eyes twinkled!
Their clever new measures, they worked-out all wrinkles.
So-called foolproof regulations, they may have misjudged,
Threat levels green, yellow, orange, red, grey, no clearer than mud.

Go to a restaurant, you can bring a group of four,
To a nightclub with music, a hundred, no more;
Take away the Deejay, you can only have fifty,
Strip clubs are closed, unless they sell food--then free to get busy!

'Progressive enforcement' became the term of the day,
We educated the public, only a few had to pay.
Electeds found doubling fines would make more,
Turning loonies to two-nies and two-nies to four.

December arrived, with regulations at work,
I saw cases declining, then turned with a jerk,
My team was all talking; they gave out a moan,
Sure enough, Hamilton entered the dreaded Red Zone!

The Medical Officer of Health gave a deep whistle,
No sports, no gatherings, no fun; just abysmal.
I laughed to myself as she went out of sight,
Merry Christmas To All, And To All a Good-Night!

(*With apologies and/or credit to Clement Clark Moore—or whomever actually wrote 'Twas the Night*).

In July, the Province passed Bill 195, *Reopening Ontario Act (A Flexible Response to COVID 19) Act* 2020, S.O. 2020, c. 17 (*ROA*). The Province used the *ROA* to reopen businesses using a regional approach, dividing municipalities and regions into categories based on their volume of cases and risk factors.

In mid-November, many municipalities in Ontario entered the Red Zone, the most restrictive category of measures short of a full Lockdown, with the hopes of mitigating the effects from what became known as the 'second wave.' The Red Zone came with new regulations and new rules. Two weeks later, a small number of municipalities moved into the *Enhanced* Red Zone, a nebulous area between the Red Zone and Grey Zone – which is full Lockdown. New measures included active screening, which includes having a person stationed at the entrance of all shopping malls, retail stores and workplaces, asking patrons questions prior to permitting them entry.

As of this writing, the City of Hamilton's COVID-19 enforcement team had issued 172 *EMCPA* charges, 36 *ROA* charges, 11 Face Covering By-law charges and 138 Physical Distancing By-law charges. ❄

Identification and Elimination of Bias for Government Lawyers

January 14, 2021 | 1 PM EDT - 2 PM EDT

This presentation will discuss what implicit bias is and why it's important for government lawyers to be concerned about their implicit biases. The presentation will also provide tips on how to combat and eliminate biases in the legal workplace.

Speakers: Tara Kelly

Update on Fair Housing Obligations for Local Governments: Disparate Impact, Affirmatively Furthering Fair Housing, and Others

January 21, 2021 | 1 PM EDT - 2 PM EDT

Free Live for IMLA Members.

CLE available to Kitchen Sink Subscribers and in some cases to others but fees may apply.

This session will review the basic obligations of local governments under the Federal Fair Housing Act, as well as recent changes in those obligations. Topics to be addressed include protected classes, affirmative obligations and prohibitions, the requirement to affirmatively further fair housing, and recent disparate impact cases.

Speaker: Brian Connolly

Op-Ed *cont'd from page 29*

Clearly, those plans and ambitions for the country did not stand the test of time, nor did the idea that the next most qualified person in the minds of the electors should become vice president last long. But the division of votes among the states within this body of electors remains. as does the unifying basis found in the compromise between the large and small states.

In a previous article *Federalist 62*, Madison discussed the compromise that brought large states and small states together in forming a union, while discussing the proposal for a senate:

> A government founded on principles more consonant to the wishes of the larger States, is not likely to be obtained from the smaller States. The only option then for the former, lies between the proposed government, and a government still more objectionable. Under this alternative, the advice of prudence must be, to embrace the lesser evil; and, instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences, which may qualify the sacrifice.
>
> In this spirit . . .the equal vote allowed to each State, is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States: since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.

The decision to amend the Constitution and allow senators to be elected by popular vote under the 17th Amendment eroded the concept of reserved sovereignty that informed Madison's arguments in *Federalist 62*. Nevertheless, the equal votes accorded each state in the senate that helped define the compromise between large states and small remained. Those concepts of reserved sovereignty and balancing the interests of large states and small remains evident in the Electoral College.

Rather than ignore Hamilton's view that a popular election would likely lead to a person elected to the presidency who might be ill suited to the position due to "the little arts of popularity" or "talents for low intrigue," returning to the original, albeit elitist, design for selecting the president would honor the original design of the Founders and also reap the benefits of good governance. But restoring the original plan would be like putting spilt milk back in the carton. So, are we smarter today than in 1789 that we ignore the cautions expressed by the Founders or renege on the compromise that gained the assent of both the large states and small back in 1789?

Madison and Hamilton presciently envisioned majorities exercising direct democracy in ways that adversely affected minority groups, property rights and personal security. Regardless of which side of the political divide one is on today, a person might end up on the other side tomorrow. The Constitution continues to protect through the Electoral College the interests of people in small states and must continue to do so regardless of shifting demographics, migration of people from one state to another, or popular sentiment. ML

Federal *cont'd from page 23*

pricing scales overseen by the Rate Court.

Thus, each offers blanket licensing prices for localities up to 50,000 in population for $364 per year (2020 pricing).[25] BMI further represents that it has the right to license the properties in its repertoire and indemnifies licensees for claims of infringement with respect to those works.[26]

The absence of DOJ oversight is evident in the other PROs' dealings. GMR, for example, provides a sharp contrast to ASCAP and BMI. GMR is not party to any standardized database and, as noted earlier, licenses only its "share" of musical works. It makes no express representations about rights to the titles in its catalogue and, instead of indemnifying licensees against claims of infringement, GMR requires that licensees indemnify it, and its (unnamed) parent company. Other GMR contractual provisions include the unilateral right to terminate the agreement in the event of any act, law or decree by any entity, federal, state or local, that results in "any substantial increase" in its cost of doing business. And, evidencing the pricing muscle objected to by the RMLC, GMR prices its blanket licenses for municipalities up to 50,000 in population at more than twice the price charged by BMI and ASCAP, to provide a miniscule fraction of the works they license. SESAC also charges significantly higher rates to the under-50,000 localities than do ASCAP and BMI. For the roughly 18,000 American local governments in that small town category, the pricing differential is significant, particularly given the fact that in many cases only minor fractions of the work are being licensed.

Regardless of the PRO, there are material limitations on the scope of the performance license granted. Coupling the musical work

with video is not covered; that process mandates obtaining a separate synchronization license. Nor does the standard municipal license from any of the PROs allow performance at a host of public venues, including conventions or trade shows, colleges and universities, sporting events, theme parks operated by the government, community symphony, or via a jukebox. And the performance of music at "special events" such as marathons requires a separate fee based on revenues generated, under various PRO agreements.

Conclusion

The bottom line is that municipalities are confronted with an opaque and costly system that seemingly demands licenses from multiple PROs. As GMR's example indicates, there appears to be no inherent barrier to additional PROs entering the market, capturing a few high-value songwriters, and commanding still more licenses and payments. Some music users--large, well-funded commercial enterprises come to mind--may be able to curate playlists that filter out specific artists or titles and avoid individual PROs, but that task seems beyond that reach of local governments.

The question arises whether the Act should be construed to allow ever-smaller fractional copyright ownership in a given work to be held by an unlimited number of separate licensors, each with the potential to unleash statutory sanctions unless a costly performance license is signed. While composers, lyricists and others involved in musical creativity are entitled to compensation for their considerable contributions to society, adding more PROs does not create more music. As the Act struggles to stay abreast of changing technologies and industry dynamics, the role of the PRO will require continued scrutiny. ML

Notes

1. 35 U.S.C. § 101.
2. 17 U.S.C. § 102.
3. *Id.*
4. *Id.*
5. 17 U.S.C. § 106 (4) and (6).
6. 17 U.S.C. § 101.
7. 17 U.S.C. § 505.
8. 35 U.S.C. § 154 (a)(2).
9. https://www.copyright.gov/circs/circ01.pdf
10. 17 U.S.C. § 302.
11. https://web.law.duke.edu/cspd/publicdomainday/2021/
12. *Id.*
13. *Id.*
14. 17 U.S.C. §§ 106, 114-115.
15. Stasha Loeza, Out of Tune: How Public Performance Rights Are Failing to Hit the Right Notes, 31 Berkeley Tech. L.J. 725 (2016).
16. Mem. of the United States in Support of the Joint Mot. to Enter Second Amended Final Judgment at 14-15, United States v. ASCAP, No. 41-1395 (S.D.N.Y. Sep. 4, 2000), available at https://www.justice.gov/atr/case-document/file/485996/download.
17. United States v. ASCAP, 41 Civ. 1395 (S.D.N.Y. 1941); *see* https://www.justice.gov/atr/case-document/second-amended-final-judgment.
18. United States v. BMI, 64 Civ. 3787 (S.D.N.Y. 1964); *see* https://www.justice.gov/atr/case-document/bmi-final-judgment.
19. Radio Music License Committee Inc. v. Global Music Rights LLC, 19-cv-03957 (C.D. Cal.).
20. 17 U.S.C. § 501 (a).
21. 17 U.S.C. § 110 (4).
22. Antitrust Consent Decree Review Public Comments - ASCAP and BMI 2019 (justice.gov), available at https://www.justice.gov/atr/antitrust-consent-decree-review-public-comments-ascap-and-bmi-2019
https://www.bmi.com/special/songview/
24. https://www.ascap.com/press/2020/12/12-21-Songview
25. https://www.bmi.com/forms/licensing/gl/lge.pdf
26. *Id.*

PRACTICE TIPS

BY: BRENT ISRAELSEN, *Analyst, and* KARL CATES, *Transition Policy Analyst, Institute for Energy Economics and Financial Analysis (IEEFA), Lakewood, Ohio*

Negotiating Responsible Tax Breaks on Renewable Energy Deals: *A Guide to Community Due Diligence*

Wind and utility-scale solar power generation is the fastest-growing sector of the U.S. electricity market, and development deals with communities now occur almost daily across the country. Such agreements typically include property-tax abatements that encourage developers to build in a particular jurisdiction and create jobs and other beneficial effects that might not otherwise happen.

Some research suggests tax incentives aren't worth the return, but when private property is left undeveloped or underdeveloped, it may not generate the same public revenues it would if renewable energy development is incentivized. Benefits flow most commonly to school districts and other public -service jurisdictions like sewer districts and road-maintenance funds.

Few standards exist across the industry, however. The deals are described by various terms from state to state, for instance, although they can be referred to generically as PILOT agreements; PILOT standing for "payments in lieu of taxes."

This brief includes general guidance on best community practices for negotiating renewable-energy agreements and salient detail from three recent agreements between private-sector companies and local governments:

• In **Wharton County, Texas,** where the Wharton Independent School District negotiated a tax-limitation agreement with AP Solar 6 LLC, which will build the 350MW Red-tailed Hawk Solar Project. The office of the Texas State Comptroller's Office endorsed the project as a way "to invest capital and construct the project in this state," and an economic-development alliance called Powering Texas is promoting such deals.

• In **Franklin County, New York** where EDP Renewables built the 77.7MW Jericho Rise wind farm in a deal that splits tax revenues among the Chateaugay Central School District, the county and the towns of Chateaugay and Belmont. The deal was struck under guidelines set by the New York State Energy Research and Development Authority.

• In **Raleigh County, West Virginia** where Raleigh Solar 1, a subsidiary of Denver-based Dakota Power Partners, will build a 90MW solar farm. The Raleigh County Commission passed a resolution in support of the agreement for its "creation and preservation of jobs," likely effects that will "encourage, foster and facilitate new economic development" and "create and develop a more diversified and balanced economy." While this is a tiny sample of recent agreements, it is illustrative of the lack of consistency across the board, highlighting a dearth of standards that could put communities at a disadvantage during negotiations.

Some best practices to follow in negotiating responsible tax breaks on renewable energy deals:

• ***Conduct up-to-date due diligence on the market and on the proposed site location.*** Factors to consider include availability of robust wind and solar resources, proximity to transmission lines and substations, and trends in electricity demand. Private energy consultants can be helpful in researching such issues.

• ***Obtain an independent cost-benefit analysis.*** Communities should source their own analysis via a competitive request-for-proposal (RFP) process.

• ***Involve all parties in the negotiations.*** Misunderstandings created by leaving people out of talks can drive developers away or undercut public support.

• ***Have a clear tax-exemption policy in place already.*** Keep rules as simple as possible and state clearly what kinds of projects are eligible/ineligible and what minimum criteria must be met.

• ***Negotiate as small an exemption and as short an exemption period as possible.*** Generally speaking, the best deals grant abatements of no more than 50% and for no more than five years. Conduct independent audits of revenue streams every five years.

• ***Make the process transparent.*** All details and timelines should be posted online. All meetings should be open. All actual or potential conflicts of interest should be disclosed.

• ***Channel a portion of tax payments into economic development per se.*** Diversification around how revenues are distributed will provide longer-term benefits.

PILOT programs can bring community benefit from renewable energy development and are best executed when built around guidelines like the ones described here. ML

(Brent Israelsen can be contacted at bisraelsen@ieefa.org and Karl Cates at cates.goodworldconsultants@gmail.com).

LISTSERV

BY: BRAD CUNNINGHAM,
Municipal Attorney, Lexington, South Carolina

A Different Kind of Holiday Season?

Much of the discussion on the Listserv and Water Cooler this year revolves around the around the challenges to local governments as they scramble to protect their citizens and employees while continuing to provide essential services.

One of the more polarizing issues in many places is the subject of "Mask Mandates." Some states think they can't pass them and send that responsibility down to the local governments. My Town of Lexington is struggling with that issue.

A local Councilmember made the decision to ask folks on Social Media what they thought about a potential "mask ordinance," and the responses were amazing. The Mayor and Council were called "stupid" by *everyone* who responded. Some said they were stupid for considering it. Others said they were stupid for not having done it already. Of course, you can never make *everybody* happy. But is it too much to ask to make *somebody* happy? Anybody?

It is a tough time for municipal employees. While other professions are praised for their "heroic" actions, municipal employees are plugging along, ignored or insulted as they continue their efforts so the "heroes" can get their garbage picked up, take a shower, and flush the toilet, I have seen several instances in surrounding communities of folks providing lunches and/or supplies for teachers, doctors nurses, and other professionals. Yes, these are well deserved of course.

But does anyone remember the utilities worker who got up at 4 a.m. because of a water line break, and had it fixed by 6 a.m. so the rest of us could take a shower before work? Does anyone remember the sanitation worker who rode in the back of the truck in the cold rain so the rest of us could have clean streets and offices? Shout out here to the Utilities Department, Sanitation Department, Fire Department and Police Departments everywhere who seem to get little credit for their work that allows the rest of us to go on during these trying times.

Is there a worse time of year than the holidays for a pandemic and its health-related restrictions? The elderly who live alone are now prevented in many instances from even getting the few visits they might have gotten in an otherwise "normal" year. Holiday party catering business is in the doldrums. "Virtual" parties are held instead, where people sit in front of a computer eating and drinking by themselves. One guy has a steak. The other has a Big Mac. There may or may not be any football games to watch. If there are, how do you watch a ball game with pals virtually?

Instead of Merry Christmas, Happy Holidays, Happy Hanukkah, Kwanzaa, and so on, the most popular phrases recently uttered were "Can you see me? Can you hear me? Am I coming through? Turn your sound up Oops, my microphone was off. My video was off. My computer was down. The internet is down."

Back to municipal government operations. I took a trip around the Midlands of South Carolina. And I observed a little of what the typically busy holiday shopping and partying season was like. Many things were handled "differently" this year. I will give several examples. As usual, I am not taking a right or wrong side on these issues. I am only passing on some observations.

I attended a Christmas parade in a local municipality. Only one band performed. They had masks on, and those who played an instrument pulled the mask down just far enough to be able to play. Horns had black "covers" stretched over the bell for, I suppose, the purpose of reducing the chance of saliva droplets getting into the air. Spit valves were taboo.

Folks on floats stood their distance. There was no candy distributed… No politicians shaking hands… No free apple cider and hot chocolate at the churches along the route. The onlookers all wore masks and stayed apart like they were strangers. Last but not least, Santa Claus rode the final float *sans* elves. I wondered how he was going to make it all the way around the world in one night with no help? Would he even be allowed to go? Aren't Santa and the elves *essential*?

Some parades were actually held virtually, with attendance discouraged. Community tree lightings were broadcast on You Tube with nobody actually present. There were no Christmas carols, cocoa or candy canes.

A trip to the shopping mall after the parade revealed plenty of available seating in the food court. Perhaps the saddest sight of all was the grand Santa Claus house at the center of the mall decorated in all its typical glory. It was beautiful. But inside sat Santa Claus wearing a mask with his head

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The Fourth Circuit, relying on *Brower*, declined to extend Fourth Amendment protections to an innocent bystander who was unintentionally killed by a police officer attempting to seize a fleeing criminal.[42] (Other courts have also refused to allow hostages to bring Fourth Amendment claims against police officers who accidently shot them while attempting to seize their captors, even though the means applied, ie: gunfire, was intentional, because there was no intent to seize the hostage).[43] The Fourth Circuit held:

> A Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement, such as in the case of an innocent passerby who is injured when he is inadvertently struck by the force employed, 'nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement,' such as in the case of a fleeing felon who is unknowingly and unintentionally stopped by an officer. Rather, a Fourth Amendment seizure occurs 'only when there is a governmental termination of freedom of movement though means intentionally applied.' [44]

Harkam argued that, unlike the case of an innocent bystander or hostage, she was an intended target of seizure by the FBI agents and was entitled to recover for any injuries (including purely emotional injuries) she sustained as a result of Agent Braga firing his weapon at Schultz, the passenger. The court rejected this argument, holding that for an officer to be personally liable for violation of the Fourth Amendment, the plaintiff must at a minimum be able to demonstrate that the officer actually terminated her freedom of movement by means of the alleged excessive force. The Court distinguished Harkum's claim from Schultz's claim because "the force employed was not directed towards her, not intended to seize her, and did not seize her." [45]

The Fourth Circuit further explained that it was not holding that a suspect must be physically struck by a bullet (or any other object) to state a claim for excessive force; however, to hold an officer personally liable for violation of the Fourth Amendment, the plaintiff must at a minimum be able to demonstrate that the officer actually terminated her freedom of movement by means of the alleged excessive force. "The Fourth Amendment protects persons who have been personally subjected to a "governmental termination of freedom of movement through means intentionally applied" that are unreasonable.[46] Harkum relied on cases from other circuits that allowed suspects to pursue Fourth Amendment claims of excessive force against police officers who inadvertently shot them, but the Court determined those cases were allowed to proceed not because the plaintiff was a "foreseeable victim" of the officer's gunfire, but rather because each was a desired target of seizure and in fact, stopped or seized by the bullet intentionally fired by the officer. [47]

United States District Courts-Southern, Northern, and Western Districts of Texas.

1. ***Young v. Green.***

Two cases decided by the U.S. District Court for the Southern District of Texas, Houston Dividion, within a few years of each other addressed bystander liability claims. The first, *Young v. Green*, was brought against the City of Houston and Officer Green by multiple plaintiffs who alleged that Green used excessive force against Michael Young, which was witnessed by the other plaintiffs.[48] The underlying facts arose out of a crowd gathered for a midnight athletic shoe sale in December of 2010. Joseph Young and his two cousins, Christopher and Christian Bell bought their shoes but could not leave the store due to the crowd outside. Michael Young alleged that as another officer was helping move the crowd, Officer Green "hit him in the back of the head with a nightstick, then began to shove and yell at him." When Joseph Young and Michelle Bell tried to intervene, Officer Green grabbed Joseph's throat "momentarily" and pushed Michelle in the chest.[49] Michael was not placed in custody and he and the other bystander plaintiffs drove away from the store.

The seven bystander plaintiffs allegedly suffered mental distress by witnessing the use of force against Michael Young. The district court held Officer Green was entitled to summary judgment on the bystander plaintiffs' claims which were based on witnessing the use of force against Michael Young. The district court stated, "case law holds that a bystander who witnesses a police action, but who is not himself or herself an object of that action, cannot recover for resulting emotional injuries under § 1983, although there may be such a claim under state tort law. There is no constitutional right to be free from witnessing police action, apart from the question of whether that action physically injured the target of that action."[50] Subsequently, the City of Houston also moved for summary judgment on plaintiffs' bystander claims.[51] Because summary judgment was previously granted for Officer Green on plaintiffs' bystander claims, the district court held the City of Houston was entitled to summary judgment on the federal bystander claims for observing the officer's use of force against Michael Young, for the reasons set forth in its prior opinion. [52]

2. ***Khansari v. City of Houston.***

In *Khansari v. City of Houston*, the parents of Corey Khansari, who was tased by Houston Police officers, alleged bystander claims for severe emotional distress they suffered as a result of the defendants' unreasonable conduct.[53] The officers responded to a 911 call at the Khansari's home after Corey was believed to have attempted suicide. The first officer to arrive pulled a long gun out of her squad car and appeared to load the chamber. When Mrs. Khansari asked,

"what are you doing," Officer Vaughn replied, "I might have to kill someone" or some similar words. [54] Corey came out of the house while his parents tried to explain the situation to the officers and the Khansaris could see red laser beam dots from the officers' weapons on him. Mrs. Khansari positioned herself between Corey and the officers and the red laser beam dots appeared on her so Corey, fearing his mother was in danger, pushed her out of the line of fire and was immediately tased by officers, resulting in taser darts piercing his eye. He became severely disoriented and fell but was tased several more times when he tried to get up a few seconds later.

Plaintiffs alleged that Mrs. Khansari was a witness to the entire terrifying even and was herself a subject of the Officers' conduct, including "being pointed at with guns, being grabbed by the neck or shoulder, and being told threatening statements."[55] Furthermore, "She was within feet of her son when he was shot by taser guns" and "[s]he suffered shock as a result of the direct emotional impact upon her from the Officers' actions directed specifically at her and from her contemporaneous observance of the events."[56] Further, Plaintiffs alleged that Mr. Khansari was also a subject of the Officers' actions, with Officers yelling at him in a threatening manner for interfering with police work, yelling at him to get away, and threatening to arrest him if he didn't comply, which he did.

The district court concluded that Plaintiffs' claims for excessive use of force asserted against the individual officers should be dismissed for failure to state a claim because these bystander Plaintiffs did not allege facts capable of showing that the police actions were directed at them or that they suffered a "seizure" as required for a violation of rights protected by the Fourth Amendment.[57] Mr. and Mrs. Khansari cited to *Petta v. Rivera* in support of their argument that they were the subjects of the Officers' excessive force, but the district court found this argument misplaced, stating "[a] civil rights claim must be based upon a violation of a plaintiff's personal rights secured by the Constitution, and a bystander who is not the object of police action cannot recover for resulting emotional injuries under § 1983."[58]

The court held that the Khansaris asserted claims for emotional distress arising from witnessing police action against their son Corey and had failed to alleged facts capable of establishing a cognizable claim for excessive use of force against them; thus, it granted the individual defendants' motions to dismiss the bystander claims for emotional distress under § 1983 arising from force witnessed by Mr. and Mrs. Khansari.The court also granted the City's motion to dismiss the
§ 1983 bystander actions for failure to state a claim for which relief may be granted, restating its conclusion that the facts alleged by Mr. and Mrs. Khansari were not capable of establishing that they were targets, as opposed to mere witnesses, of a police action.[59]

3. ***Cole v. Hunter.***

In *Cole v. Hunter,* the parents of Ryan Cole asserted bystander claims, alleging they had a contemporaneous perception of the shooting of their son by virtue of having heard the shots fired from their front yard, and experienced significant emotional and mental anguish resulting from this perception in the past.[62] Defendants argued that the federal bystander claims of Plaintiffs Randy and Karen Cole must be dismissed because they failed to allege a deprivation of their own constitutional rights. The United States District Court for the Northern District of Texas agreed and granted Defendants' motion to dismiss to the extent Plaintiffs sought to assert a § 1983 bystander claim for their emotional injuries based on police action directed at their son. The district court stated, "A civil rights claim must be based upon a violation of a plaintiff's personal rights secured by the Constitution, and a bystander who is not the object of police action cannot recover for resulting emotional injuries under § 1983. [63]

4. ***Dantzler v. Hindman.***

Further, in *Dantzler v. Hindman*, Plaintiffs brought an excessive force claim against deputies alleging that "in the course of executing a seizure of Plaintiff Huntly Dantzler, they used excessive and unreasonable force which resulted in severe physical and emotional injuries, thereby depriving them of their rights under the Fourth Amendment.[62] Deputies went to the Dantzler's residence to conduct a welfare check after it had been reported that Huntly Dantzler, Jr. had been seen placing pills in a woman's drink and then leaving the bar with her highly intoxicated. His parents Huntly, Sr. and Mrs. Dantzler refused to allow the Deputies inside their home and Huntly, Sr. was subsequently handcuffed by Deputy Westbrook for resisting but then unhandcuffed after they briefly searched the home.

The district court dismissed Plaintiffs' section 1983 excessive force claim against Deputy Hindman for failure to state a claim and based on qualified immunity. That holding was similar to other courts' rejections of claims of emotional injuries for observation of excessive force used against another person, holding "a bystander who is not the object of police action cannot recover for resulting injuries under § 1983.") [63]

Conclusion

The foregoing examples illustrate that bystanders often assert § 1983 claims which are derivative from underlying claims that might be brought by the actual victims of excessive force. It is therefore critical to thoroughly review and analyze the facts plead in a federal lawsuit involving multiple plaintiffs, including bystanders alleging an excessive force claim under § 1983. If the bystander plaintiff is not the object of police action but merely witnesses an officer's use of force on another person, the municipality and officer defendants may well be able to get the claim dismissed early in the litigation on a motion to dismiss or for summary judgment. ML

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Notes

1. U.S. Const. amend. IV.
2. Graham v. Connor, 490 U.S. 386, 393-394 (1989) (citing Baker v. McCollan, 443 U.S. 137, 144, n. 3 (1979)).
3. *Id*. at 394.
4. *Id*. at 395.
5. Tennessee v. Garner, 471 U.S. 1, 11 (1985).
6. *Graham*, 490 U.S. at 396 (citing Terry v. Ohio, 392 U.S. 1, 22-27 (1968)).
7. *Id.*
8. *Id*. (citing *Terry* at 20-22).
9. *Id*. at 396-397.
10 Plumhoff v. Rickard, 572 U.S. 765, 766 (2014).
11. *Id*. at 778 (quoting Alderman v. United States, 394 U.S. 165, 174(1969)) (see also Rakas v. Illinois, 439 U.S. 128, 138-143 (1978)).
12. *Id.*
13. *Id*. at n. 4, (citing Vaughan v. Cox, 343 F.3d 1323 (11th Cir. 2003)) (suggesting yes); (see also Fisher v. Memphis, 234 F. 3d 312 (6th Cir. 2000)) (same); (see Milstead v. Kibler, 243 F. 3d 157 (4th Cir. 2001)) (suggesting no); (see also Landol-Rivera v. Cruz Cosme, 906 F. 2d 791 (1st Cir. 1990)) (same). (See also County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998)) (passenger killed as a result of a police chase could recover under a substantive due process theory only if the officer had "a purpose to cause harm unrelated to the legitimate object of arrest.")
14. Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985).
15. *Id*. at 167.
16. *Id*. at 168-69.
17. *Id*. at 172 (quoting Baker v. McCollan, 443 U.S. 137, 146 (1979)).
18. Coon v. Ledbetter, 780 F. 2d 1158 (5th Cir. 1986).
19. *Id*.at 1160.
20. *Id.*
21. *Id*. (citing Dohaish v. Tooley, 670 F. 2d 934 (10th Cir. 1982) (right to bring action under civil rights act is personal in nature and does not accrue to a relative), cert. denied, 459 U.S. 826 (1982)).
22. *Id*. at 1161.
23. Petta v. Rivera, 143 F.3d 895, 897-898 (5th Cir. 1998) (per curiam).
24. *Id*.
25. *Id.*
26. *Id*. at 898, n.3 ("Whether the district court correctly found no "seizure" of the children under these facts is therefore not before us.").
27. *Id*. at 900.
28. *Id*. at 910, n.25 (citing *Graham*, 490 U.S. at 395, n.1).
29. *Id*. at 911.
30. *Id*. (citing Brower v. Inyo County, 489 U.S. 593, 596-97, 103 L. Ed. 2d 628, 109 S. Ct. 1378 (1989)), (*Graham*, 490 U.S. at 395 n.10). *See also* Ikerd v. Blair, 101 F. 3d 430, 433 n.6 (5th Cir. 1996) (applying Fourth Amendment standards to excessive force claim where police officer grabbed child's arm; child's father, and not the child herself, was the object of the arrest); Stroik v. Ponseti, 35 F. 3d 155, 156-57 (5th Cir. 1994) (applying Fourth Amendment to excessive force claim where hostage was shot by police officer as officer fired at her captor).
31. *Id*. at 913-914 (citing *Brower*, 489 U.S. at 596-597).
32. Archuleta v. McShan, 897 F. 2d 495 (10th Cir. 1990).
33. *Id*. at 496.
34. *Id*. at 497 (citing Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981)).
35. *Id*. (citing Dohaish v. Tooley, 670 F.2d 934, 936 (10th Cir. 1982)) ("The § 1983 civil rights action is a personal suit. It does not accrue to a relative, even the father of the deceased."), cert. denied, 459 U.S. 826, 74 L.Ed. 2d 63, 103 S. Ct. 60 (1982); *see also* Coon v. Ledbetter, 780 F. 2d 1158, 1160-61 (5th Cir. 1986); Trujuillo v. Board of County Commissioners, 768 F.2d 1186, 1187 (10th Cir. 1985).
36. *Archuleta* at 498.
37. *Id*. at 499 (citing *Trujillo v. Board of County Commissioners*, 768 F.2d at 1190).
38. *Id*. at 500 (emphasis added).
39. Shultz v. Braga, 455 F. 3d 470, 472 (4th Cir. 2006).
40. *Id*. (quoting Brower v. County of Inyo, 489 U.S. 593, 596 (1989)).
41. *Id.*
42. *Id*. at 480 (quoting Rucker v. Harford County, 946 F.2d 278, 281 (4th Cir. 1991)).
43. *Id*. at 480 (citing Childress v. City of Arapaho, 210 F. 3d 1154, 1157 (10th Cir. 2000)); Medeiros v. O'Connell, 150 F.3d 164, 168-69 (2d Cir. 1998*);* Landol-Rivera v. Cosme, 906 F. 2d 791, 798 (1st Cir. 1990) (holding that the Fourth Amendment is not implicated when a hostage is inadvertently shot during a police pursuit of a robbery suspect because "the individual alleging harm was [not] the object of the challenged police conduct").
44. *Id*. at 481 (quoting *Brower*, 489 U.S. at 597) (emphasis omitted)).
45. *Id*. at 483.
46. *Id*. at 482 (quoting *Brower*, 489 U.S. at 597 (emphasis omitted)).
47. *Id*. at 482 (citing Vaughan v. Cox, 343 F.3d 1323, 1329 (11 Cir. 2003); Fisher v. City of Memphis, 243 F. 3d 312, 318-19 (6th Cir. 2000); Yang v. Murphy, 796 F. Supp, 1245, 1250 (D. Minn. 1992).
48. Young v. Green, 2012 U.S. Dist. Lexis 115027 *1-2, 2012 WL 3527040 *1 (S.D. Tex. 2012).
49. *Id.*
50. *Id*. at *4.
51. Young v. Green, 2013 U.S. Dist. Lexis 27252 *2, 2013 U.S. Dist. Westlaw 775388 *2 (S.D. Tex. 2013) (mem. op.).
52. *Id*. at *22.
53. Khansari v. City of Houston, 14 F. Supp. 3d 842 (S.D. Tex. 2014) (mem. op.).
54. *Id*. at 850.
55. *Id*. at 862.
56. *Id.*
57. *Id.*
58. *Id*. at 863 (citing Grandstaff v. City of Borger, 767 F. 2d 161, 172 (5th Cir. 1985)), cert. denied, 480 U.S. 916 (1987)); (*Coon v. Ledbetter*, 780 F. 2d

1158, 1160 (5th. Cir. 1986)); (*See also* Young v. Green, 2012 U.S. Dist. Lexis 115027, 2012 WL 3527040, *4 (S.D. Tex. Aug. 15, 2012)). ("[C]ase law holds that a bystander who witnesses a police action, but who is not himself or herself the object of that action, cannot recover for resulting emotional injuries under § 1983, although there may be such a claim under state tort law. There is no constitutional right to be free from witnessing police action, apart from the question of whether that action physically injured the target of that action.").

59. *Id.*

60. Cole v. Hunter, 2014 U.S. Dist. Lexis 8796, 2014 WL 266501 (N.D. Tex. Jan. 24, 2014) (mem.op.) (Judge O'Connor's ruling on the motion to dismiss the bystander claims was not challenged on appeal. Other issues in the district court's opinion at the summary judgment stage were appealed). Cole v. Hunter, 68 F.Supp. 3d 628 (N.D. Tex. 2014); aff'd in part, rev'd in part; Cole v. Carson, 802 F.3d 752 (5th Cir. 2015), vacated and remanded; Hunter v. Cole, 137 S.Ct. 497, 196 L.Ed.2d 397 (2016), reinstated in part, remanded in part; Cole v. Carson, 905 F.3d 334 (5th Cir. 2018), rehearing en banc granted, 915 F.3d 378 (5th Cir. 2019) (en banc) cert. denied, _ S. Ct. _, 2020 WL 3146695 (June 15, 2020) (mem.).

61. *Id.* at *56. (*See* generally Grandstaff v. Borger, 767 F. 2d 161, 172 (5th Cir. 1985)); (Coon v. Ledbetter, 780 F. 2d 1158, 1160 (5th Cir. 1986)).

62. Dantzler v. Hindman, 2017 WL 6403043 *3 (W.D. Tex. 2017).

63. *Id.* at *13 (citing Khansari v. City of Houston, 14 F. Supp. 3d 842, 862 (S.D. Tex. 2014)(mem. op.)); (Grandstaff v. City of Borger, Tex., 767 F. 2d 161, 172 (5th Cir. 1985)); and (Coon v. Ledbetter, 780 F. 2d 1158, 1169 (5th Cir. 1986)).

Listserv *cont'd from page 35*

resting on his hand propped up by the arm of the chair. No children on his lap… Not one single child in line for their rite of passage. He looked terribly lonely, and I couldn't help but feel if this wasn't a harbinger of things to come for many folks this holiday season. Perhaps the only ones busy were Amazon, the Post Office and UPS?

A trip down the "not so busy" freeway to a neighboring "University City" showed some interesting sights. Final Exams were in session, but the library was empty. Classrooms were empty. Wait! Didn't I say exams were in session? Yes, but all the students were quietly huddled up in their dorm rooms by themselves, eyes glued to a computer to partake in exams online… Online… Just like every other activity in which they engaged this semester.

Those who had unfortunately tested positive for "it" were all shuffled off to the same dorm which was the designated quarantine location. They were not allowed to leave their rooms *at all* and food was shoveled under the door like they were prisoners in confinement. The normally active college campus was without song, without voice. To quote Paul Simon, I saw "People talking without speaking, People hearing without listening. People writing songs that voices never share, and no one dared, disturb the sound of silence." I sure would hate to be a college freshman this holiday season… Miles away from home for the first time… Huddled in a room and told to go nowhere…

An area medical professional reports there are waiting lists to virtually every counselor and psychologist in the area because folks are in a state of depression and anxiety. I shake my head.

What does all of this possibly portend for municipal governments? More calls for EMS… Less traffic… Hopefully fewer accidents… Less Hospitality Tax revenue generated by restaurants… Less gas tax revenue because nobody is traveling. Meanwhile, we must continue to provide services and go about business as usual with our "essential" tags around our necks. Very thankfully, though, because, it seems essential may be better than the alternative.

Am I am intending to be a fountain of gloom? No sir. I also observe the positive differences and behaviors and attempt to participate. Instead of $10, I handed $20 to the homeless fellow I see outside the sandwich shop every day. I saw folks putting $40 in the Salvation Army kettle at Wal Mart. In the face of difficulties, I see plenty of folks doing the best they can and enjoying themselves. I see people being thankful for the few opportunities they have to celebrate in a small way this year.

As municipal employees perhaps we should do the same. We have work, and it won't slow down. We are essential and we are needed. We are thankful for what we have. Let's all enjoy it. Wait a minute… Isn't this the point of the holidays? For those of us who are healthy, working, solvent and in touch with loved ones, maybe this is shaping up to be the BEST holiday season we have ever had?

I realize this will be read following Christmas and as the New Year begins. 2020 has been a difficult year for all of us. As municipal employees, let's strive to make 2021 a rebound year. Let's all work harder for our citizens. Let's strive to be positive rather than negative. Let's give more, laugh more, love more and pray more. We're being watched. Let's set the tone for 2021. Let's be leaders and show them how it is done!

The prosecution rests, your honor… ML

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