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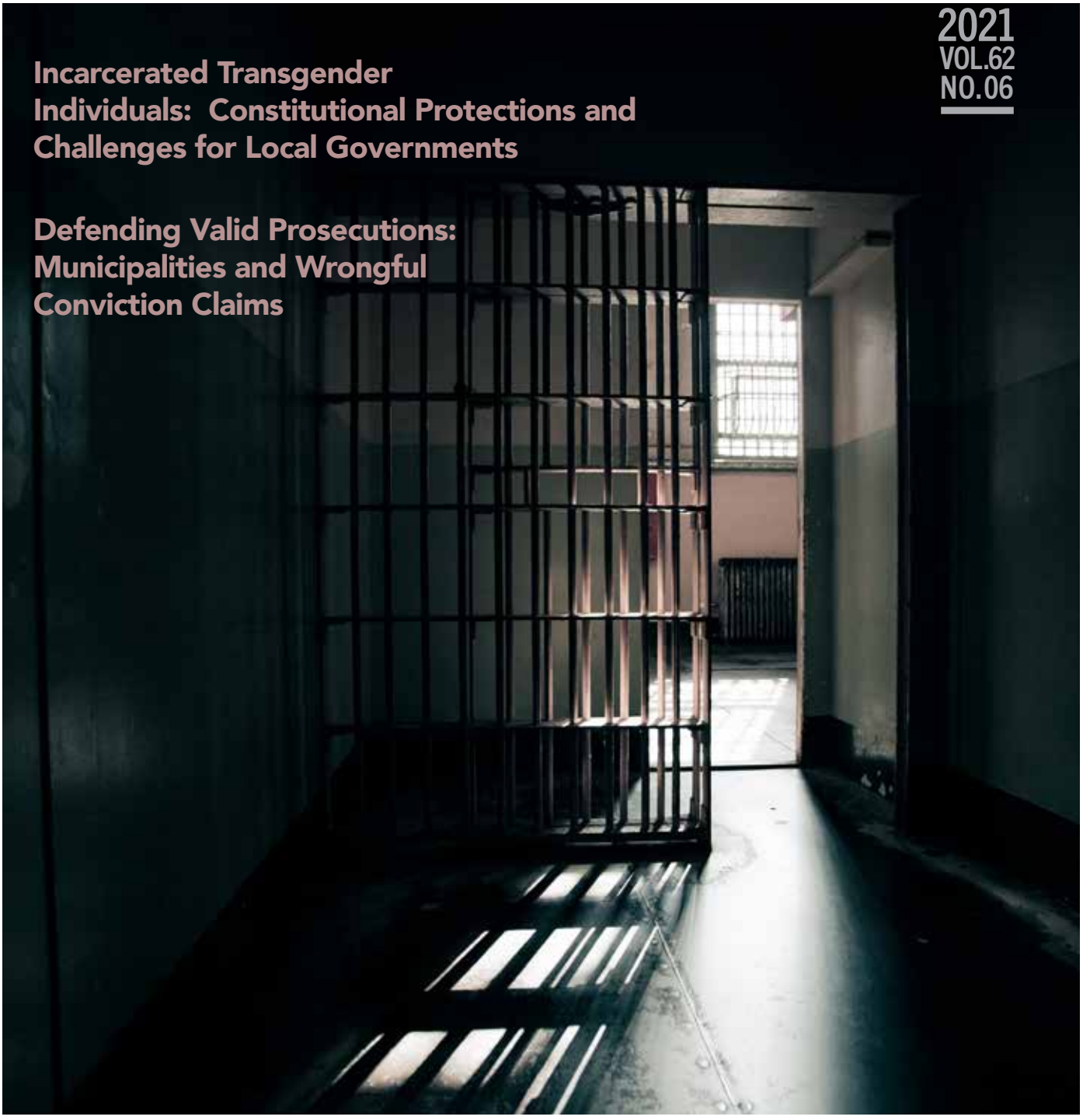
Municipal Lawyer

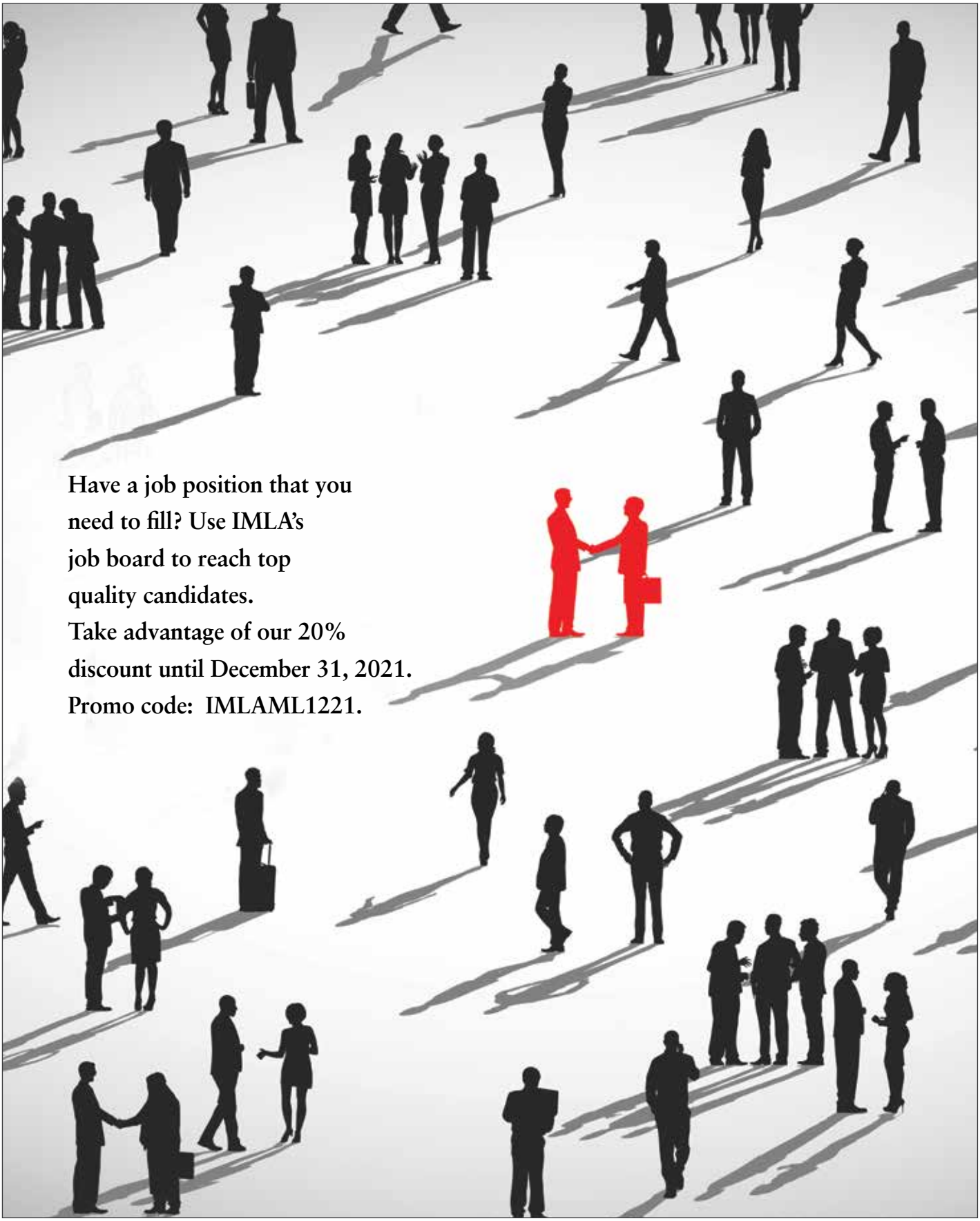
THE JOURNAL OF LOCAL GOVERNMENT LAW

NOV DEC 2021 VOL.62 NO.06

Incarcerated Transgender Individuals: Constitutional Protections and Challenges for Local Governments

Defending Valid Prosecutions: Municipalities and Wrongful Conviction Claims

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MARKETING Caroline Storer

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EDITOR'S NOTE



BY: **ERICH EISELT**
IMLA Assistant General Counsel
and Director of Affirmative Litigation

Thanksgiving as a Constitutional Dilemma?

Three weeks from now, Americans will gather at tables across the land to celebrate what many of us rate as the finest holiday on our national calendar. Involving no frenzied gift-giving, no unachievable resolutions, and no bottle rocket accidents, Thanksgiving is simply an opportunity to declare a temporary ceasefire to the turbulence around us and share an extended meal with friends and relatives. Beyond the protestations of vegetarians, or controversies over stuffing, marshmallows, canned onion rings, pumpkin versus apple, and so on, there could seemingly be no dispute that America's recognition of the fourth Thursday in November is a virtuous exercise.

Not so fast. While most will likely remember that Abraham Lincoln formally designated Thanksgiving a national holiday in 1863, an equally foundational American president—Thomas Jefferson—refused even to recognize the event. Although the colonies had been giving thanks ever since their Revolutionary War victory at Saratoga in late 1777, our third chief executive could not sanctify that practice. For Jefferson, a state-endorsed day of thanks to the almighty contravened the first words of the Bill of Rights, and ran headlong into his oft-cited "wall of separation between church and state."

So much for constitutionally-flavored subject matter certain to spice up an otherwise peaceable and harmonious family gathering. There is actually a legitimate segue between the foregoing and this November-December 2021 *Municipal Lawyer*: in *Amicus*, we discuss the implications of a case where a municipal government (Boston) has attempted to remain outside the establishment/free expression fray by declining to allow religious flags of any sort on its government-controlled flagpoles. Our features cover two issues of interest in the criminal law context—namely, how to avoid violating the rights of transgender incarcerees, and how to confront inauthentic claims of wrongful conviction. We hear from Vancouver colleagues in *Inside Canada* as they report on continuing battles between lawmakers and unscrupulous property owners. *Affirmative Litigation* describes the challenges facing municipalities seeking to tax streaming services for use of public rights of way. And *Listserv* reaffirms the benefits of in-person conferencing with IMLA members from across the country. Finally, we present the inaugural letter from IMLA's newly-installed president, Barbara A. Adams.

This leaves us with much to be thankful for this year, whether in Canada on October 11, or stateside on November 25. With regrets to Jefferson, we join all of you in celebrating Thanksgiving.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



BARBARA A. ADAMS,
General Counsel, Illinois Local Government Lawyers Association and IMLA President

IMLA's Enduring Value

The value of membership in IMLA has proved itself over and over throughout my career as a local government lawyer, and I am honored to write this letter as your new IMLA President.

After attending my first annual conference as a young local government lawyer, I came home with the understanding that this organization (then NIMLO) had something special to offer to attorneys like me, who practice local government law. Since that conference, I have attended many annual conferences and mid-year seminars. And returning home last month from IMLA's first ever-hybrid (virtual and in-person) annual conference in Minneapolis, I continue to believe that IMLA is a special organization for all of us.

The benefits of participation in IMLA are substantial and wide-ranging. At the national and international level, no other organization in the United States and Canada provides the quality and quantity of information and education in areas of law relevant to local governments—information that is key to providing thoughtful and well-reasoned legal advice to our clients. I was reminded of this at the Minneapolis conference; after about day and a half into the conference an attorney exclaimed to me that every session in the program so far had provided information that the attorney would take home and be able to use in representing local governments—information that offered a different perspective than the excellent state-level programs available back at home. In addition to conferences and seminars, the regular remote-learning programming available throughout the year helps us learn about new trends in the law as well as have a periodic refresher course on key topics.

Education at IMLA events takes place not just in a seminar room. Before and after conference and seminar sessions, IMLA offers opportunities to network with other attendees—at the WONK breakfast or State/Provincial Breakfast, at lunch, and at receptions, all of which provide informal opportunities to meet new friends and talk about common problems and new approaches to the issues, and to have some fun as well. Even at the hybrid-only mid-year seminars and annual conference held during the pandemic, virtual networking opportunities were available—during those events, I was delighted to meet a number of you that I might not have met in a large, in-person reception.

IMLA also recognizes local government attorneys who provide important service to their clients and exemplify the values of the organization. Recognizing current members for exceptional achievements through awards, many of which are named in remembrance of those who have gone before us in this organization, allows us to carry forward the important objectives of the organization.

All of this cannot be accomplished without the work and support of many hard-working volunteers and an excellent staff. The Board of Directors is a talented and energetic group that provides great support to the organization. It has been a privilege to work with them during my time on the Board. Many of you serve on a committee or participate in one of the subject matter Sections or Working Groups. These are great opportunities to gain substantive knowledge and get to know other members too. If you might be interested in participating, just take a look at the list of opportunities under the "Network" tab on imla.org.

IMLA's staff, led by Executive Director and General Counsel Chuck Thompson, provides a high level of professionalism and dedication to IMLA and to providing useful services to our members. Chuck came to IMLA in 2006, at a time when IMLA had some serious financial challenges. Chuck's unwavering enthusiasm for IMLA's purposes and his persistence in resolving IMLA's financial issues has put our organization on a sound financial footing for the future. He has identified new ways to provide value for our members. An example is his keen ability to focus on new issues that IMLA's members will face, and to identify programming and establish working groups to tackle those issues. The result is IMLA's robust package of opportunities for education and information sharing. As you know, he has chosen to step down at the end of 2021. We extend our deep thanks to Chuck for his inspiring leadership, and welcome his continuing contributions to our organization.

I look forward to serving IMLA in the coming year, which will be a year of change for IMLA as we welcome Amanda Karras to succeed Chuck as Executive Director and General Counsel. And we will also be changing and transitioning, we hope, to a post-pandemic world where IMLA continues to thrive and find ways to provide valuable service to you. I hope you will join us, and share it with your colleagues who are not yet members. ML

Best regards,
Barbara A. Adams

Incarcerated Transgender Individuals: Constitutional Protections and Challenges for Local Governments

CHRISTOPHER D. BALCH,
Principal, Balch Law Group, Atlanta, Georgia and IMLA Board Member

I. INTRODUCTION

By some estimates, nearly one percent of the United States adult population is incarcerated.[1] The causes of this mass imprisonment may be subject to debate (a discussion well beyond the scope of this article), but the fact remains that as our citizenry ages, as its demographics change, and as the ability of our citizens to express who they are and how they wish to be perceived evolves, new challenges face our sheriffs and their deputies, our municipal police forces, and our elected leaders at all stages and phases of government.

This article will focus on the particular legalities surrounding incarceration of transgender persons: persons whose expression of themselves to the world does not match the gender they were assigned at birth. I will discuss the conduct by jailers, correctional officers, or policymakers that might give rise to claims by transgender incarcerees, the possible theories of recovery, and the trends or disagreements among the courts on how to address this population.

It is important, and indeed crucial, to recognize first and foremost the humanity of incarcerated persons, irrespective of the consequences that placed them behind bars. If one spends enough time around jails or prisons and guards and correctional officers, one can become inured to the generic "inmate" who is a soulless, manipulative, and untrustworthy sort, generally unfit to be let loose among law abiding folks. If the person is further marginalized within the jail or prison environment because of ethnicity, country of origin, sexual orientation, or expression, then the consideration of their humanity can often be further discounted.

The caselaw involving transgender prisoners often involves horrific allegations (and facts) that reveal years of assault and abuse at hands of guards, jailers, and other incarcerees. Even a cursory read of the relevant cases or literature will surface tales of horror that are difficult to believe, much less understand. Defense counsel must be prepared to address these allegations and, where available, articulate cogent reasons for why the choices made by the jail or prison were appropriate, reasoned, and lawful.

II. Claims by Incarcerated Persons

If you are an old hand at jail litigation or medical care in jails litigation, you can skip this section and not miss anything. If you are new to the area, this primer is offered as a place to start.

The Eighth Amendment to the United States Constitution prohibits a person jailed for an offense from being subjected to cruel and unusual punishment, although that is not to say that the Constitution mandates comfortable prisons. *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981). The prohibition against cruel and unusual punishment is applied to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962).

Generally speaking, the Eighth Amendment forbids a person being intentionally harmed while incarcerated, or being denied adequate medical care, food, clothing, and hygiene, because such failures constitute cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (*citing Trop v. Dulles,* 356 U.S. 86, 101 (1958)); *see also*, *Taylor v. Riojas*, 141 S. Ct. 52 (2020). The harm need not be inflicted by jailers or corrections officers, but could be caused by another inmate or some other third party. *Helling v. McKinney*, 509 U.S. 25 (1993). More than negligence is required. *Whitley v.*

Albers, 475 U.S. 312, 319 (1986). So long as the officer is not deliberately indifferent to the risk of harm or the serious medical need, there is no constitutional violation. *Estelle*, 429 U.S. at 106. A cognizable claim requires the prison official to be subjectively aware of the risk of harm and deliberately indifferent to the consequences of that harm. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

Persons who are jailed while awaiting trial are not convicted and cannot, therefore be punished, rendering the Eighth Amendment inapplicable. *Bell v. Wolfish*, 441 U.S. 97, 104 (1979); *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983). The *Bell* Court held that the rights of pretrial detainees are measured under the Fourteenth Amendment's due process clause and must be "reasonably related to a legitimate governmental interest." *Bell*, 441 U.S. at 104; *but see Youngblood v. Romeo*, 457 U.S. 307, 317 (1989) (involuntarily committed person "wholly dependent on the State" is entitled through the substantive component of the Fourteenth Amendment's due process clause to food, shelter, clothing, and medical care).

There is some difference of opinion in the Circuit Courts about the precise limits of constitutional duties to pretrial detainees. In the majority of circuits, all a detainee need establish is an objectively provable claim that the action or inaction of jailers amounted to deliberate indifference. *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019)(deprivation of water); *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017) (overcrowded and filthy detention cells); *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016; *cert denied*, 137 S. Ct. 831 (2017)(placing detainee with cellmate known to be violent); *Colbrunno v. Kessler*, 928 F.3d 1155, 1161-63 (10th Cir. 2019) (walking detainee naked through hospital's public space). In the Fifth and Eleventh Circuits, the subjective component of the Eighth Amendment jurisprudence still prevails. *Harper v. Lawrence County*, 592 F.3d 1227, 1234 (11th Cir. 2010); *Baughman v. Hickman*, 935 F.3d 302, 306-07 (5th Cir. 2019).

III. Claims by Transgender Incarcerated Persons

Before jumping into the heart of this matter, it is important to put a couple of issues to rest. "Gender Dysphoria" is a diagnosable mental state where a sufferer feels that their identity does not coincide with their sex as assigned at birth, based solely on a visual inspection of the baby's external sex organs. It was first added to the Diagnostic and Statistical Manual (DSM) as "Gender Identity Dysphoria" and appeared with that nomenclature through the DSM-IV-TR published in 2003; this is how the condition was described in older cases. Its current classification in the DSM-V (updated and published in 2013) drops the "identity" part of the nomenclature, but the diagnostic criteria remain largely the same. For a person to be diagnosed with Gender Dysphoria, the person must exhibit a "marked incongruence between one's experienced/expressed gender and assigned gender, of at least six months' duration as manifested by at least two of the following":

> a marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics, a strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender, a strong desire for the primary and/or secondary sex characteristics of the other gender, a strong desire to be of the other gender, a strong desire to be treated as the other gender, or a strong conviction that one has the typical feelings and reactions of the other gender.

In addition, the person's condition must exhibit "clinically significant distress," that is the person's ability to function in a meaningful way is severely impacted or limited and they have reached a point that medical or surgical intervention or both is required.

In general, the cases note that there is no dispute among experts for plaintiffs or defendants that Gender Dysphoria is a serious medical issue that requires professional attention and, usually, medication. Thus, the first prong of a deliberate indifference to medical needs claim is satisfied, i.e., the existence of a serious medical condition. *See Edmo v. Corizon*, Inc., 935 F.3d 757, 769 (9th Cir. 2019); *Gibson v. Collier*, 920 F.3d 212, 219 (5th Cir. 2019) (no dispute that Gibson suffers a serious medical need, but affirming summary judgment to defendants on claim for gender reassignment surgery); *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (concluding that "transsexualism is a serious medical need"); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011); *Phillips v. Michigan Dep't of Corr.*, 932 F.2d 969 (6th Cir. 1991).

Second, seven of the eleven Circuit Courts of Appeal have held sexual abuse of inmates to violate constitu-

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Chris Balch serves as the City Attorney in Brookhaven, the 11th largest city in Georgia in the heart of the Metro Atlanta area. He has been called the go-to crisis response lawyer for cities and counties across the state, assisting local governments with out-of-control elected officials, employees whose conduct and misconduct ends up on national news feeds, and employees and supervisors who create a hostile work environment or undertake retaliatory acts. A Marine Corps veteran, Chris speaks nationally on issues of governance and the intersection between the First Amendment and elected officials' use of social media.

tional standards. *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997); *Ricks v. Shover*, 891 F.3d 468, 473 (3d Cir. 2018); *Rafferty v. Trumbull County*, 915 F.3d 1087 (6th Cir. 2019); *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000); *Giron v. Correctional Corp. of America*, 191 F.3d 1281, 1290 (10th Cir. 1999); *Sconiers v. Lockhart,* 946 F.3d 1256, 1259 (11th Cir. 2020). The other four circuits do not seem to have addressed the specific question.

In 2010, the Supreme Court eliminated the requirement that an Eighth Amendment claim result in a physical injury, concluding rather that conduct offended the Constitution when the force is applied "maliciously and sadistically to cause harm." *Wilkins v. Gaddy*, 559 U.S. 34, 36 (2010), leading the Eleventh Circuit (not a Circuit Court known to recognize *per se* constitutional torts, s*ee, e.g. Hope v. Pelzer*, 536 U.S. 730 (2002) reversing 240 F.3d 975 (11th Cir. 2001)), to conclude that sexual abuse is always wrong regardless of whether a physical injury occurs. *Sconiers*, 946 F.3d at 1259. In these circuits, at least, the right appears "clearly established." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The reported cases appear to establish little dispute that transgender persons are at greater risk of sexual abuse, sexual assault, and sexual harassment than other inmates, and that prison officials should be aware of this increased risk. The question then becomes what are the obligations of the jail or prison to respond.

This section examines the different places where jail or prison officials interact with transgender incarcerees and discusses what risks of liability arise from each interaction. All of the legal claims will arise either from the Eighth Amendment for convicted persons or the Fourteenth Amendment for persons in pretrial detention, as described above. Cases from the various circuit courts, or if especially useful, the district courts, will be discussed so that a general sense of the trends can be discerned and illuminated.

The reported cases appear to establish little dispute that transgender persons are at greater risk of sexual abuse, sexual assault, and sexual harassment than other inmates, and that prison officials should be aware of this increased risk. The question then becomes what are the obligations of the jail or prison to respond.

A. Classification

Jail and prison officials have a constitutional duty to keep their charges safe. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Hudson v. McMillian*, 503 U.S. 1 (1992). This duty includes an obligation to protect prisoners from violence at the hands of other inmates. *Farmer*, 511 U.S. at 833 (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988). Phrased in terms applicable to transgender persons, the issue can be stated as whether an incarceree who appears as a gender different than their assigned birth gender is appropriately placed in a prison or jail population consistent only with their assigned birth gender?

In two early cases, *Guzman-Martinez v. Corrections Corp. of America,* 2012 WL 2873835 (D. Ariz. 2012) and *Saw v. District of Columbia*, 944 F. Supp. 2d 43 (D.D.C. 2013), the outcome turned on whether the transgender incarceree was legally male or female. In *Guzman-Martinez*, plaintiff was placed in general population and in a cell with a male offender who brutally assaulted and raped her. The Arizona District Court found no liability and concluded, in part, that placing a pre-operative transgender woman in a female population would offend the privacy rights of those other women at least as much as requiring her to remain with other biological males. 2012 WL 2873835 at *9. In contrast, the District Court for the District of Columbia found that where the plaintiff had undergone gender reassignment surgery and was legally recognized as a woman, the guards and supervisors were required to acknowledge and treat her as a woman, including in her classification for housing. 944 F. Supp. 2d at 58.

This distinction is not currently recognized in the standards and guidelines published by the World Professional Association for Transgender Health (WPATH), discussed more fully below. If a person manifests sufficient indicia of living as a gender different than the one assigned at birth, that appears to be sufficient for WPATH to apply its criteria for treatment.

The key lesson from this and other cases is that qualified medical testimony from physicians with experience treating persons with Gender Dysphoria will be necessary. Defense counsel would benefit by securing the services of an advising expert upon assignment and obtaining a initial opinion of the case as soon as all of the relevant medical records can be accumulated.

B. Medical Treatment

1. Hormone Treatment

When considering cases involving adult incarcerees, it appears clear that providing hormone treatment to inmates diagnosed with Gender Dysphoria may be required unless there

is a medically reasonable rationale to discontinue treatment. Almost no case finds that an abject or unjustified failure to treat a transgender person with hormone therapy is appropriate. As the District Court for the District of Massachusetts noted in *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 188 (D. Mass. 2002), "if [plaintiff] had cancer, and was depressed and suicidal because of that disease, the DOC would discharge its duty to h[er] under the Eighth Amendment by treating both h[er] cancer and h[er] depression." One of the requirements of a Gender Dysphoria diagnosis is the conclusion by the treating or consulting therapist that the disconnect between assigned gender and gender identity is resulting in clinical signs. Those clinical signs often include depression, anxiety, suicidal ideation, attempts at self-harm (including attempted self-castration, Picking and choosing what ailments will be treated, regardless of the rationale, is likely is likely to be deemed per se unreasonable and unconstitutional.

In a forum not generally known for denying public officials' qualified immunity, the Eleventh Circuit held that the refusal of a medical director to provide hormone therapy for a transgender inmate was a violation of clearly established law; therefore, qualified immunity did not absolve the medical director of potential liability. *Kothman v. Rosario*, 558 Fed. Appx. 907 (11th Cir. 2014). Kothman was a 38-year-old transgender man incarcerated from 2010 to 2011 in Florida's Lowell Correctional Institution for Women. Dr. Rosario was the chief health officer while Kothman was at Lowell. Kothman had lived as a man throughout his life; while in prison, Kothman received some mental health therapy, but the records submitted did not reveal that he received any specific treatment for Gender Dysphoria (called Gender Identity Dysphoria in the court's opinion). 558 Fed Appx. 907 n.2 (detailing the revision in the nomenclature in the DSM and the reason for the language adopted by the court). Kothman's evidence established he had been diagnosed with GID in 2005 and had been treated with hormones since that time. Neither the complaint nor the record established that Kothman had ever received treatment for his GID while under Dr. Rosario's care. On this record and with these facts, the Eleventh Circuit held Dr. Rosario was not entitled to qualified immunity because GID was recognized as a serious medical condition prior to her interaction with Kothman and the record established that hormone treatment was medically necessary and appropriate. (*See also, Diamond v. Owens*, 131 F. Supp. 3d 1346 (M.D. Ga. 2015)).

2. Gender Reassignment Surgery

There is a clear split in the Circuits between courts that will require, on the right record, gender reassignment surgery and those that will not. *Compare Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019) (denial of gender reassignment surgery constitutes deliberate indifference) with *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014) *en banc* (because of dispute in medical community about the appropriateness of gender reassignment surgery, refusal is not deliberate indifference) and *Gibson*, 920 F.3d at 220 (same); *but see Fisher v. Federal Bureau of Prisons*, 484 F. Supp. 3d 521, 542 (N.D. Ohio 2020) (allegation of a blanket policy by state prison officials not to perform sex reassignment surgery is not related to individualized determination of medical need and may violate the Eighth Amendment). This is perhaps not surprising given that the medical community cannot agree on what care is required for a person diagnosed with Gender Dysphoria.

WPATH, the international organization dedicated to healthcare for transgender individuals, has been recognized by a number of courts, *see, e.g., Soneeya v. Spencer*, 851 F. Supp. 2d 228 (D. Mass. 2012); *Campbell v. Kallas*, 2020 WL 7230235 (W.D. Wis. 2020); *Tay v. Dennison*, 457 F. Supp. 3d 657 (S.D. Ill. 2020); *Hicklin v. Precynthe*, 2018 WL 806765 (E.D. Mo. 2019), and WPATH experts have been accepted by those courts as the authority on the standard of care for transgender persons. The WPATH standards have also been endorsed by the National Center for Correctional Health Care in Chicago.

But the WPATH standards are not without their challenges. They are discussed at length by the First Circuit in *Kosilek v. Spencer*, 774 F.3d 63, 74-79 (1st Cir. 2014), which offers both a road map to cross-examination for a competing expert and one possible path to summary judgment for defense counsel. Dr. Chester Schmidt, a psychiatrist and the associate director of the Johns Hopkins School of Medicine, testified for the Illinois Department of Corrections, and referred to the Standards of Care from WPATH as guidelines, not standards, because there is not a consensus in the medical community about sex reassignment surgery (SRS). Unsurprisingly, Plaintiff's experts disagreed. One of those opinion witnesses, Dr. George Brown, was a participating author for the WPATH Standards. 774 F.3d at 74. The Court then appointed its own expert, Dr. Stephen Levine, who was also a participating author of the WPATH Guidelines and serves as a clinical professor of psychiatry at Case Western Reserve School of Medicine. 774 F.3d at 77. Dr. Levine acknowledged the advocacy role of WPATH and wrote in his report that, "The [Standards of Care] are the product of an enormous effort to be balanced, but it is not a politically neutral document. …The limitations of the [Standards of Care] are not primarily political. They are caused by a lack of rigorous research in the field." 774 F.3d at 78. He concluded that the treatment option adopted by Dr. Schmidt was not medically unsound, even if most treating physicians would disagree with it.

The Ninth Circuit provides a com-

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Defending Valid Prosecutions: Municipalities and Wrongful Conviction Claims

SHNEUR NATHAN *and* AVI KAMIONSKI, *Nathan & Kamionski, LLP, Chicago, Illinois*

I. INTRODUCTION

Wrongful Conviction lawsuits are not new. These high-profile and high-exposure lawsuits are being filed across the country and are costing municipalities millions of dollars to resolve. Generally, a plaintiff alleges that he was accused of crime he did not commit and that the police fabricated evidence to secure an unjust conviction. In the past, true DNA exonerations were the catalyst for releasing inmates. However, today, most wrongful conviction lawsuits involve allegations of witnesses recanting their original statements to the police.

In witness recantation cases, a plaintiff generally does not have any physical evidence exonerating him from the crime; rather, the evidence of "innocence" is merely a witness who recanted prior sworn testimony. The recanting witness will also claim he or she was pressured by the police to identify the plaintiff as the perpetrator. This questionable recantation is later characterized as a *Brady* claim when the plaintiff alleges that the police failed to disclose the recanting witness's "true" statement and the allegedly coercive circumstances that surrounded the witness's statement. Under *Brady v. Maryland*,[1] police officers have duty to disclose material exculpatory evidence. If the police withhold such evidence, the criminal defendant is denied his due process right to a fair trial.

II. Potential Liability

Plaintiffs in reversed conviction lawsuits typically seek $1 million to $2 million per year for every year they were incarcerated. These kinds of eye-popping verdicts have been affirmed virtually across the country. *Limone v. United States,* 579 F.3d 79 (1st Cir. 2009) ("wrongfully imprisoned plaintiffs were entitled to compensation of *at least* $1 million per year of imprisonment."); *Thompson v. Connick,* 553 F.3d 836, 865-66 (5th Cir. 2008) (upholding jury award of $14 million for 18 years of wrongful incarceration), *vacated on other grounds,* 562 F.3d 711 (5th Cir. 2009) (en banc); *Newsome v. McCabe,* 319 F.3d 301, 302-03 (7th Cir. 2003) (involving award of $15 million for 15 years of wrongful incarceration); *White v. McKinley,* No. 05-203, 2009 WL 813001, at *22 (W.D. Mo. Mar. 26, 2009) (upholding jury award of $14 million in compensatory damages for 5½ years of wrongful incarceration); *Sarsfield v. City of Marlborough,* No. 03-10319, 2006 WL 2850359, at *1 (D. Mass. Oct. 4, 2006) (reflecting judicial award of more than $13 million for 9½ years of wrongful incarceration). Just this year a North Carolina jury awarded $75 million to brothers wrongly convicted of a 1983 murder. Similarly, the Fourth Circuit affirmed a $15 million judgment against the city of Baltimore.

In addition, like all civil rights litigation, under 42 U.S.C. § 1988, if a plaintiff prevails on his federal claims he will be entitled to attorneys' fees. Given the nature of this litigation and the amount of time generally spent, you can expect to see attorneys' fees petitions for several million dollars.

III. How Do You Win?

The standard approach to litigating

reversed conviction cases typically does not lead to an outcome favorable to the defense. Motions to dismiss raising the qualified immunity defense are typically denied. Plaintiffs often spend years developing their cases to a point where they will be successful in creating a fact dispute that will defeat defense motions for summary judgment.

The standard defense playbook is to subpoena vast records and take twenty or more depositions just to reach the point where the case settles. Plaintiffs assert privilege or work product over the documents most helpful to the defense and have no problem relying on witnesses who are lying. Riding a wave created by a prosecutorial or judicial decision to vacate the conviction, plaintiffs are able to garner sympathy from judges and juries. Often the only hope for the defense to actually win a reversed conviction case is to change the narrative by proving that the plaintiff actually duped the system and engaged in fraud or other misconduct in order to unjustly procure the reversal of his conviction. While each case is different, this article explores approaches that can assist lawyers in defending, and winning, reversed conviction cases through (1) the careful review of prison phone calls; (2) examination of any questioned document; and (3) the creative use of expert witnesses.

IV. Recorded Prison Calls

Witnesses lie at depositions. Sadly, this is a frustrating truth that attorneys defending reversed conviction cases must accept as a practical reality. Recorded prison and jail phone calls, however, often provide an unfiltered window into a plaintiff's world that cannot be screened by their counsel. Prison calls tend to offer a treasure trove of helpful evidence - including outright admissions concerning the crime underlying the case as well as evidence of witness tampering and perjury. Discoveries made from the review of a plaintiff's prison phone calls often turn the entire case around. Given the important information likely to be contained in a plaintiff's phone calls, it is imperative that this evidence be fully and methodically reviewed. Case-critical information will often arise briefly within a broader conversation which may seem unimportant. It is not unusual for inmates to have thousands of hours of recorded call time. With this volume of data, it is tempting to review the calls in an ad hoc and incomplete manner. However, if the defense takes short cuts and fails to review the entire database of available calls, case-critical information may be missed.

In addition, timeliness of the review is a critical component of any successful prison call review strategy. When the calls are reviewed quickly, it allows the assigned attorneys to utilize the information from the prison calls to develop carefully crafted interrogatories and deposition questions. For example, if the plaintiff's calls suggest that an intermediary was used to pay a witness, this information could be used to draft an interrogatory in order to obtain the identifying information for the intermediary. This information could then be used to take the individual's deposition. If the same information from a plaintiff's call is obtained after the close of discovery, the defense could expect a motion in limine to exclude the phone calls under Fed. R. Evid. 403 because the defense did not sufficiently establish the probative nature of the call. Thus, the later in the discovery process that a critical phone call is received, the likelihood that a court will permit it into evidence is greatly diminished.

Another good reason to review plaintiff's prison calls early in the case is the possibility that it will reveal evidence so powerful for the defense that it could result in the dismissal of the case. For instance, in one 13-year wrongful conviction lawsuit brought against Baltimore, the case was dismissed outright as a litigation sanction when the defense discovered plaintiff's phone calls which showed that he paid the recanting witness $10,000. *Dewitt v. Ritz*, No. CV DKC 18-3202, 2021 WL 915146, at *1 (D. Md. Mar. 10, 2021). The dismissal of this case was widely publicized in a front page article of the *Baltimore Sun*. In a malicious prosecution case brought against Chicago arising out of a police scandal where two police officers were convicted of raiding homes based on bad search warrants, the plaintiff voluntarily dismissed his civil case after the defendants presented to the court that "roughly 20% of Plaintiff's [prison] calls involve discussions of drug manufacturing and/or sale activity." In another case, plaintiff's attorney promptly withdrew after defendants obtained his phone calls. While not all phone call reviews will lead to a case's dismissal, it provides valuable information in virtually every case.

Even where the calls do not contain direct admissions regarding direct culpability or witness tampering, they commonly contain information relevant to damages. It is typical for plaintiffs in reversed conviction cases to characterize the prison experience in the harshest terms possible. These allegations range in topics from prison food, isolation, and violence. Calls between the plaintiff and his family members which are inconsistent with the litigation characterization of the prison experience could be provided to defense damages experts to rebut plaintiff's claim for damages.

V. Prison Calls Are Discoverable

A savvy plaintiff's attorney will understand that plaintiff's recorded calls carry a high risk of including information that will be helpful for the defense. Therefore, defense counsel should expect plaintiff's counsel to heavily resist defense attempts to obtain the calls via subpoena. Typical

Continued on page 12

objections to a defense subpoena will include scope, relevance, invasion of privacy, and the attorney-client privilege. Therefore, defense counsel should be prepared to craft subpoenas that anticipate these objections.

A. Addressing Objections Based on the Attorney-Client Privilege

Surprisingly, the attorney-client privilege is typically not a proper basis for plaintiffs to object to defense subpoenas for prison calls. This is because prison calls regularly include a warning message that the call is being monitored. Courts have found that this operates as a waiver of any attorney-client privilege that otherwise would have applied.

For example, in February 2020, the United States District Court for the Western District of Wisconsin in *Lieberman v. Portage County* held that when an inmate received notice that calls made in prison were being recorded, the inmate did not have a reasonable expectation of privacy in any calls made to his attorney; therefore, the recording and monitoring of such calls did not violate attorney-client privilege. The *Lieberman* decision is consistent with holdings from courts in several jurisdictions. Moreover, since the Supreme Court has not "directly answered the question of whether the Fourth Amendment protects attorney-client conversations in the jail or prison setting," the *Lieberman* decision is persuasive authority in any federal circuit because it provides an up-to-date analysis on Fourth Amendment protection in the prison context.

The Supreme Court has held that the "right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." *Hudson v. Palmer*, 468 U.S. 517-527-28 (1984). In *Lieberman*, the court noted that all inmates were informed prior to each call, and via handbook, that calls were recorded. At the time of the recordings, the prison had no mechanism to flag attorney calls as private. Therefore, prison officials did not intentionally attempt to violate any prisoner's attorney-client privilege because attorney calls just happened to be "swept up" with the rest of the recorded calls. As a result, the *Lieberman* court held that a prisoner with notice that all calls are being recorded does not have an objectively reasonable expectation of privacy in a call with his attorney.

The Eighth Circuit also held that attorney-client phone calls from prison were not protected because "the presence of the prison recording device destroyed the attorney-client privilege. Because the inmates and their lawyers were aware that their conversations were being recorded, they could not reasonably expect that their conversations would remain private. The presence of the recording device was the functional equivalent of the presence of a third party." *United States v. Hatcher,* 323 F.3d 666 (8th Cir. 2003). Similarly, the Seventh Circuit has held that the Fourth Amendment did not give a federal prisoner's sister-in-law a reasonable expectation of privacy in telephone conversations she had with the prisoner. *United States v. Sababy,* 891 F.2d 1308, 1329-30 (7th Cir. 1989). The Seventh Circuit has also held that it was not a violation of attorney-client privilege for a guard to read correspondence between an inmate and his lawyer. *Guajardo-Palma v. Martinson*, 622 F.3d 801 (7th Cir. 2010).

In applying *Lieberman*, litigants can expect courts to undergo an intense fact-analysis to determine whether inmates were informed that calls were recorded and whether the jail or prison had a mechanism for keeping inmate calls with attorneys confidential. Should a court find that sufficient notice was given, it is likely that an inmate's calls with an attorney will not be considered privileged. Defense counsel litigating motions for protective orders regarding prison calls should be prepared to make a record that the plaintiff knew that his or her calls were being recorded. Helpful evidence in this regard may be sample phone calls as well as prison handbooks provided to inmates which often explicitly state that their phone calls will be monitored.

B. Plaintiff's Limited Privacy Rights and Scope Objections

Despite the general inapplicability of the attorney-client privilege in the prison call context, several courts have held that prisoners have a limited right to privacy in their phone calls and, therefore, defendants cannot simply fish for information in plaintiff's prison calls. *Bishop v. White*, No. 16 C 6040, 2020 WL 6149567, at *7 (N.D. Ill. Oct. 20, 2020) ("Defendants need to present a more convincing argument that relevant evidence will be found in Plaintiff's jailhouse calls before they will be allowed to 'go fishing' in that particular pond.") On the other hand, once defendants establish that there is a reasonable likelihood that subpoenaed phone calls will contain relevant information, courts tend to permit discovery regarding the phone calls. *Coleman v. City of Peoria*, No. 15-CV-1100, 2016 WL 3974005, at *1 (C.D. Ill. July 22, 2016) (permitting discovery regarding plaintiff's recorded prison calls with witnesses in the case).

One court recently had little patience for plaintiff's efforts to shield his phone calls from discovery when the plaintiff himself expected defendants to produce robust *Monell* discovery. In *Velez v. City of Chicago*[8], the plaintiff filed a motion to quash a defense issued subpoena to the Illinois Department of Corrections for production of a selection of Plaintiff's prison calls between the plaintiff and his wife, daughter, and brother. Plaintiff argued that the calls' relevance was

speculative; the scope of the subpoena was out of proportion with the needs of the case under Rule 26; and that the subpoena violated Plaintiff's privacy interest. The court rejected these arguments. First, defendants were able to demonstrate that the phone calls during the period at issue revealed that plaintiff was coordinating affidavits with witnesses. Second, the court held that the subpoena was not overbroad because the calls being sought covered a relevant time period. Finally, "as case after case holds, the mere invocation of the right of privacy is never the end of analysis, requiring a predetermined outcome in favor of the party asserting the claimed privacy interest. As the plaintiff must concede, he knew (or should have known) his phone calls were being monitored or recorded."[9] The Court noted:

> Plaintiff makes what some courts have found to be a valid point, and it is somewhat attractive, at least on the surface: "while [plaintiff] knew that his call recordings might be reviewed for a limited correctional purpose, he never could have imagined that every single one of his retained conversations with his minor daughter, wife, and brother would be indiscriminately produced en masse to be combed through by adverse parties in civil litigation. But, the few courts that have accepted this premise did not go beyond the plaintiff's bald assertion, and given the circumstances here, accepting that same assertion seems naive. In any event, the worth of a judicial opinion depends on its reasoning, not on its conclusion.
>
> The plaintiff says he "[n]ever g[ave] up on proving his innocence" and "worked tirelessly to show that he had absolutely nothing to do with this crime." His investigation began years ago, paying off, as he says, in 2016. While plaintiff worked without a lawyer early on, he was represented by one of the attorneys representing him here as things developed, and an amended post-conviction petition was filed, which eventually led to the State's decision to vacate his conviction in December 2017. So, not only is it clear from the content of some of the calls that litigation was in mind in 2013-14, it is likely that it was based on the timeline. Plaintiff may have even been represented by counsel by the time. This is a far cry from cases where the plaintiff was supposedly surprised to be involved in litigation years later.[10]

As such, when plaintiffs move to quash a subpoena for recorded prison calls, it is important to consider the above cases. It is possible that a series of subpoenas will be needed, beginning with calls between plaintiff and known witnesses and then potentially broadening the scope of the subpoena as relevant information is learned from defendants' review of the calls.

VI. Expert Witnesses

The right expert can win your reversed conviction case. Each case is fact specific, but here are some examples that highlight how experts can help defendants win a reverse conviction case.

A. DNA Experts

DNA evidence is not always as "exonerating" as a plaintiff would like to portray it and an expert will help defense counsel understand why. The following case illustrates this point. In 2016, Malcom Bryant was released from prison based on DNA evidence that he presented to the City of Baltimore State's Attorney's Office. In 1998, Bryant had been arrested and charged with the murder of Toni Bullock. Ms. Bullock was stabbed by her attacker. Bullock did not die right away. Paramedics and other first responders provided first aid and Bullock was transferred to a hospital where she died after medical staff were unable to save her life. Bryant was identified by an eyewitness, but no physical evidence tied him to the murder. Bryant sought post-conviction DNA testing on some physical evidence from the original case. A private lab, hired by Bryant, uncovered evidence of a partial YSTR (male DNA) profile on the victim's fingernails and a full YSTR profile on the victim's t-shirt. Bryant was excluded as contributing to either of these profiles. The actual source of the YSTR profile is unknown. Because the YSTR profile was inconsistent with Bryant, he represented it as DNA from the attacker and conclusive evidence of his innocence. This approach succeeded. Bryant's conviction was vacated and he filed a lawsuit against the primary detective and a member of the crime lab. Upon closer examination, however, the YSTR profile discovered by this private lab does not exonerate Bryant. First, there is no evidence that the attacker had any contact with the victim's tee shirt. The victim was wearing multiple layers of clothing and the attacker stabbed her through at least three layers of clothing prior to reaching her t-shirt. In addition, first responders and medical personnel had contact with the

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Shneur Nathan a co-managing partner at Nathan & Kamionski LLP, represents municipalities, businesses and individuals in high stakes litigation including reversed convictions and deaths in custody. Mr. Nathan has successfully resolved hundreds of cases through motions and trial including class actions, securities, partnership disputes, employment discrimination, wage and hour, and insurance defense. His personal interests include Muay Thai and Brazilian Jiu Jitsu.



Avi Kamionski, a co-managing partner at Nathan & Kamionski LLP, has tried more than 25 jury cases to verdict and is known for his creativity and use of expert witnesses. He is a recognized expert in police misconduct litigation. Avi has served as an adjunct professor of law at Chicago-Kent College of Law, Chicago's Department of Law, and in the Office of White House Counsel. An avid mountain biker, Avi sits on the board of Geerz, a nonprofit using mountain biking to provide kids with life skills.

Wrongful Conviction *cont'd from page 13*

victim, she was transported to a hospital and life-saving efforts were performed by several hospital staff. Therefore, any one of those first responders are potential sources of this YSTR profile.

Defense counsel should not accept scientific representations being presented from the plaintiff. Experts should be consulted to evaluate any scientific findings and potential explanations for findings, that on their face, may appear exonerating. In Bryant, defense counsel hired a DNA expert to explain that the DNA evidence was not exonerating.

B. **Questioned Documents**

Consider this scenario. Plaintiff produces a "smoking gun" document that seemingly checks all the boxes. It appears to capture an exculpatory eyewitness account regarding an alternative suspect that was never disclosed to the accused. Defense counsel faced with this kind of situation should consider the strong possibility that such a document is not genuine even if prosecutors relied on the document to vacate a plaintiff's conviction.

Fraudulent documents are popping up with growing frequency in reversed conviction litigation. In *Dewitt,* for example, the plaintiff successfully overturned his conviction with a wholly fabricated document which purported to be a police report that memorialized a prior statement from an eyewitness to a police officer identifying an alternative suspect in the crime at issue. Plaintiff then pointed to this fraudulent evidence at his post-conviction proceedings and argued that it was "newly discovered" exculpatory *Brady* material which required his murder conviction to be reversed. And it worked. Plaintiff filed a post-conviction petition claiming this report, which said another eyewitness to the crime by the name of Tyrell Curtis, gave a statement that he witnessed George Gaines commit the crime, was only discovered after his criminal case and was withheld from his criminal defense attorney. The criminal court ultimately agreed to release Dewitt. Dewitt filed a 13-year wrongful conviction lawsuit alleging the police withheld this report from him in violation of *Brady*. The document appeared suspicious. Below is a copy of the fraudulent police report.



Tyrell, Curtis
1625 Normal Ave.
Lake Clifton High School

NARRATIVE Describe any property recovered. Show disposition of recovered property. List property number.
List Property First
4002896 ------- Note to: Detective Gregory S. Macgillivery

On December 10th, 2002 1400 hours I Mark Veney responded to the 1700 block of Montpelier St.to assist another officer on call pertaining to a potential eye-witness to this case. Upon my arrival Detective Garnell Green and I transported Tyrell Curtis to North Eastern District, as well as Headquarters Homocide Division on the above date and time. Tyrell Curtis gave a statement during the interview stating that he witnessed George Gaines cone around the corner shooting at everybody who sitting on the porch at the 1700 block of Montpelier St. Tyrell Curtis indicated to me during the interview that Tony Dewitt had nothing to do with the shooting. After terminating the interview Tyrell Curtis was transported back to the 2600 block of Harford Rd.

Respectfully,
Detective
Mark Veney

VENEY

Sgt. Garnell Green

654322 Exhibit 4 793331

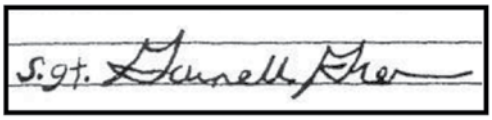
This document was not located anywhere in the police file, which seemed suspicious to civil defense counsel. How could it be that plaintiff had possession of the smoking gun report but it was not located anywhere in the official police file? The truth is that the police did have the original of this police report in their file, but it was blank and not completed. Upon closer examination defense counsel observed that each police bubble report had its own unique identifying number—in the *Dewitt* case, "793331"—located at the lower right-hand corner of both pages of the document. This identifying number is similar to a Bates number in that it facilitates document tracking. This report, however, had the same identification number as an existing document in the police file. As such, experts retained by the defense determined that the blank, known police document was used to fabricate the report which plaintiff claimed was withheld. The unique identifying number exposes the fact that the document plaintiff presented in his post-conviction motion and at his post-conviction hearing was not genuine.

Second, the questioned document experts were able to show that the signature of Sergeant Garnell Green that appears on the report was not written by Sergeant Green. Although the purported signature of Green appears similar to a known exemplar, inspection revealed tremors in the signature, a lack of pressure patterns, and blunt endings, exposing the signature as a fake. The below side-by-side graphics showcase the defects in the copied as compared to the original signature.

Questioned Document

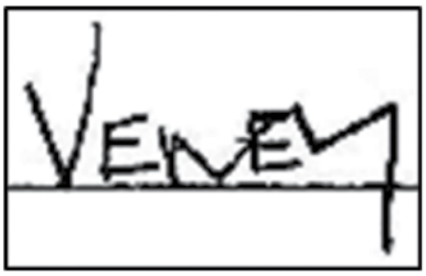


Known Signature

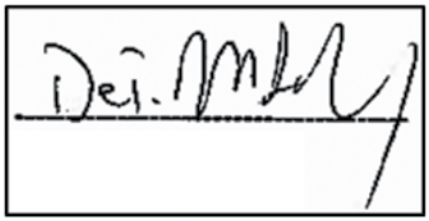


Third, the purported "signature" of Detective Mark E. Veney that appears on the Questioned Document had no resemblance to other known signatures or handprinted examples of the word "Veney" in the official police file. The following graphics showcase the obvious differences, such as that the final stroke of the "N" in the Questioned Document is diagonal and connects to the letter "Y," and that the letter "E" was added between the "N" and "Y" only afterward.

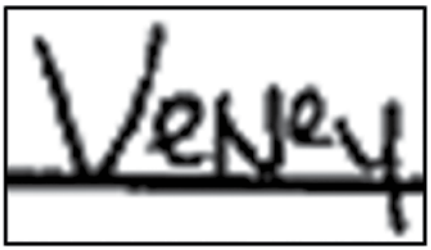
Questioned Document



Known Signature



Known Handprinted



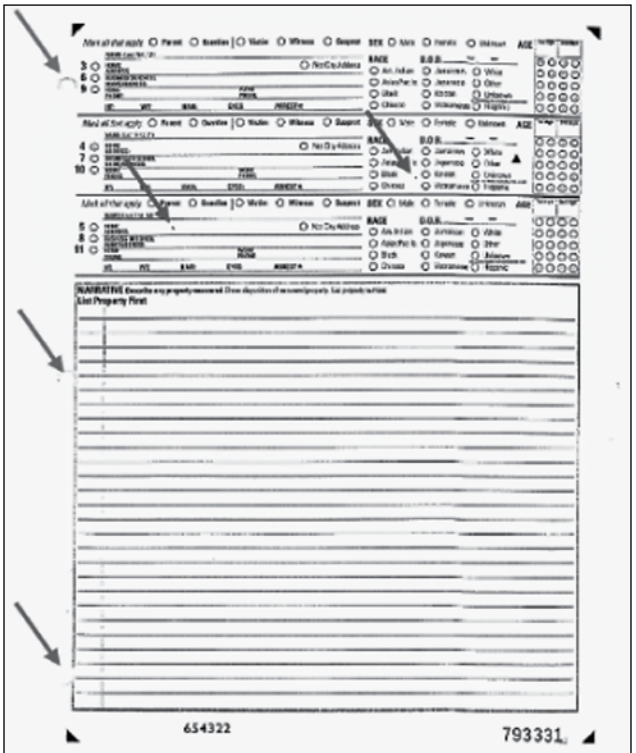
Finally, the report plaintiff presented contained hole punches and "trash marks" (imperfections, scratches or dirt from a copy machine which is visible on a photocopy) that line up perfectly with the unfilled copy plaintiff received from the prosecutor in discovery, as opposed to the known document in the official police file which did not contain hole punches or "trash marks."

Thus, the plaintiff in *Dewitt* deceived the criminal court and the prosecutor and secured his release from prison utilizing shockingly unacceptable means. Plaintiff forged the Questioned Document to support witness's false testimony, then presented the forgery to the court to procure the reversal of his conviction. Based on this discovery and evidence from plaintiff's phone calls, the district court dismissed *Dewitt*'s 13-year reversed conviction case as a litigation sanction and awarded defendants over $100,000 in attorney's fees as prevailing parties.

C. Creative Use of Experiments

Plaintiffs rely heavily on experts to shift the factual landscape from the background that sustained their conviction into a new circumstance where a prosecutor and judge decides to overturn a jury verdict. These experts carried much weight in the criminal case and it takes defense determination and creativity in order to develop persuasive counter theories. Two examples below illustrate this point.

Continued on page 16



States Attorney's Office

K-4B Dated 07/03/02 or 07/05/02
3 pages not 2 separate sets has hole punches (Green Arrows-3 on left)
Note: Holes do not penetrate the
margin as far as K-5A
above has trash marks (Red Arrows)



Questioned Document

Q1 Dated 12/10/03
Has hole punches (Green Arrows - 3 on left.
Note: Holes in same position as K4B and not K4A above has trash marks (Red Arrows)

Wrongful Conviction *cont'd from page 15*

In one case, plaintiff was convicted of an arson and sentenced to life in prison. According to the plaintiff's confession, he started the fire by pouring gasoline from a milk container on the fire scene. Plaintiff succeeded in overturning his conviction, in part, by relying on two fire scientists who opined that the milk container contained a substance that was not gasoline. This opinion was then used to argue that plaintiff's confession—which stated that a milk container was used to transport gasoline—was false as a matter of science. Instead of accepting the opinions of plaintiff's experts, defense counsel conducted scientific testing to determine gasoline's rate of evaporation from a milk container. This testing showed that gasoline evaporates from a milk container to the point where it is undetectable between 8 and 24 hours. Therefore, the absence of detectible gasoline in the milk container was not a false fact contained within plaintiff's confession.

In another case, the plaintiff brought a suggestive identification claim after his conviction was reversed and he contended that the sole eyewitness at his trial was manipulated by law enforcement. Plaintiff retained an expert who opined that a sketch of the suspect was used with the witness to suggest to her that she should identify the plaintiff. Instead of countering this opinion testimony with the opinion of just another expert, Defendants commissioned a study to determine whether, in fact, individuals exposed to the sketch would select the plaintiff from a photo array at a higher rate than chance.

Good experts have the ability to change the course of a reversed conviction lawsuit. Defense counsel should think creatively and beyond simply identifying a police practices expert. Consider experts on a wide range of issues that could put the defense case on better footing. A reconstruction expert could help the jury understand that a confession was accurate. A child witness expert might take the sting out of plaintiff's false confessions expert. A forensic pathologist might explain that plaintiff's DNA expert's opinion is based on faulty assumptions about the crime scene. In order to place the defense case in the best posture for success, defense counsel should always keep an open mind about the evidence and not fall into



a trap where the civil case is merely a re-do of the post-conviction litigation that resulted in plaintiff succeeding in having his or her conviction overturned.

Conclusion

The elements discussed in this article are but a few of the many strategies available to preserve valid prosecutions. Municipalities should be prepared to defend meritorious convictions vigorously, serving the interests of justice and avoiding costly and unwarranted awards. ML

Notes

1. 373 US 83 (1963).
2. https://www.theguardian.com/us-news/2021/may/16/north-carolina-jury-awards-75m-to-brothers-wrongly-convicted-of-1983
3. https://news.bloomberglaw.com/us-law-week/jurys-15-million-judgment-against-baltimore-detective-affirmed
4. https://www.baltimoresun.com/news/crime/bs-pr-md-ci-cr-false-affidavit-exoneration-20210316-ucxzn-rfowfhqfnd6dvqdsutzd4-story.html.
5. Teague v. Salgado, No. 19-cv-4113 (N.D. Ill. Apr. 2, 2021) Dkt. #94 p. 3.
6. Harris v. City of Chicago, No. 20-cv-4521 (N.D. Ill. May 26, 2021).
7. No. 18-cv-450-JDP, 2020 WL 869232, at *1 (W.D. Wis. Feb. 21, 2020).
8. No. 18-c-8144, 2021 WL 3231726 (N.D. Ill. July 29, 2021).
9. *Id.*
10. *Id.*
11. DNA evidence frees man serving life for killing of teen in 1998, https://www.baltimoresun.com/news/crime/bs-md-ci-bryant-dna-exoneration-20160511-story.html).



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LISTSERV

BY: BRAD CUNNINGHAM,
Municipal Attorney, Lexington, South Carolina and IMLA Board Member

IMLA in Minneapolis: Face to Face Again, Finally

It was Monday morning at the Minneapolis Hilton following the 86th Annual International Municipal Lawyers Association Annual Conference which had wrapped up the day before. I strolled downstairs to mail a postcard to my daughter, and afterwards walked the empty halls that housed the conference. IMLA posters promoting the Sunday schedule remained in place. The registration and exhibit areas were empty. The slightest noise sounded as though thunder had struck. A cough echoed in the halls.

What a difference a day makes, I thought. Only 24 hours earlier, the halls were bustling with activity. The IMLA staff was scurrying around doing its typical fantastic job. Exhibitors were pitching their products one last time, the air smelled of coffee and attendees were hauling luggage through the halls to their last seminars of the conference. This was a welcome sight after the circumstances of the past two years.

The last time IMLA gathered in person was the outstanding Annual Conference in Atlanta. How wonderful it was to convene in person again! My thoughts drifted back to other successful conferences. Nashville… New Orleans…Chicago…Austin… Baltimore…Las Vegas…San Diego… Niagara Falls…Houston…Atlanta… I can add Minneapolis to that list now as well. The in-person conference brought many of us together again in familiar circumstances.

I was able to shake hands, and even exchange a few hugs with old friends, some of whom have become among the best friends I have. I saw new faces and made a few new friends among the many attendees. Robust discussions about shared issues over a drink were again a welcome occurrence, and I thoroughly enjoyed the IMLA Annual Conference the way I used to.

Now, don't get me wrong here. I do not dismiss at all the importance and convenience of virtual meetings. They offer the chance to increase meeting attendance by bringing those who otherwise could not attend in person. Even someone in quarantine could attend the conference without putting others at risk. Those unable to travel could attend. The IMLA staff is to be commended for preparing the conferences in a manner that would allow for *either* virtual or in-person attendance. Folks, we have no idea how hard the staff works in preparing these conferences, and now they have to prepare in an additional manner to allow for virtual attendance. Next time you see a staff member, please take the time to thank them for all the work they have done in keeping these top-rate programs available to us in both formats.

But I am old school. Given the choice I choose to attend in person. There is nothing like a handshake, a lunch, dinner, or a cup of coffee with fellow attendees and the many shared issues that were discussed following the seminars. As I walked the empty halls, thoughts wandered to my old friend the late Brad Bailey who I met in DC for the first time. Likewise, Ron McKinney of Greenville, SC, who helped me a lot in my earlier years as a municipal attorney. Ron is now deceased as well.

Memories of previous conferences and adventures echoed through my mind… The trip behind Niagara Falls… Watching a glacier fall into Prince William Sound in Alaska… An evening junket to Tijuana… The Water Cooler Reunion at Pete's Piano Bar in Houston…Being caught up in a riot in Baltimore with Mike Pitts…Canceled flights and the race for rental cars as attendees were stuck in New Orleans on September 11…Nearly having to deliver a baby in DC… A salmon fishing trip… Discussing where to buy Webkinz with Lori Bluhm…Going with Australian buddy Dan Best to his first ever ice hockey match in Austin... Riding over the Golden Gate with Becky and Stan Tydings…The Red Sox and Astros in the ALCS in Houston… I could go on.

Stories such as these often provoke the question "Do you actually get any work done? Attend any semi-

nars? The answer is a resounding yes!!! In a typical seminar/conference, I can get my entire year's CLE requirement fulfilled. Not only do I get it fulfilled, but with first rate programs which are 100 percent relevant to my area of practice. So, as to the value received, I say to my employer "There isn't a better expenditure of travel funds than my attendance at the IMLA events!"

Additionally, thanks to technology, I can still get my phone calls, answer emails, and correspond with folks back home just as though I was in the office. In fact, there are times when I have been away from the office for a week and some of the department heads here did not even know it. So, even though I am out of town, the work is getting done.

However, once the work is over, I choose to make the most out of the conferences and try to meet as many fellow comrades as I can. To my mind, this is one of the big advantages of an in-person event. Virtually, once the seminar or class is over, I tend to log off and go onto other business. But, at an in-person conference the learning and the fun do not end once you log off.

We share a lot of strong ideas on the listserve. It is an invaluable resource. But many things cannot be done online. One is a handshake, a pat on the back and the common sharing of experiences we have had over the years. Again, my mind flashed back to past experiences that could not have happened online.

There was the time Patrick Baker and I thought we might be getting kidnapped on an Uber ride. As our driver left the highway and began wandering through a residential neighborhood, I begin to get an uneasy feeling as we left course. I looked over at Patrick and he was busy texting home… "Not sure what is going on…Hopefully I am not being kidnapped…" The driver pulled into a residential driveway and we looked at each other as if to say "What in the **** is going on." The driver backed out and proceeded in another direction. Finally, possibly sensing our trepidation, he mumbled to us that he was trying to get around some road construction. Indeed he was, and shortly we were back on our way. Patrick and I reshared that story in Minnesota couple of weeks ago and we can now laugh about it. It is much funnier in person.

There was the time the fishing guide left me high and dry in the middle of the Alaskan wilderness. I was so far into the wilds that I was having to leave clues on branches to retrace my trail. When the guide didn't show, I tried to make a phone call but didn't have any signal. Walking to the top of a hill resulted in a flittering on my screen, so I decided to climb a tree to get higher. When one bar finally popped up steady, I was able to make the call to find my landing spot which the guide neglected to tell me he had changed.

Other events include the trivia night at James Joyce Pub in Baltimore… Fort McHenry fireworks… A car ride with Nick Spiropoulos to Girdwood, Alaska, to eat at the Double Musky Inn…Group gatherings to watch Saturday evening college football…Softball Games…Running into Tom Brokaw on the sidewalk in DC…Avoiding the naked bicycle races in San Francisco…

If you can't attend the conferences in-person, I urge you to try to attend online. The IMLA education is worth every penny of it. But, if you do indeed get the chance to attend in person, I urge you to take the chance. It is well worth the time and effort. If you are afraid you won't know anyone, forget that thought. This is the friendliest group of people I have ever met. And, if you are a first-time attendee, don't miss the Watercooler Reunion where it is strictly NOT business, and more about just having a good time and meeting folks. What other event comes with the Brad Cunningham guarantee? If you don't have a good time, I pay the bill!

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Back to the business end of the IMLA Conference, I am excited to be appointed to the Board of Directors for our outstanding group. Thanks to our outgoing fearless leader, Chuck Thompson, for making the appointment. And, thanks to Chuck for many years of dedicated service to IMLA and cities in general. I was pleased to be able to see Chuck receive the Charles S. Rhyne Lifetime Achievement in Municipal Law Award. Way to go, Chuck, you deserve it! And thanks for all of your efforts over the years!

As a Board Member for IMLA, I will do my best to assist in building on the already great benefits provided by IMLA. I will honor the mission of the organization and ask always that if you ever have any questions or suggestions, bring them to me and I will try to answer, get the answer or take them to the Board. I'm ready to roll up my sleeves and get the job done!

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Lastly, I want to revert to my practice of ending the column with a bit of humor. Recently, there was a case in local court for Disorderly Conduct. The facts were that a few guys were partying and one of them fell asleep. While asleep, a couple of his "buddies" decided to play a trick on him, and they superglued a "sex toy" to his hand. Upon waking, he apparently went to scratch his face and smacked himself right between the eyes with the thing. An argument ensued and it escalated to a point where the police were called. Disorderly conduct charges were leveled. ML

The prosecution rests, your honor…

INSIDE CANADA

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Rental Housing Initiatives on Canada's West Coast

Like many North American cities, British Columbia's largest cities have over the past several years been struggling to accommodate the demand for residential housing that is affordable for families with low to moderate incomes. Part of the challenge has been to attenuate the erosion of affordable rental housing stock through redevelopment and renovation of existing buildings. Some recent legislative changes and court decisions highlight the complementary roles of the provincial and local governments in meeting these difficult challenges.

Rental Tenure Zoning

Pursuant to amendments that were made to B.C.'s *Local Government Act* [1] in 2018, its municipalities are empowered to require rental tenure in apartment buildings. Specifically, the new section 481.1 of the *LGA* allows municipalities to enact zoning bylaws that limit the form of tenure to rental tenure within a zone or part of a zone where multi-family residential use is permitted. This section additionally authorizes municipalities to limit the form of tenure to a specified portion of units within a building.

Section 242 of B.C.'s *Strata Property Act*[2] provides local governments with the discretion to approve or refuse applications to subdivide previously occupied buildings into strata lots, a key step for developers converting rental housing to ownership housing. In exercising this discretion, local governments must consider a variety of factors set out in the legislation, including the priority of rental accommodations in the surrounding area (s. 242(6)(a)) and "any other matters that, in its opinion, are relevant" (s. 242(6)(e)). The City of New Westminster has exercised this authority for several years to protect affordable rental housing in its community. The City was also one of the first to exercise the new rental tenure zoning power.

A recent decision of the B.C. Supreme Court in *V.I.T. Estates Ltd. v. New Westminster (City)* provides guidance in relation to the scope of the above legislation.[3] In this decision, the Court upheld a zoning bylaw that limited the tenure of about 140 units in six different residential properties to rental tenure, pursuant to s. 481.1 of the *LGA*. The City of New Westminster enacted the bylaw to protect rental tenure in buildings that had been subdivided into strata lots many years ago despite the City's moratorium on strata conversions, but had always been managed and operated as rental buildings. The bylaw effectively prevented the conversion of these rental units to owner-occupancies.[4] The bylaw arose in the context of the City's Affordable Housing Strategy. A report accompanying the bylaw stated that "the City is committed to protecting and enhancing this affordable rental stock as it provides an important source of safe, secure and affordable housing for our residents."[5] The petitioners, who were corporate owners of the six properties at issue, argued that the bylaw was *ultra vires*, and that the City could not apply residential tenure zoning to strata units as that would interfere with the right of strata lot owners to occupy their units themselves.

On the reasonableness standard of review that applied to the City's interpretation of its authority under the new s. 481.1 of the *LGA*,[6] the question before the Court was whether the City's interpretation of s. 481.1 as including the power to restrict the form of tenure of residential strata lots to rental tenure in perpetuity was one that no reasonable municipal council could have made. That question included consideration of the entire statutory framework for the City's interpretation.

Justice Saunders of the B.C. Supreme Court held that there is neither any inconsistency between the provincial legislation and the bylaw, nor any conflict between the 2018 amendments to the *LGA*, the *Land Title Act*,[7] or the *SPA*. He further held that nothing in the language of the 2018 amendments suggests that the rights of individual strata unit owners are privileged over those of non-strata residential rental property owners. Since s. 242 of the *SPA* already granted municipalities the power to approve or disapprove applications to stratify previously occupied buildings, the 2018 amendments could not have been, as the owners asserted, intended only to prevent owners from evicting tenants in order to strata-title their buildings. In dismissing the petition, Justice Saunders noted that the bylaw "accomplish[es] the precise aims of the legislation": by empowering the City to prevent an owner from converting a rented strata unit into an owner-occupied unit, the bylaw preserves the City's available rental housing.[8]

This decision provides clarity in relation to the 2018 amendments to the B.C. *Local Government Act*, and should be encouraging for other municipalities around B.C. that wish to use the residential rental tenure zoning power to preserve affordable rental housing in their communities.

Renoviction Regulations

Prior to its repeal on July 1, 2021, a provision in B.C.'s provincial residential tenancy regime expressly permitted evictions for the purpose of renovation, if a landlord had acquired the appropriate permits and the renovation required a vacant unit.[9] Because rent controls in British Columbia attach to the tenant rather than the unit, landlords could evict tenants, perform token renovations, and rent the unit to a new tenant at whatever rent the market would bear. The portmanteau word "renoviction" was coined to describe the practice, which has constituted the business plan for many building acquisitions that have occurred in the Vancouver area housing market over the past several years.

In May of 2019, the City of New Westminster enacted a bylaw to regulate renovictions under its general business regulation power. For any renovations substantial enough to require an eviction of the tenant, the bylaw requires the landlord to either enter into a new tenancy agreement with the tenant in respect of a comparable unit in the same building on the same, or better, terms as the tenant's existing tenancy agreement, or make other arrangements for the tenant's temporary accommodation and return to their unit at the same rent when the work is complete.[10] For the second option, the bylaw prohibits landlords from increasing the rent payable by the tenant upon their return after the renovation. As reflected in Council notes, the policy context for the bylaw was the City's long-standing concerns relating to insufficient affordable housing, as well as the lack of adequate protections in the *RTA* from renoviction projects.

In *1193652 B.C. Ltd. v. New Westminster (City)*,[11] the petitioner landlord (an owner of rental apartments) argued that the City's bylaw is *ultra vires*. In the petitioner's view, the bylaw contravened the Legislature's intention to regulate evictions consistently throughout the province. Honourable Chief Justice Hinkson for the BC Supreme Court disagreed. Applying the correctness standard of judicial review that applied prior to the Supreme Court of Canada's *Vavilov* decision[12] to questions of statutory interpretation, the Court cited section 10 of the B.C. *Community Charter*,[13] which deals with conflict between municipal bylaws and provincial laws. Section 10 provides that a municipal bylaw is inconsistent with a provincial bylaw, and is consequently of no force or effect, only if it requires contravention of the provincial enactment. Here, the City had exercised its authority in an area already subject to a provincial regulatory regime, but in a way that was not inconsistent by this standard. The City also presented a novel argument regarding the scope of municipal authority in ss. 8(6) and 8(3)(g) of the *Community Charter*. Section 8(3) provides that a council may by bylaw, regulate, prohibit, and impose requirements in relation to "the health, safety or protection of persons or property in relation to matters referred to in section 63," which include "rental units and residential property." Regarding this provision, the petitioner argued that "health, safety or protection of persons" must be narrowly inter-

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peting roadmap. *Edmo*, 935 F.3d at 780; *see also*, *Edmo v. Corizon, Inc.*, 358 F.3d 1103, 1111 *et seq*. (D. Id. 2018) (injunction against Corizon, Inc. vacated on appeal because it was a private company running the prison where Plaintiff was assigned by the Idaho Department of Corrections). In each of the *Edmo* cases, the Court largely rejects the arguments made by defense counsel and favors the treatment of the inmate. Years of abuse based on biological gender placement and classification by prison officials and the opinions of treating physicians (both rejected by the First Circuit) persuaded the District Court and the Ninth Circuit that surgery and reclassification were needed to address Edmo's serious medical needs and physical safety.

It is incumbent on defense counsel to obtain expert testimony to address the WPATH standards and to offer testimony as to whether they are appropriate and whether the incarcerating agency has satisfied the constitutional standard of care. In *Monroe v. Meeks*, 2020 WL 1048770 (S.D. Ill. 2020), the court expressly criticized the Illinois Department of Corrections for not presenting any evidence to address Plaintiff's claims that the WPATH standards applied or were appropriate under the facts as presented.

C. Personal Safety

A series of nationwide studies of inmates seems to establish that transgender persons are more likely to be assaulted while incarcerated than others. These studies are required under the Prison Rape Elimination Act (discussed in detail in the next section). In 2011-12, the Bureau reported that 39% of transgender inmates in federal custody had been assaulted in the previous twelve months. Thus, it would appear that data is readily available that transgender persons, and women especially, are significantly more likely to be assaulted or harassed, either by other inmates or by jail/prison staff, supervisors, or administrators. *Diamond*, 131 F. Supp. 3d at 1362 (complaint alleged that warden stated, during a grievance hearing, placed plaintiff in solitary confinement for "pretending to be a woman"). *See also, Doe v. District of Columbia*, 215 F. Supp. 3d 62 (D.D.C. 2016) *quoting* Amnesty International USA, "Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual, and Transgender People in the US" 60 (2005).

As the District Court found in *Diamond*, the existence of these studies provides circumstantial evidence of a need to protect transgender inmates. *Id*. at 1376. Pursuant to the standard announced by the Supreme Court in *Farmer v. Brennan*, 511 U.S. at 825, the background studies establish the objective prong of the deliberate indifference standard. When coupled with actual knowledge resulting from direct communications to prison officials by the inmate (usually required as part of the administrative exhaustion requirements of the Prison Litigation Reform Act. 42 U.S.C. § 1997e(a)), arguable liability may be established.

Because of the inability of incarcerees to make decisions to protect themselves or care for themselves, jails and other involuntary detention facilities owe a duty to protect those in their custody. It does not mean that jail is supposed to be a pleasant place. But it does mean that prison officials need to accept they have a responsibility to control violence to the extent they can.

D. Prison Rape Elimination Act (PREA)

Passed in 2003, and evolving somewhat over time in its application and scope, the Prison Rape Elimination Act, 34 U.S.C. §30301 *et seq*. and 42 U.S.C. § 15601 *et seq*., 117 Stat. 972, PL 108-79, establishes a national priority to eliminate sexual assault, sexual abuse, and sexual harassment in the nation's prisons and jails. 34 U.S.C. § 30302 and 42 U.S.C. § 15606(a) (as amended by the Consolidated Appropriations Act of 2005, P.L. 108-447, 118 Stat. 2809). PREA requires the Department of Justice to establish national standards for "the detection, prevention, reduction, and punishment of prison rape." The current rule can be found at 28 C.F.R. Part 115 issued on June 20, 2012. The Rule was not amended during the previous administration.

PREA's only enforcement mechanism is to withhold federal funds and grants to jails and prisons that do not comply with the standards established by the Regulation. 34 U.S.C. § 30307(e). It does not provide a private claim or purport to create a privately enforceable claim by an individual if a violation of PREA or of the Regulations occurs. *See, e.g.*, *Jones v. Schofield*, 2009 WL 902154 (M.D. Ga. 2009) (citing *Blessing v. Freestone*, 520 U.S. 329, 340 (1997), *Gonzaga University v. Doe*, 536 U.S. 273, 290-91 (2002) (§ 1983 only provides a mechanism of redress where a federally protected right has been infringed)); *Smith v. Malone*, 2018 WL 4781146 (W.D. Wis. 2018); *Law v. Whitson*, 2009 WL 5029564 (E.D. Cal. 2009). However, to the extent the Regulations purport to establish "national standards" for control and elimination of sexual abuse in jails and prisons, there is at least an argument that a breach of the standards could be used as evidence of a failure to train or a failure of adequate policy. *See*, *JKJ v. Polk County*, 960 F.3d 367, (7th Cir. 2020) *en banc, cert. denied* 141 S. Ct. 1125 (2021) (Failure to train on a known and obvious risk of abuse of female inmates by male security staff justifies verdict against county defendant); *Lucente v. County of Suffolk*, 840 F.3d 284, 305 (2d Cir. 2020); *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687 (S.D. Tex. 2016). In *Chao v. Ballista*, 772 F. Supp. 2d 337,

(D. Mass. 2011), the United States District Court for the District of Massachusetts noted that the conversation over preventing sexual abuse in prison created in part by PREA was sufficient to place supervisory officers, including the Commissioner of the Department of Corrections, on notice that the risk of harm to inmates required more and different training and supervision in the past. That notice, coupled with other systemic problems in the Department, led to the Court denying the supervisor's motions for summary judgment. In addition, the Court later denied the Rule 60 motions for judgment as a matter of law following the jury's verdict for Plaintiff, as applied to the facility Superintendent (the jury did not find the Commissioner liable). 806 F. Supp. 2d at 358.

PREA offers substantial fodder for opposing counsel to address and seek documents related to policy, training, supervision, and other systemic issues (cameras and surveillance, or areas outside of visual supervision, etc.). In short, the statute may provide a basis for a *Monell* claim. Furthermore, the cases arising under PREA often provide road maps to liability (particularly *JKJ v. Polk County*) or at least a path to explore liability against the entity running the jail or prison. When defending cases involving transgender inmates, counsel would be well advised to review the regulations, and make sure any experts you interview are familiar with the regulations as well as other relevant standards.

IV. An Effective Defense

Despite the presence of these factors and the likely emotional appeal of the factual assertions in the complaint or in Plaintiff's testimony, the defense is not without weapons in response. Courts continue to recognize the responsibility and ability of jailers and prison officials to take steps to ensure the facility is secure; meaning that persons held there for lawful reasons remain in custody, that those held are treated safely and humanely, and that those incarcerated are appropriately disciplined for misbehavior while incarcerated.

A. Security of the Facility

Those who run jails and prisons prefer bright lines and policies that limit discretion. There are two reasons for this: (1) bright lines are easier to manage and administer; and (2) ambiguity or discretion creates places for inmates to exploit. While these two are often analyzed separately, they each boil down to the need to support the standard from *Hudson v. McMillan*, 503 U.S. 1 (1992), that a prisoner's rights are violated if the actions of the jailers or administrators were not related to security and discipline. If there is discretion in policy, not only is the inmate likely to exploit the gaps, but plaintiff's counsel will also likely attempt to exploit those same gaps and others to establish that the exercise of discretion was in bad faith and unrelated to permissible penological goals.

Security is often a balancing act for jail or prison administrators. *Richardson v. District of Columbia*, 322 F. Supp. 3d 175 (D.D.C. 2018). But the balancing must arguably relate to an actual or perceived security or safety related to the facility. In *Tates v. Blanas*, 2003 WL 23864868 (E.D. Cal. 2003), the jail treated transgender inmates in a manner ordinarily reserved for the most dangerous detainees. Inmates were classified upon arrival to the jail. Some might be classified as requiring protective custody, or "T-sep" (for total separation from the rest of the population), or they might be assigned to the general population. All transgender inmates were categorized as T-sep regardless of their risk of harm, their danger to other inmates or staff, or any other qualifying criteria. The District Court held that the jail's policies and procedures established that the classification process, its associated stigma, and lack of privileges, constituted conduct without a legitimate penological, security, or safety justification.

It would be nice if *Tates* and *Diamond* were isolated incidents. They are not. Whether in the literature on this subject or in the cases, jail staff and other inmates have treated transgender persons as as fakers or pretenders who need who need to be punished or beaten into submission. The results are often tragic for the individual and understandably result in litigation for jails or their employees.

B. Safety of Other Inmates/Incarcerees

Often jail supervisors or prison administrators will claim that they are protecting their female population from assault by not housing a pre-surgical transgender woman with that population. This explanation has often been proffered in defense of a claim seeking re-classification of the inmate away from others of their birth-assigned gender. But the explanation is not universally accepted. *Tay v. Dennison*, 457 F. Supp. 3d 657 (S.D. Ill. 2020) (refusal to house transgender woman unrelated to rational basis and supported only by discriminatory logic). Nonetheless, there are anecdotal reports of transgender inmates sexually assaulting female inmates while in prison. However, protection remains a viable defense, so long as it is supported with rational testimony divorced from stereotypes and "discriminatory logic."

C. Veracity of Diagnosis

Not every person who claims to be transgender suffers with Gender Dysphoria. The diagnostic criteria are quite stringent and require the practitioner to undertake a rigorous interview with the patient to determine an appropriate conclusion.

Every effort should be made to determine any bias possessed by the diagnosing practitioner. Do they specialize in transgender patients or in treating Gender Dysphoria? How many times have they interviewed a patient and NOT concluded they suffered from Gender Dysphoria? Where have they testified before? Have they ever testified against

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a finding of Gender Dysphoria? What articles have they authored or relied on in reaching any treatment opinions? There are potentially limitless grounds for attacking the credibility of the diagnosing therapist who seeks to further a cause rather than treat a person.

The same can be said of the plaintiff. Their credibility is legally suspect solely because of any prior felony conviction. Fed. R. Evid. 609. Similarly, deposing the treating physician involves whether the therapist undertook any critical analysis of the information they received from their patient. Often, a therapist may take what is said at face value without examining the consistency or authenticity of what was said. In one case, the therapist reported a litany of problems reported by the plaintiff/patient that were demonstrably different from what the patient said at deposition or how he interacted with people in his life. The therapist was committed to its diagnosis despite the obvious problems with the credibility of what it had been told. Credibility is always at issue.

D. Qualified Immunity, or What Did the Defendant Know, and When?

The subjective prong of the deliberate indifference inquiry also generally resolves the defendant's entitlement to qualified immunity. Fundamentally, a jailer, supervisor, or even an administrator will be denied qualified immunity if the court concludes there is evidence the jail official possessed actual knowledge of a risk of harm or of a serious medical need and either ignored that knowledge or refused to take action in the face of such knowledge. The facts recounted in *Diamond* are illustrative. In that case, the Court found plaintiff had asserted a widespread pattern by Department of Corrections employees over a period of years and at multiple facilities denied her treatment solely because she was transgender. 131 F. Supp. 3d at 1382. Based on those facts, the Court had little trouble determining that the statewide medical director was not entitled to qualified immunity.

As discussed above, when it comes to claims related to medical care or the failure to protect the safety of incarcerated persons, even the Eleventh Circuit has little trouble finding qualified immunity does not protect a jailer, so long as there is evidence to support the underlying factual predicate, which obviously includes the actual subjective knowledge of the jail supervisor or official of the need for different action.

E. Entity Liability

Entity liability is established in these cases like any other claim under *Monell*. If there is a pattern, practice, policy, or procedure of the entity itself that is a moving force in the harm suffered by the plaintiff, liability will attach. *Monell v. Dept of Social Services*, 436 U.S. 658 (1978). Additionally, the plaintiff must show that the government's action or inaction was the "moving force" behind the injury alleged. *Bryan County v. Brown*, 520 U.S. 397 (1997). That remains a very high bar to overcome.

Similarly, failure to train claims are established by ignoring a known risk. *City of Canton v. Harris*, 489 U.S. 378 (1989); *see also Diamond*, 131 F. Supp. 3d at 1383. Given the state of the data and information ostensibly available to administrators, the risk of sexual assault on transgender persons is increasingly going to be a known risk. The failure to address that risk may similarly result in entity and supervisory liability becoming more common on these claims.

V. Conclusion

Litigating a case involving an incarcerated transgender person presents a number of risks and pitfalls for the defendant and its counsel. As defense counsel the case comes pre-packaged: policies are already in place, the conduct has occurred, the training record is established, and the response has been made. If there is an opportunity on the front side (in the risk management role or during policy formulation), during policy formulation, then these issues may be positively influenced before an event occurs that raises the specter of a lawsuit and adverse publicity.

The Supreme Court has settled, for now, the rights of people to live, love, and exist as they deem appropriate for themselves. That journey began with the school cases in the 1920s (*Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1924)), traveled through *Loving v. Virginia*, 388 U.S. 1 (1967), and currently ends with *United States v. Windsor*, 570 U.S. 744 (2013) and *Obergefell v. Hodges*, 576 U.S. 644 (2015). Those choices are not abrogated when one is incarcerated, absent some overriding security purpose or the ability to describe the change based on a penological basis or some other arbitrary and capricious or malicious and sadistic purpose. *Hudson v. McMillian*, 503 U.S. 1 (1992) (Eighth Amendment is violated if there is no good faith effort to restore or maintain discipline and security.)

One issue which bears highlighting admits of no answer at present: what will be the long-term effect of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held that an employer who fires an individual merely for being gay or transgender violates Title VII? Justice Gorsuch asserted the Court's ruling was intended to be quite narrow. 140 S. Ct. at 1753. Justice Kavanaugh worried that "the implications of this Court's usurpation of the legislative process will likely reverberate in unpredictable ways for years to come. *Id.* at 1836-37 (Kavanaugh, J., dissenting). But Justice Thomas lamented that the Court's qualified immunity jurisprudence had "been turned on its head" in his dissent to *Hope v. Pelzer*, 536 U.S. 730, 748 (2002) (Thomas, J., dissenting), and that has not come to pass.

As a June 1, 2021, article in *USA Today* stated, lower federal courts are reading *Bostock* quite broadly. In just over a year, the case had been cited 282 times. In August of last year, the Fourth Circuit cited *Bostock* in a case overturning the ban on transgender children using the bathroom of their expressed sexuality versus their assigned gender. *Grimm*

v. Gloucester County School Board, 972 F.3d 586, 616 (4th Cir. 2020). In December, the North Carolina Court of Appeals relied, in part, upon Justice Gorsuch's majority opinion in holding that the North Carolina statute that barred same-sex couples from obtaining domestic violence protection orders was unconstitutional under the Fourteenth Amendment *M.E. v. T.J.*, 854 S.E.2d 74, 91 (N.C. App. 2020). How and whether *Bostock* will influence decisions for pretrial detainees, whose rights while incarcerated flow from that same Fourteenth Amendment remains to be seen.

Additionally, science seems to have settled the question whether Gender Dysphoria is a serious medical need. As discussed above, the open question is what treatment is reasonably necessary for the patient—the answer to which cannot be determined without a fact-intensive inquiry. Where a policy is made that does not account for that factual resolution, the policy is often found to be unlawful. Where there is only disagreement over treatment options as applied to the particular inmate, no constitutional tort exists. *Snell v. Neville*, 2021 WL 2102927 *15 (1st Cir. 2021); *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998); *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004); *Russell v. Sheffer*, 528 F.2d 318, 318-19 (4th Cir. 1975); *Austin v. Kroger Tex., LP*, 864 F.3d 326, 328 (5th Cir. 2017); *Street v. Corrections Corp. of America*, 102 F.3d 810, 816 n.13 (6th Cir. 1996); *Thomas v. Martija*, 991 F.3d 763 (7th Cir. 2021); *Smith v. Marcantonio*, 910 F.2d 500, 502 (8th Cir. 1990); *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004); *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803, 811 (10th Cir. 1999); *Hoffer v. Florida Dept. of Corrections*, 973 F.3d 1263, 1273 (*citing Harris v. Thigpen*, 941 F.2d 1495, 1504 (11th Cir. 1991).

Finally, the damages landscape has changed substantially in the last 18 months. Minneapolis has settled the George Floyd case for $27 million. That number is out there for every potential juror to know. Whether it will have any impact on the perceived value of cases, whether by plaintiffs and their counsel or by jurors, remains to be seen. It may continue to be true that jurors oftentimes devalue persons who are incarcerated. *Chao II*, 806 F. Supp. 2d 358 (D. Mass. 2011) (damages awarded for hundreds of sexual encounters by a prison guard over a five-year period of $97,000 and $6,200 in punitive damages).

These cases will continue to challenge jail and prison administrators and their lawyers for many years. They are not easy, nor should they be. But preparation, diligence, and a solid foundation in the law and the science should help the practitioner where a meritorious defense exists. ML

Notes

1. https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/
2. Am. Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders* 452 (5th ed. 2013).
3. *DSM-V* at 453, 458.
4. *See* Jae Sevelius & Valerie Jenness, Challenges and Opportunities for Gender-Affirming Healthcare for Transgender Women in Prison, 13 Int'l J. Prisoner Health 32, 36 (2017)).
5. WPATH's publication is available as a free download at https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?_t=1613669341.
6. Bureau of Justice Statistics, United States Department of Justice, National Inmate Study, https://bjs.ojp.gov/taxonomy/term/19721.
7. Allen J. Beck, *et al.*, "Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12", Bureau of Justice Statistics, 2013.
8. Diana Shaw, "Transgender" Inmates are Raping Female Prisoners at a Shocking Rate, Ministry of Justice Reveals (May 18, 2020), https://www.womenarehuman.com/transgender-inmates-are-raping-female-prisons-at-a-shocking-rate-ministry-of-justice-reveals/ (last accessed June 8, 2021).



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Inside Canada *cont'd from page 27*

preted to include protection against citizens' physical harm, which does not encompass the protection of tenants. Justice Hinkson disagreed and held the following (at paras. 58 and 59):

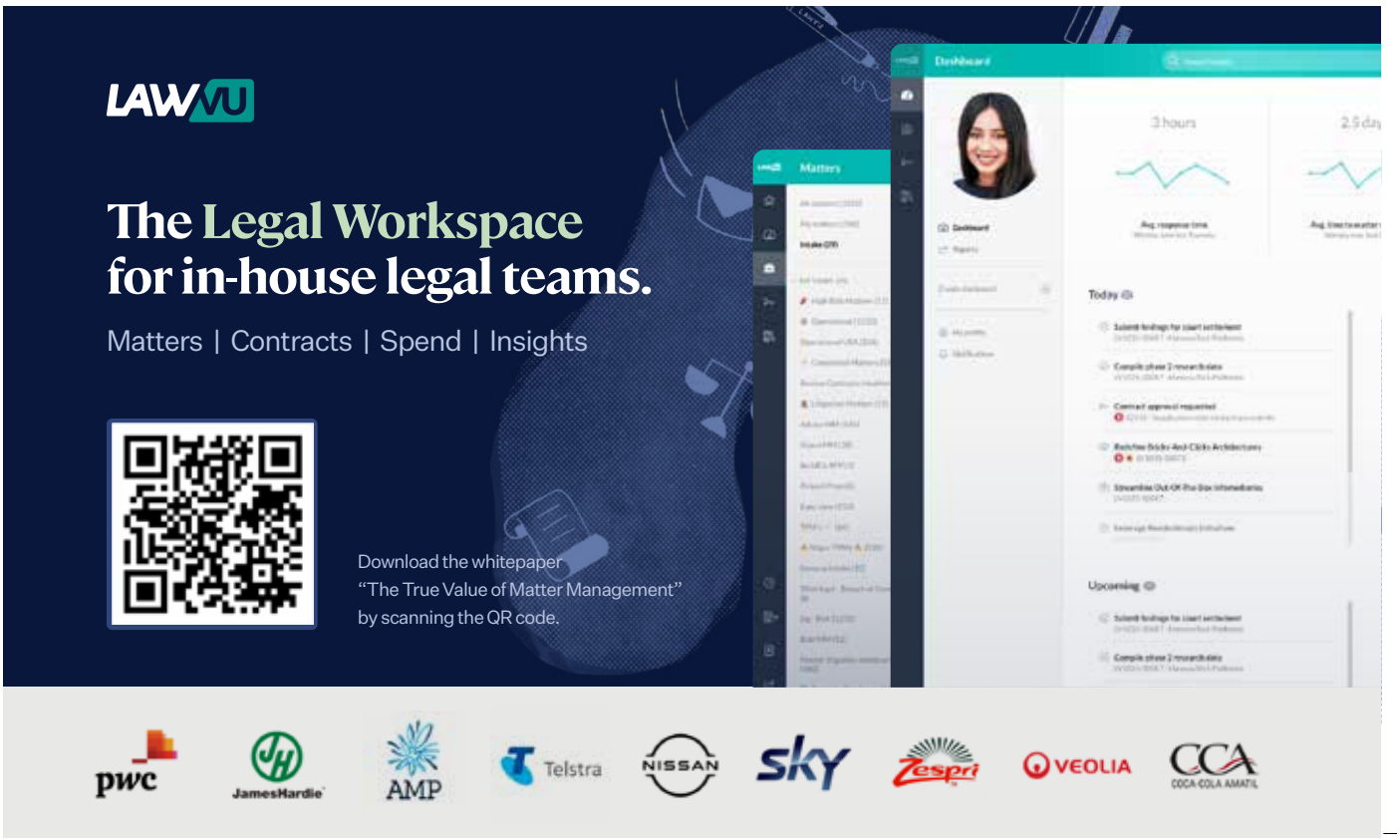
> There is no express limitation in s. 8(3)(g) as to the permissible object of a bylaw aimed at the "protection" of tenants of rental units. I agree with the City that the word "protection" cannot have been included in this section to give authority to deal only with physical harm. I find that there is no reason to conclude that the tenant protection aims of the City are insufficient to bring the Impugned Bylaw within the scope of the authority in s. 8(3)(g). This interpretation of s. 8(3)(g) is consistent with the purpose of the *Community Charter* as described in s. 3(c), which gives a municipality the flexibility to respond to the needs of a particular element of the community; in this case, renters.

Justice Hinkson concluded that the bylaw was *intra vires*, and dismissed the petition.

The landlord appealed, and the issue on appeal was whether the *Community Charter* authorizes municipalities to enact bylaws that protect tenants from renovictions.[14] On the reasonableness standard of review mandated by the *Vavilov* decision, Honourable Madam Justice Dickson, writing for a unanimous Court of Appeal, held that the City's decision to enact the Bylaw was grounded in a reasonable interpretation of its statutory authority. The reasoning of the trial judge in relation to section 10 of the *Community Charter* was also upheld, as the bylaw did not require landlords to contravene the *RTA*. Additionally, the Court noted that the City's interpretation was consistent with the principles of subsidiarity, wherein the local government responded to its community's local needs by introducing complementary legislation within an area of jurisdictional overlap.[15]

The Court of Appeal upheld the decision of the trial judge and dismissed the appeal. This decision provides insight into the authority of municipalities to enact bylaws that respond to community exigencies, so long as they are consistent with provincial legislation.

On March 1st, 2021, in the aftermath of these decisions, the B.C. Legislative Assembly introduced Bill 7: *Tenancy Statutes Amendment Act, 2021* to improve security for renters throughout the province. The legislative provisions relating to the *RTA* came into force on July 1, 2021 and included amendments to the "eviction for renovations" provisions, as well as implementing a freeze



on rent increases for the remainder of the year. Of most significance, s. 49(6)(b) of the *RTA* was repealed; instead, the *RTA* now requires landlords to obtain approval from the provincial government's Residential Tenancy Branch prior to ending a tenancy for the purpose of substantial renovations or repairs. To do so, the landlord must apply to the Branch with evidence that ending the tenancy is the only way the renovations can be done. For clarity, the Branch has published a policy guideline indicating what kinds of renovations should and should not require an eviction. This new application process aims to prevent tenancies from ending unnecessarily, while also allowing landlords to make needed renovations.

Concluding observations.
The bylaws discussed in this article represent novel approaches of local governments to the seemingly never-ending series of business strategies that frustrate the maintenance of a supply of affordable housing on Canada's west coast. As long as the vast majority of housing is provided as a market commodity, provincial and local governments will have to continue to monitor market trends and respond with appropriate legislation to protect the interests of households of modest means. In this regard, both the Province of B.C. and the City of New Westminster have, over the past couple of years, been up to the task. ML

Notes

1. R.S.B.C. 2015, c. 1, amended by *Local Government Statutes (Residential Rental Tenure Zoning) Amendment Act*, 2018, S.B.C. 2018, c. 26.
2. S.B.C. 1998, c. 43.
3. 2021 BCSC 573.
4. In B.C., strata lot owners are allowed to evict their tenants in order to occupy the unit themselves.
5. 2021 BCSC 573, at para 13.
6. Standard of review of is determined pursuant to the Supreme Court of Canada's 2019 decision, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*").
7. RSBC 1996, c. 250.
8. 2021 BCSC 573, at para 72.
9. former 49(6)(b) of the *Residential Tenancy Act*, SBC 2002, c. 78 [the "RTA"]. The Act set out no criteria for when vacancy was required.
10. Business Regulations and Licensing (Rental Units) Bylaw, s. 47.
11. 2020 BCSC 163.
12. See note 5.
13. SBC 2003, c. 26.
14. *1193652 B.C. Ltd. v. New Westminster (City)*, 2021 BCCA 176.
15. The subsidiarity principle, articulated by the Supreme Court of Canada in its 2001 decision in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, holds that regulation is best accomplished by the level of government that is closest to those citizens being regulated.



AFFIRMATIVE LITIGATION

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Video Services Taxation: Cutting the Cord Hits Municipalities

In 2019, America's cable television and pay TV providers reaped more than $90 billion in revenues, reflecting an increase of 80 percent during the prior decade.[1] Because those businesses deliver programming via the public right of way (PROW), the Cable Communications Policy Act of 1984 (CCA) allows municipalities to charge franchise taxes of up to five percent of cable company gross revenues. States and localities have enacted measures to codify this taxing authority, generating billions. These funds have been deployed in a variety of ways including the provision of public access television, enabling millions to be more engaged in civic activities.

After reaching its zenith around 2015,[2] the cable business has come under increasing threat as consumers began to cut the cord in favor of on-demand streaming services like Netflix and Hulu. Covid's stay-at-home lifestyles accelerated the trend, reversing cable's once-meteoric growth: the top seven providers lost 1.5 million consumers in 2019 and nearly 2.0 million more in 2020.[3] By 2024, streaming service users are projected to surpass cable subscribers.[4]

The new streaming businesses have resisted paying franchise taxes, despite using the PROW to provide internet-delivered programming. As their tax base dwindles, municipalities are increasingly bringing suit under provisions analogous to the cable taxation statutory framework.

Remand, but no Decision: The earliest such litigant was Creve Coeur, Missouri. In 2018, it brought a class action on behalf of 40 Missouri localities against Netflix and Hulu in St. Louis County Circuit Court, citing violations of local code provisions and Missouri's Video Services Providers Act (VSPA).[5] Defendants removed the case to federal court and moved for dismissal. In an early procedural win for the municipalities, the Eastern District of Missouri remanded, finding that the Tax Injunction Act[6] and principles of comity favored state court resolution of the case.[7] Left unanswered was the question of whether the streaming services' activities fell within the VSPA or an exception to its definition of "video service."

Similar cases were rapidly filed by municipalities in a dozen states, all seeking to recover franchise taxes from streaming services.[8] Some, including Gwinett County, Georgia's action against Netflix[9] and the case brought by Fishers, Indiana against Direct TV,[10] succeeded in obtaining remand to state court. And several federal courts have declined to rule on municipal actions, seeking state supreme court guidance on the terminology involved; this would include the action by Maple Heights, Ohio, where the court has certified two familiar questions: "(1) Whether Netflix and Hulu are video service providers under Ohio law;" and "(2) whether Maple Heights can sue Netflix and Hulu to enforce Ohio's video service provider provisions."[11] But no locality has so far won a judgment forcing the streaming companies to remit five percent of their gross revenues. To the contrary, several early dispositions have reached the opposite conclusion, dismissing cases against the video services.

Reno, Nevada: Paralleling the statutory regime in many states, Nevada's video service law requires video service providers to obtain certificates of authority from the Nevada Secretary of State. In return, Nevada's local governments may impose franchise fees on video service providers that use the public rights-of-way to deliver their services "based on the gross revenue that the provider receives from its subscriber within the jurisdiction of the local government."[12]

Excepted from the definition of taxable video services is "[a]ny video content provided solely as part of, and through, a service which enables users to access content information, electronic mail or other services that are offered via the public Internet."[13]

Reno brought a class action against Netflix and others in 2020 for bypassing the certificate of authority and failing to pay taxes. It argued that the streaming companies would have received a certificate of authority had they paid taxes, and the failure to obtain the certificate did not absolve them of the tax obligation:

> The Nevada Secretary of State would have authorized video service providers such as Defendants to use public rights-of-way, as long as said video service provider makes a franchise fee payment to each local government in whose jurisdiction it provides video service. . . . Defendants' failure to receive a certificate of authority, however, did not relieve Defendants of the obligation to pay a franchise fee of up to 5% of their gross revenues derived from providing such video service in those cities and counties.[14]

The streaming companies moved for dismissal on various grounds. One was that they are not "video services," based on the exception cited above. The city argued otherwise:

> First, Defendants do not provide video content 'as ***part of*** . . . a service.' Providing video content is the ***entirety*** of the services offered by Defendants. Second, Defendants' services are ***not*** 'offered via the ***public Internet***.' Defendants' services are only offered to paying subscribers who need login credentials to access content from Defendants' private servers (emphasis in original).[15]

The court rejected Reno's parsing of the provision:

> The individual films and individual television programs Defendants provide are each a piece of their video content library and thus a "part of" a service, and not the "entire" service. . . . Plaintiff's argument suggests that the Court read "any" as "all" video content, but . . . the Court declines to read it as so."[16]

Also unavailing was Reno's argument that Netflix was not utilizing the "public internet" because users paid for access to the streaming content. The court cited *Webster's Dictionary* for the proposition that "public" means "for the use and benefit of all" and nothing in that definition suggested that, merely because subscribers paid a fee, the "internet" used by Netflix to deliver its offerings was not "public."

Netflix advanced an alternate basis for dismissal, based on the VSL requirement that "[a]ny action to recover a disputed underpayment of a franchise fee . . . must be commenced and prosecuted by the Attorney General on behalf of the affected local governments." The court agreed, finding that nonpayment was tantamount to "underpayment" for purposes of the law, and only the Nevada Attorney General could bring the action. Reno's case was dismissed on September 3, 2021; on September 22, 2021, the city appealed to the Ninth Circuit.

Ashdown, Arkansas: On September 30, 2021, the class action brought by Ashdown, Arkansas against Netflix and Hulu met a similar fate. There, construing statutory language mirroring the Nevada law, the Western District of Arkansas came to the same conclusions as the Nevada federal court in *City of Reno* —the streaming companies fell within the statutory exception for "video services" delivered over the "public internet:"

> A plain and sensible reading of the statute reveals that the exclusion applies to any video programming provided as part of a service. Video programming is a part of a service that both Defendants provide, regardless of whether Defendants provide multiple services or just one service. . . .
>
> Plaintiff argues that Defendants' services are not offered over the public internet because the services are only offered to paying subscribers who need login credentials to access content from Defendants' private servers. Defendants counter that the question is not whether their video services are public but whether they are provided over the public internet. The Court finds the analogy offered by Hulu on point: whether a driver locks the car doors while driving does not affect whether the road taken is a public road.[17]

New Boston, Texas: Dismissal of a Texas case followed a different path. The City of New Boston brought a class action on behalf of all Texas municipalities where Netflix and/or Hulu operated, citing the Texas Video Services Providers Act (VSPA).[18] Enacted in 2005, the VSPA sets up a regime for issuing state-sanctioned franchises to cable or video service providers, through the state's Public Utility Commission (PUC).[19] The franchise authorizes the construction and operation of a cable or video services network in the PROW; in exchange, cable or video providers are to pay each Texas municipality where they operate a franchise fee of five percent of the provider's gross revenue.[20]

Netflix and Hulu moved for dismissal, relying on the fact that they had not been granted franchises by the PUC. Parsing the language of the VSPA, the court agreed, finding that the absence of a franchise prevented operation of the other elements of the taxing statute:

> (a) The holder of a **state-issued certificate of franchise authority** shall pay each municipality in which it provides cable service or video service a franchise fee of five percent **based upon the definition of gross revenue**s as set forth in this chapter . . . .
> (6)(A) "Gross revenues" means all consideration of any kind or nature including without limitation cash, credits, property, and in-kind contributions (services or goods) **derived by the holder of a state-issued certificate of franchise authority** from the operation of the cable service provider's or the video service provider's network to provide cable service or video service within the municipality. . . . (emphasis in original).[21]

Given that, in order to be taxable, "gross revenues" must be derived by the holder of a state-issued certificate, the failure of Netflix and Hulu to have obtained such a certificate effectively immunized them from municipal franchise tax liability. As the court delineated, this procedural hurdle, controlled by the state, eliminates local authority to create the condition precedent to VSPA taxation: the law "reserves the question of who must obtain a state-issued certificate of franchise authority to the PUC while limiting judicial recourse by a municipality to disputes over the amount of compensation against providers who have already obtained a state-issued certificate

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AMICUS

By AMANDA KARRAS,
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Flagpoles as Government Speech

The First Amendment does not apply in cases of government speech because the Free Speech Clause only applies to the regulation of private speech.[1] The government speech doctrine allows governments to choose what messages they wish to convey (or not convey) without fear of running afoul of the First Amendment and thus protects not only local government autonomy but also reduces liability for local governments. The doctrine allows local governments to promote programs important to their citizenry, express policies, and take positions on issues. That has the potential to change because last month, the Supreme Court granted certiorari in *Shurtleff v. Boston*, an important government speech case.

The seminal case in this area is *Pleasant Grove City v. Summum*, in which the Supreme Court held that although a public park is a traditional public forum, a local government was not required to accept a permanent monument for placement in that public park.[2] Instead, the decision to place monuments in public parks rests squarely with the government as a result of the government speech doctrine; such a decision is therefore not subject to scrutiny under the Free Speech Clause of the First Amendment.[3] Additionally, the Court held that the government does not lose the protection of the government speech doctrine simply because it chooses to "receive assistance from private sources for the purpose of delivering a government-controlled message."[4] In other words, the mere fact that the monuments were donated by third-parties did not change the government speech analysis.

The next major government speech case the Supreme Court decided was *Walker v. Texas Div., Sons of Confederate Veterans*, which involved the question of whether specialty license plates constituted government speech such that the State could reject a proposal from the Sons of Confederate Veterans to offer a specialty license plate design featuring the confederate flag.[5] The Court concluded the specialty license plates were government speech and therefore not subject to First Amendment restrictions.[6] The Court reasoned the "freedom" behind the government speech doctrine "in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech."[7]

In explaining the importance of the doctrine, the Court noted in *Walker* that if the Free Speech Clause were interpreted to reach government speech, "government would not work."[8] The Court provides the rather prescient example in *Walker* of a government seeking to "develop programs designed to encourage and provide vaccinations" and the Court questioned how the government could do so "if officials also had to voice the perspective of those who oppose this type of immunization?"[9] If such a contrary view had to be provided every time the government wished to speak, the Court notes "[i]t is not easy to imagine how government could function if it lacked th[e] freedom" to select the messages it wishes to convey."[10]

Shurtleff v. City of Boston

That brings us to the Supreme Court's new government speech case, which centers on the City of Boston and its three flagpoles in front of City Hall. Boston flies the United States and the POW/MIA flag on one flagpole, the Commonwealth of Massachusetts flag on the second flagpole, and its own flag on the third flagpole. Boston sometimes allows third parties to fly their flag instead of the City's flag in connection with an event taking place near the flagpoles. Broadly speaking, the third-party flags that the City approved to fly on its flagpole have been for "the flags of other countries, civic organizations, or secular causes."

Enter Camp Constitution, a group that seeks "to enhance understanding of the country's Judeo-Christian moral heritage." It asked the City twice to fly its Christian flag, which has a picture of a cross on it, while it held an event near the flagpoles. The City refused, explaining that "the City's policy was to refrain respectfully from flying non-secular third-party flags in accordance with the First Amendment's

prohibition of government establishment of religion."

Over a 12-year period, the City approved 284 flag-raising events, and until the Camp Constitution request, never rejected one. However, the Camp Constitution request was the first onet made by a religious organization to fly a flag at City Hall. Shortly after litigation commenced, Boston memorialized its policy to comport with its past practices of only flying "the flags of other countries, civic organizations, or secular causes."

Camp Constitution sued Boston for violations of the First and Fourteenth Amendments. The First Circuit held that the City is engaging in government speech when it flies third-party flags in front of City Hall and it therefore did not violate the First Amendment.[11] In coming to its conclusion, the First Circuit relied on *Summum* and *Walker,* which set forth a three-part test for determining when speech is government speech. Under those decisions, courts look at the history of governmental use, whether the message conveyed would be ascribed to the government, and whether the government "effectively controlled" the messages because it exercised "final approval authority over their selection."[12]

As to the history of governments using flags, the parties did not dispute that "governments have used flags throughout history to communicate messages and ideas."[13] In terms of whether the message would be ascribed to Boston, the First Circuit concluded that an observer would likely attribute the message of a third-party flag on the City's third flagpole to the City, particularly given the location of the flags, their prominence, and the overall context.[14] On this point, the court explained:

> … an observer would arrive in front of City Hall, "the entrance to Boston's seat of government." She would then see a city employee replace the city flag with a third-party flag and turn the crank until the third-party flag joins the United States flag and the Massachusetts flag, both "powerful governmental symbols," in the sky (eighty-three feet above the ground). A faraway observer (one without a view of the Plaza) would see those three flags waiving in unison, side-by-side, from matching flagpoles.
>
> That the third-party flag is part of a broader display cannot be understated. … The sky-high City Hall display of three flags flying in close proximity communicates the symbolic unity of the three flags.[15]

Finally, the First Circuit also concluded that city controlled the flags based on its practice of reviewing requests and approving or rejecting them. The court rejected Camp Constitution's argument that because Boston had approved 284 requests and rejected only theirs, the City was not meaningfully exercising control over the approval process, "because the exercise of authority to reject is necessarily case-specific and limited by the kinds of requests the City receives."

The First Circuit also rejected Camp Constitution's argument that the City created a public forum for flying third-party flags, reasoning the government creates a public forum "only by intentionally opening a nontraditional forum for public discourse." In coming to this conclusion, the court relied on the City's final approval authority and the fact that the City had criteria that limited approval only to flags of other countries, civic organizations, or secular causes.

Camp Constitution also argued that the third-party flags should not be considered government speech under *Summum* because of the short duration that the flags are flown. The First Circuit concluded, however, there is no permanence requirement for government speech.

After losing at the First Circuit, Camp Constitution petitioned for Supreme Court certiorari, and the issues can generally be summarized as follows:

1) Whether Boston created a public forum based on both its policy and the fact that it approved hundreds of third-party flags on a city flagpole outside of city hall and did not reject any requests except this one;
2) Whether the First Circuit properly classified a brief display of a private religious organization's flag on a city flagpole as government speech; and
3) Whether Boston discriminated based on viewpoint or content in violation of the First Amendment in denying the religious organization's permit to briefly display its flag on the city flagpole.

In its petition for certiorari, Camp Constitution argues that Boston had a policy expressly creating a public forum on its flagpoles. The petition points to the application to use Boston's public fora, which includes "Guidelines for any Person or Group Requesting the Use of Faneuil Hall, Sam Adams Park, City Hall Plaza, City Hall Lobby, North Stage or the City Hall Flag Poles," stating that the "application applies to any public event proposed to take place at [inter alia] the City Hall Flag Poles." In *Summum,* the Court acknowledged that "[t]here may be situations in which it is difficult to tell whether a governmental entity is speaking on its own behalf or is providing a forum for private speech," but noted the case did not "present such a situation." In this case, if the Court accepts the argument that Boston created a public forum on its flagpoles, the City will almost certainly lose, given the First Amendment prohibition against viewpoint discrimination. While that result would be

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Amicus *cont'd from page 37*

unfortunate for Boston, it would be fact-specific and would hopefully not have far-reaching impacts on local governments around the country.

That said, even if Boston unintentionally created a public forum, that would seem to be the type of fact-specific case the Supreme Court is generally not interested in. And given that the First Circuit's analysis tracks the Supreme Court's existing government speech cases, it begs the question as to why the Court took this case. The answer may be that the current Supreme Court has a keen interest in cases that involve what it perceives as religious discrimination. And in this case, the fact that Boston approved 284 flag-raising requests from third parties and the only request it rejected was from a religious group, perhaps drew the Court's attention. That is not to say Boston discriminated against Camp Constitution; to the contrary, there is no evidence to suggest any viewpoint or religious discrimination was afoot. Instead, Boston's expressed concerns were based solely on the Establishment Clause.

If the Court is seeking to limit or redefine the government speech doctrine to say that governments cannot reject the message of a religious group when the government speaks, the case could have dramaticconsequences.. If the government must accept religious messages as its own, where would a court draw the line? Would a government be required to adopt all religious messages? Only pro-religious messages? Would the government need to delve into whether the religious group seeking to have its message adopted by the government was an established religion? These questions, and more, highlight the uncertainty and mischief such a ruling would cause.

Or might the Court be interested in distinguishing this case from *Summum* and *Walker* due to the temporary duration of the speech involved in raising the flags? If so, that would also pose problems, as a durational limitation on what constitutes government speech would be challenging to implement and would also likely shut down expressive forums.

IMLA plans to file an amicus brief in this case to highlight the far-reaching implications of the case and underscore the importance of the government speech doctrine to local governments.[16] While Boston's practice of flying third-party flags may be uncommon, local governments adopt third party-messages as government speech in many other ways, and the implications of the decision in this case could be significant. *Shurtleff* has not yet been set for oral argument, but we can expect an opinion before the end of June 2022. Hopefully that decision will not undermine the government speech doctrine. ML

Notes

1. Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009).
2. *Id.* at 464.
3. *Id.*
4. *Id.* at 468.
5. Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 203-04 (2015).
6. *Id.* at 208-09.
7. *Id.* at 207.
8. *Id.*
9. *Id.* at 207–08.
10. It is not just vaccine programs that would be at risk if the Court undermines the government speech doctrine. Everything from recycling programs and climate policy to campaigns to reduce speeding or getting homeless animals adopted would be implicated. As the Court in *Walker* noted: "How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary?" *Id.*
11. Shurtleff & Camp Constitution v. City of Boston, 986 F.3d 78, 94 (1st Cir. 2021).
12. *Id.* at 87.
13. *Id.* at 88.
14. *Id.*
15. *Id.*
16. *Id.* at 91.
17. *Id.* at 92.
18. *Id.* at 93.
19. *Id.* at 93-94.
20. *Id.* at 90; *see also* Shurtleff v. City of Boston, 928 F.3d 166, 175 (1st Cir. 2019).
21. Shurtleff v. City of Boston Petition for Writ of Supreme Court Certiorari, p. 7.
22. *Summum*, 555 U.S. 460, 469 (2009) (explaining "any restriction based on the content of the speech must satisfy strict scrutiny" when the government regulates private speech in public fora).
23. *See e.g.*, Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1723–24 (2018) (concluding "[t]he Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach.")
24. In supporting the government speech doctrine in *Summum*, IMLA crafted a survey that was sent to its members to provide examples of local governments accepting privately donated monuments on public land and to explain the acceptance and editorial process that local governments exercise over such monuments. IMLA's amicus brief in the *Summum* case was cited several times by the Supreme Court. Pleasant Grove City v. Summum, 555 U.S. 460, 471-76 (2009).

Affirmative Litigation *cont'd from page 35*

of franchise authority."

On September 30, 2021, the Eastern District of Texas dismissed New Boston's complaint, without prejudice, "subject to refiling should the Defendants become holders of state-issued certificates of franchise authority." [22]

Conclusion

The decline in cable-related municipal tax revenue seems inevitable as consumer preferences change. It appears obvious that multibillion-dollar entities like Netflix and Hulu should compensate municipalities for the use of their PROW facilities. But the cases to date suggest a formidable fight ahead. Statutes preempting local authorities from instituting action, and definitional hurdles excluding the streaming companies' services from taxable activity, will pose significant challenges.

Notes

1. Revenue of U.S. cable and pay TV providers 2005-2019 | Statista.com
2. The Rise And Fall Of Cable Television (forbes.com).
3. Major Pay-TV Providers Lost About 5,120,000 Subscribers in 2020 | Leichtmanresearch.com.
4. Here's when non-pay-TV households are expected to surpass pay TV households - Insider Intelligence Trends, Forecasts & Statistics (emarketer.com).
5. Mo. Rev. Stat. § 67.2675, *et seq.*; Creve Coeur Municipal Code, Ch. 635, Art. VI, Sec. 635.330(C)(1).
6. 28 U.S.C. § 1341: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."
7. City of Creve Coeur v. Netflix, No. 4:18 cv 1495, (E.D. Mo. Aug. 6, 2019).
8. These include Arkansas, California, Georgia, Illinois, Indiana, Kansas, Louisiana, Nevada, New Jersey, Ohio, Tennessee, and Texas.
9. Gwinnett County v. Netflix, no. 21 cv 0021 (N.D. Ga. Aug. 5, 2021).
10. City of Fishers v. DirecTV, no. 20-3478 (7th Cir. July 21, 2021).
11. City of Maple Heights v. Netflix, no. 20 cv 1872 (N.D. Ohio July 1, 2021).
12. Nev. Rev. Stat. § 670.1.
13. Nev. Rev. Stat. § 711.141(3)(a).
14. Complaint, City of Reno v. Netflix, no. 20 cv 4099 (D. Nev. Sept.2, 2020), at p. 5.
15. Opposition to Motion to Dismiss, City of Reno v. Netflix, no. 20 cv 4099 (D. Nev. Dec. 11, 2020), at p. 14.
16. City of Reno v. Netflix, no. 20 cv 4099 (D. Nev. Sept.3, 2021).
17. City of Ashdown v. Netflix, no. 20 cv 4113 (W.D. Ark. Sept. 30, 2021).
18. Tex. Util. Code Ann. § 66.001.
19. *Id.*
20. *d.* § 66.002(5); § 66.005.
21. *Id.* § 66.005(a); § 66.002.
22. City of New Boston v. Netflix, no. 20 cv 00135 (E.D. Tex. Sept. 30, 2021). ML

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