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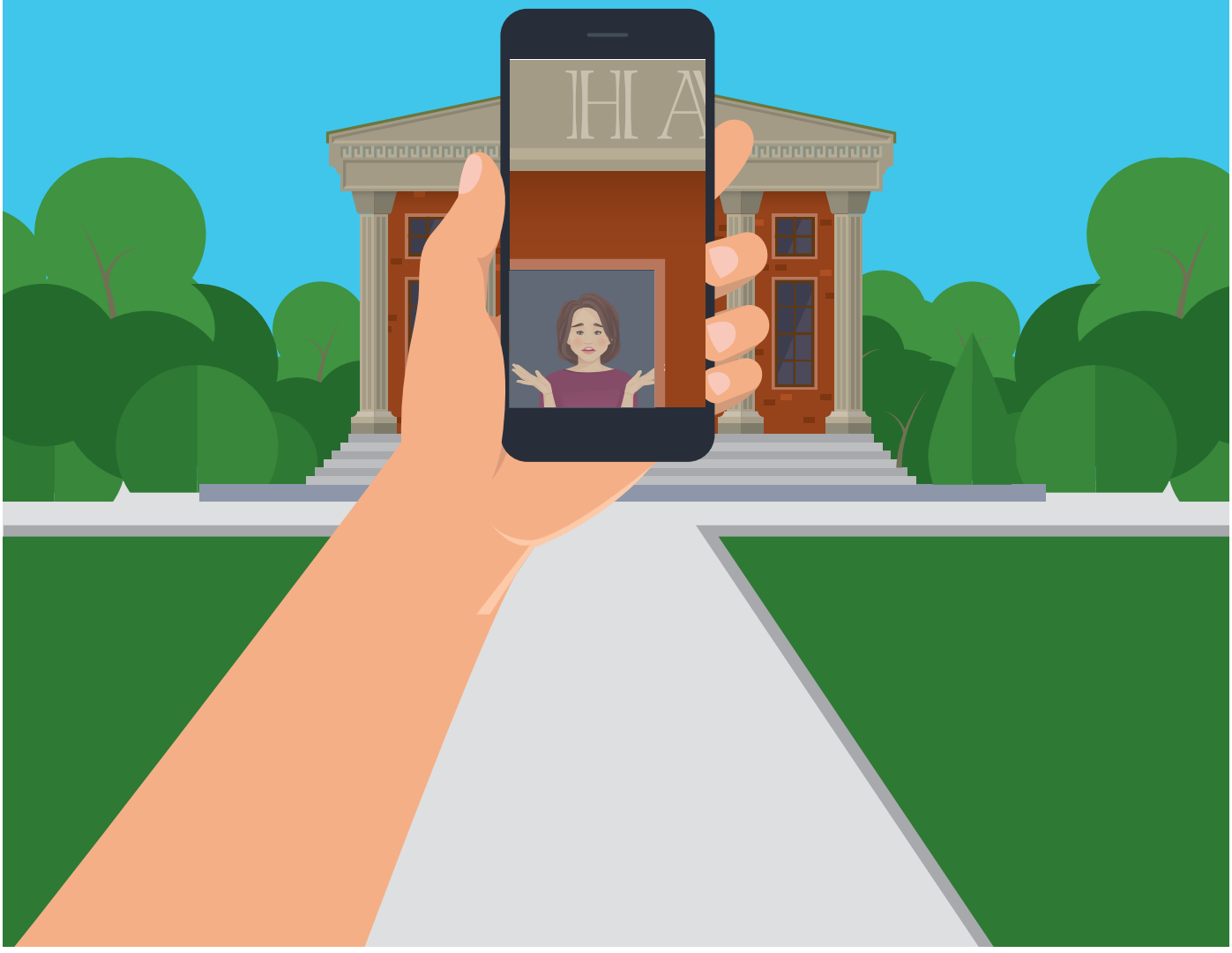
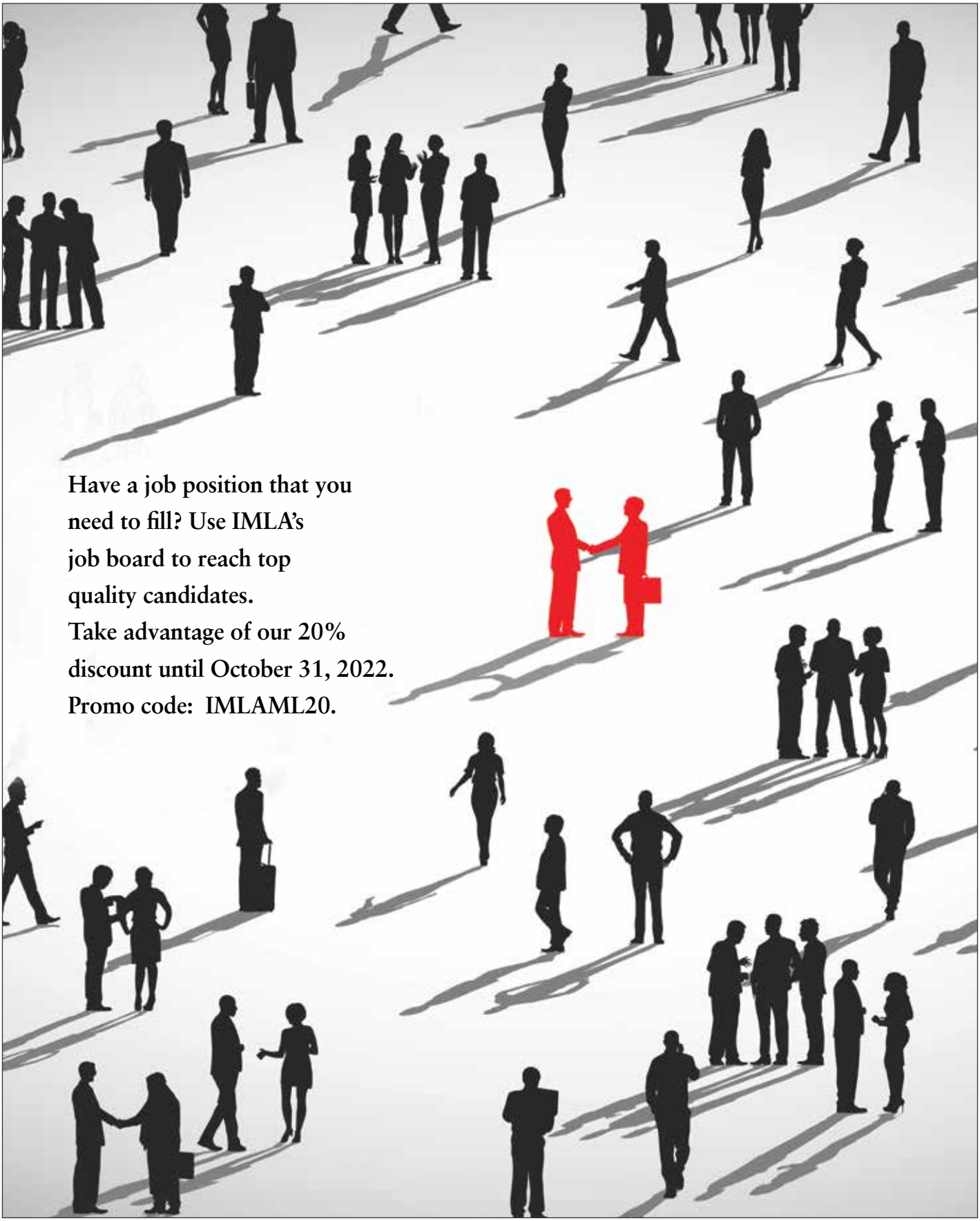
Municipalities And The First Amendment: Free Speech, Religion, And Citizen Audits

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Citizens continue to assert First Amendment rights across the municipal landscape, generating controversy and headline-grabbing Supreme Court decisions. Local government lawyers need to know the fine line between Free Exercise and Establishment, public and nonpublic forums, the nuances of content neutrality, and the practicalities in dealing with citizen audits. A brief primer is offered.

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NAVIGATING THE LEGAL LANDSCAPE OF POLICE PURSUITS

By: Robert W. Higgason, Senior Assistant City Attorney, City of Houston, Texas

When a suspect flees a crime, police may be duty-bound to pursue. High-speed vehicular chases present particular dangers--to the public, to the police, and to the suspect. Law enforcement must make split-second decisions about whether and how to pursue, and when to end the pursuit. The author analyzes major Fourth Amendment caselaw.

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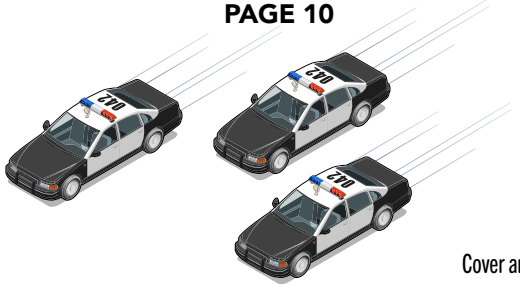

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EDITOR
Erich R. Eiselt

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Trujillo Design

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EDITOR'S NOTE



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

Main Street and the Equinox

With Labor Day just past, summer 2022 comes to a close, at least for academia and the working world. We buckle down, meeting the days with a renewed sense of responsibility: as F. Scott Fitzgerald expresses it through a character in *The Great Gatsby*, "Life starts all over again when it gets crisp in the fall."

In two weeks' time, meteorological autumn will arrive. For most of us, "crisp" will arrive much later, and for an increasing number, not at all. This summer's climate-related havoc, whether from extraordinary heat, wildfire, draught, or flooding, seems destined to continue regardless of the season. At the risk of being overly cautionary, it is useful to at least consider one view of the future in a recent *Time* essay titled "Where we'll end up living as the planet burns." That author predicts that by the end of this century, many land areas along the coast and closer to the equator, including in the US, will see massive emigration to northern climes: "Fleeing the tropics, the coasts, and formerly arable lands, huge populations will need to seek new homes; you will be among them, or you will be receiving them." Places like Anchorage, Toronto, and Ottawa will be ever more desirable, says the article, as temperatures there rise to the always-comfortable range, optimal for farming and humanity.

As North American municipalities battle environmental mayhem, resource shortages, and population shifts, IMLA members will no doubt confront unanticipated challenges, some of which we are already discussing through our Climate Change work group. We will devote more pages to these issues in future MLs, but it seemed a worthwhile mention as fall approaches. Reverting to the mission at hand, we deliver the September-October 2022 *Municipal Lawyer*, offering a wide-ranging menu. IMLA provides two features authored by our members. Doug Hoffer (Eau Claire, Wisconsin) provides insights on emerging First Amendment issues including the Establishment / Free Exercise tension, the refusal to serve same-sex clientele as protected speech, and public audits of government activities, and Robert Higgason (Houston, Texas) analyzes the Fourth Amendment nuances of police chases. In *International*, we look towards IMLA's upcoming comparative law session in Seville, as David Warner (Upper Marlboro, Maryland) instructs on the parallels between local land use regulations in Spain and the U.S. *Young Lawyers* delivers a convincing rationale by Todd Sheeran (Bluffdale, Utah) for choosing a career in local government law. In *Amicus,* IMLA Executive Director and General Counsel Amanda Karras (Rockville, Maryland) advises that appellate practitioners should be fully versed in the relevant historical context when looking towards Supreme Court review. *Day in the Life* introduces us to Nghiem Doan (League City, Texas Law Department by way of Saigon). In *Inside Canada*, Monica Ciriello (Hamilton, Ontario) provides her typically interesting cross section of recent Canadian decisions, including two cases finding that Justices of the Peace misapplied the law. And Brad Cunningham (Lexington, South Carolina) highlights IMLA's nascent and already-promising mentoring program while remembering a fellow municipal lawyer who took the time to counsel Brad along his path.

With those offerings, we end where we began--with another literary aspiration, this time borrowed from Wallace Stegner in her Pulitzer prize masterpiece *Angle of Repose*: "Another fall, another turned page: there was something of jubilee in that annual autumnal beginning, as if last year's mistakes had been wiped clean by summer."

With a clean slate, we look toward autumn 2022. We'll see some of you in Seville, Spain very soon and a great many of you in Portland, whether virtually or in person, for our upcoming Annual Conference in October.

Best regards,

Erich Eiselt

PRESIDENT'S LETTER



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

IMLA-An Abundance of Expertise

Can you believe that summer is winding down and fall is almost upon us? For many of us, if our clients and communities ran at a bit slower pace over the summer months, the arrival of fall means that activities are increasing and projects are getting into full swing. And if even if the summer was not slower, the level of activity still seems to increase. Our "to-do" lists at work are getting longer, and we need to figure out how to tackle those items. Don't forget that IMLA is here, and provides a multitude of resources at your disposal!

Watch your in box for the periodic "Dates to Keep in Mind" emails. In a clear, calendar-style format, these provide reminders of upcoming IMLA activities, such as webinars and meetings of working groups and subject matter sections, and include reminders of coming registration deadlines for larger events like the Annual Conference, Mid-Year Seminar, Canada Day, University Cities, and others. With twelve webinars and meetings in September alone, you may find an event that can provides you with important insights on that question or problem that just landed on your desk.

If the current month's calendar doesn't address that "hot topic" you face today, take a look at the "on-demand webinars" that are available to IMLA members on IMLA's secure website. You may vaguely recall that there was a notice of a webinar on that topic a few months back—it wasn't relevant to you then, but it sure would be now. Many prior IMLA webinars are available to members at no charge or a reduced rate. Take a look under the "Webinars" tab at imla.org and check out "On-Demand Library" and "Past Recordings."

Local government lawyers in transition to a new position or new client can access the model employment agreement and model retainer agreement for city attorneys, under the "Publications" tab on the website. While nominally for city attorneys, these models can be easily adapted for use with a wide range of local government types.

Need to complete your required continuing legal education credits? There is nothing worse than being within a month or two of the deadline in your jurisdiction, and the only programs you can find are for topics well outside the scope of the local government lawyer's practice areas. IMLA programs solve that problem—you will find many subjects that are relevant to local government practice. And IMLA programs are recognized for CLE credit in the majority of jurisdictions. Go to the "Webinars" tab on the website and click on "CLE Corner" for a wealth of information on obtaining credit for IMLA programs.

IMLA's renowned "Kitchen Sink" program offers an easy and economical way to complete your CLE requirements. For one low price, you and your entire office can receive 40-plus distance learning webinars during a calendar year. These are great opportunities for the attorneys and other staff in your office to learn about a wide range of legal topics. Many subscribers also invite non-attorney colleagues in their government to join them for programs relevant to particular staff. For example, inviting zoning and planning staff members to an IMLA program on a new land use issue provides a vehicle for a fruitful discussion of a topic relevant to your community. And if you have a conflict at the time a program is offered, you can view the recording later. Under "Webinars," go to "Kitchen Sink" for more information.

Enough with the webinars, you say? If you want to read up on a topic in peace and quiet, check out the "Resource Library" tab, which allows IMLA members to access both Working Group materials and other past papers and publications.

Many of you know that my long-time favorites of IMLA's offerings are those that are in-person. Attending my first Annual Conference convinced me of IMLA's value, and left me inspired as I went home. The Annual Conference and the Mid-Year Seminar are opportunities for local government lawyers like no other, with a wealth of substantive information, both from the speakers and from the other lawyers who attend. The Mid-Year Seminar's Washington, D.C. location adds a focus on speakers and issues from the U.S. Capital of special interest to local governments, along with the Section 1983 programming. And IMLA's annual Canada Day event provides a special benefit to our Canadian members with a unique program focused on Canadian law.

In closing, let me add one more task to your "to-do" list: that you take a few minutes to share the value of IMLA membership with your colleagues who are not yet IMLA members. Greater membership allows IMLA to provide even more resources, benefiting local government lawyers and their communities.

See you in Portland!

Municipalities and the First Amendment: Free Speech, Religion, and Public Audits

DOUGLAS HOFFER, *Deputy City Attorney, City of Eau Claire, Wisconsin*



Municipal attorneys are regularly asked to advise their clients on challenging First Amendment issues, balancing free speech rights against the government's responsibility to promote the general welfare. The Supreme Court recently further refined and clarified important free speech standards and considered prominent cases involving religion, but free speech and religion are not the only First Amendment issues creating challenges for municipal attorneys. Communities across the country have experienced a growing number of private citizens engaging in "First Amendment audits" by entering government buildings and recording their interactions with law enforcement officers and other government employees.

This article will discuss various concepts necessary for municipal attorneys to appropriately advise and train their communities' public officials and employees on laws and practices impacting speech and religion, and will also suggest best practices for managing First Amendment audits.

Navigating the Interplay Between Free Speech and Religion.

The First Amendment includes three clauses which implicate religion: the Free Speech Clause, the Establishment Clause, and the Free Exercise Clause. The Free Speech Clause protects the right to practice one's religion provided the practice does not violate public morals or violates a compelling governmental interest. The Establishment Clause prohibits the government from establishing a religion. The Free Exercise Clause prohibits the government from restraining the free exercise of religion. During its most recent term the Supreme Court examined the interplay between these three important constitutional provisions, and attorneys serving local governments should advise their clients on the impacts of these recent decisions.

The factual scenario in *Shurtleff v. City of Boston* provides guidance to local governments on how to balance the sometimes-competing interests in the First Amendment.[1] Boston city hall has three flagpoles. The United States and the POW/MIA flag fly on one flagpole, the Commonwealth of Massachusetts flag flies on the second, and the City of Boston flag flies on the last. Third parties may request to fly their flag instead of the City's flag in connection with an event taking place near the flagpoles. Over a 12-year period, the City of Boston approved 284 flag-raising events without rejecting a single request, until a group asked to fly a Christian flag connected with their event. The City refused to fly the Christian flag, 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."

The Supreme Court ruled unanimously that Boston violated the Constitution when it rejected the application to fly a Christian flag on one of city hall's three flagpoles. Because the City program that allowed other private groups to raise and fly their own flags was not speech by the City, the court held, the City could not refuse permission to fly a particular flag because of the views that flag expressed. The majority opinion was joined by six justices, and there were three concurring opinions which all agreed that the City of Boston violated the Constitution.

The majority opinion pointed out that the City's practice did not constitute government speech because the City wielded virtually no control over the messages that the flags in the program conveyed. The City had no record of denying any flag-raising requests, and it did not have any guidelines about what flags were permitted under the program. The concurring opinions said that the government does not violate the Constitution when it puts religious speech on equal footing with secular speech, and that

Boston's approach was not the government expressing its own views but rather was regulating private speech.

Shurtleff demonstrates the problems cities can face when they provide a public forum and then try to decide what speech is permitted in that public forum. Once a city permits some speech by private actors it becomes very difficult to limit other speech the government does not wish to endorse.

Cities should do the following things to avoid some of the problems encountered in the *City of Boston*:

- Have content neutral policies in place before making decisions regarding what kinds of speech are permitted in city public forums.
  - A common example is time, place, and manner restrictions.
- Have policies in place permitting the city to speak for itself (i.e. government speech).
- Be thoughtful and intentional about decisions related to free speech. If a practice or policy might impact free speech rights be sure to get advice from the city attorney's office to ensure the practice or policy does not have unintended consequences.

Shurtleff provided guidance to communities seeking to use city facilities for government speech. The Supreme Court pointed out that the City of San Jose provides in writing that its "flagpoles are not intended to serve as a forum for free expression by the public," and lists approved flags that may flown "as an expression of the City's official sentiments." Cities are allowed to promote programs, policies, and voice official opinions, but the Court distinguished between clear government speech versus public forums where cities restrict some content it finds disagreeable.

Shurtleff was not the only recent U.S. Supreme Court case in which a government actor's attempt to comply with the Establishment Clause ran afoul of other First Amendment principles. In *Kennedy v. Bremerton School Dist.*, a school district terminated the employment of a football coach who knelt at midfield after games to offer a quiet prayer.[2] The coach first prayed alone, but later was joined by players from his team and other teams. When the school district complained, the coach briefly stopped the practice, but later notified the school district that he intended to resume praying after the next game. The school district suggested alternatives to the coach's practice such as waiting for the crowd to leave before praying. The coach rejected the proposed alternatives, so he was placed on administrative leave and his contract was not renewed for the following season.

The Court rejected the school district's argument that permitting a football coach to pray on the 50-yard line of the football field after games violated the Establishment Clause by establishing an official religion and preferring one religion over another. *Kennedy* concluded that the school district's actions violated the Free Speech Clause and the Free Exercise Clause of the First Amendment, and the school district's argument "rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech." Kennedy further concluded that the district targeted religious conduct rather than applying a content neutral rule. The coach's prayer occurred at a time when the district allowed the coaching staff to engage in all manner of private speech.

The *Kennedy* Court distinguished its decision from cases where government employees compel religious observance, concluding that the coach's conduct "did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion." The coach's prayers were not publicly broadcast or recited to a captive audience, and students were not required or expected to participate.

Kennedy further reinforced that the "Lemon test" has been abandoned as a rule to determine whether a law or practice complies with the Establishment Clause. The Lemon test said that a law or practice was constitutional if it had a secular purpose, its principal effect did not advance or inhibit religion, and it did not create an excessive entanglement with religion. The Court said this rule invited chaos, created a modified "heckler's veto," and that an Establishment clause violation does not automatically follow whenever a school or government entity fails to censor private religious speech. Instead of applying the Lemon test, courts should determine whether a law or practice violates the Establishment clause by "reference to historical practices and understandings."

Like *Shurtleff*, *Kennedy* reinforced the importance of content neutral laws and practices on matters implicating religion. Supreme Court jurisprudence appears to be evolving in a manner skeptical of government laws and practices which negatively impact religious observance, and municipal attorneys should advise their clients accordingly.

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Douglas Hoffer is the Deputy City Attorney for the City of Eau Claire, Wisconsin. He has worked in the Eau Claire City Attorney's office since 2013 after working in private practice focusing on local government law. He has successfully argued cases in Wisconsin circuit courts, the Wisconsin Court of Appeals, the Wisconsin Supreme Court, and the United States Supreme Court in cases involving constitutional law, civil procedure, land use, and municipal finance. He is an IMLA Local Government Fellow and a 2010 graduate of Marquette Law School.

First Amendment *cont'd from page 7*

Identity of the Speaker.
In determining whether speech-related regulation is constitutional, one must sometimes determine the identity of the speaker. As *Shurtleff* demonstrated, government speech provides a useful example of when the identity of the speaker can impact the First Amendment analysis. The Free Speech Clause governs how the government can regulate private speech, but does not regulate government speech.[3] The Free Speech Clause does not restrain the government from controlling its own speech. The government "is entitled to say what it wishes, and to select the views that it wants to express."[4] If the government is the speaker, then the Free Speech Clause does not apply. The lack of Free Speech clause limitations on government speech does not mean there are no limitations on government speech. In addition to other limitations, government speech must comply with the Establishment Clause. *Shurtleff* demonstrated the importance of distinguishing government speech from government restricting access to public forums based on disagreement with the message.

Determining speaker identity may have less relevance in some contexts as free speech jurisprudence continues to evolve after the *Citizens United* decision was released in 2010.[5] By applying First Amendment rights to non-natural persons, *Citizens United* may impact how to apply free speech rules based on the speaker's identity. *Citizens United* struck down a federal law that limited the amount of money corporations and unions could spend to influence elections. In *Citizens United*, a nonprofit corporation released a 90-minute documentary entitled "Hillary: The Movie" which questioned whether Hillary Clinton was fit to be President. Federal law prohibited corporations and unions from spending general treasury funds on speech that expressly advocated for the election or defeat of a candidate or electioneering communications. The nonprofit corporation argued that federal law unconstitutionally violated the organization's free speech rights. The Supreme Court held that the government may not suppress political speech on the basis of the speaker's corporate identity, and that no sufficient governmental interest justified limitations on corporations' political speech.

The lack of Free Speech clause limitations on government speech does not mean there are no limitations on government speech. In addition to other limitations, government speech must comply with the Establishment Clause.

One legal commentator suggested that *Citizens United*'s suspicion of speech regulation based on speaker identity is not new, and has long been implicit in case law.[6] Nevertheless, case law includes various examples where speaker identity is relevant to free speech analysis including cases involving public employees, limited public forums, students, prisoners, and various other examples.[1]

Speaker identity's impact on the constitutionality of laws and practices may continue to evolve in light of *Citizens United* and other case law. Municipal attorneys should continue to scrutinize the role speaker identity plays in speech regulation's constitutionality when advising clients on whether laws and practices implicating free speech are constitutional.

Content Neutrality.
In its most recent term, the Supreme Court further clarified the meaning of content neutrality in *City of Austin v. Reagan National Advertising of Austin*.[8] In *Austin*, the Court determined that city ordinances that treat off-premises signs differently than on-premises signs are content neutral. *Austin*'s holding clarified a question left unanswered by the court's 2015 decision in *Reed v. Town of Gilbert*.

Reed is important because it further refined the definition of "content neutral" regulation. *Reed*, which examined a constitutional challenge to a local sign ordinance, determined that speech regulation is content based if it applies different rules based on the content of the message. The Gilbert, Arizona sign code required permits for signs, but included various exemptions for different sign categories. A local church which lacked a permanent location violated the local sign ordinance by placing temporary signs in the Town's right-of-way directing people to its services. Gilbert's sign code included requirements about when parties could place temporary directional signs and when parties must remove those signs. The sign code did not include similar restrictions for temporary political signs and ideological signs. *Reed* concluded the sign code thus treated signs differently based on the message on the sign; consequently, Gilbert's code was content based and unconstitutional. Because almost all local sign ordinances applied different rules based on the category of sign, *Reed* called into question the constitutionality of almost every local sign ordinance.

Some legal commentators expressed concerns regarding the possible impact of *Reed* on speech regulation.[9] Legal commentators also expressed the belief that *Reed* might transform First Amendment jurisprudence because whether

courts deem a regulation "content neutral" or "content based" is often dispositive on the issue of constitutionality.[10] Content based regulations are subject to strict scrutiny and presumed unconstitutional, while content neutral regulations are subject to intermediate scrutiny. One legal commentator suggested that because "almost all laws fail strict scrutiny and almost all laws pass intermediate scrutiny, the pivotal point in the doctrinal structure is the content analysis."[11]

Although *Reed* may make it more difficult to avoid strict scrutiny in some circumstances, *Austin* narrowed *Reed*'s content neutrality application. *Austin* demonstrates that some of the worst fears related to *Reed's* potential impact have not materialized. To the contrary, although many communities across the country had to revise their sign codes, courts interpreting *Reed* have left most existing First Amendment jurisprudence undisturbed.

Prudent municipal attorneys will explore ways to eliminate content-based distinctions in speech related regulation to avoid strict scrutiny, and will recognize *Austin*'s impact on what constitutes a content neutral restriction. Content-neutral time, place, and manner restrictions of protected speech are generally afforded a great deal of deference provided they are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of information.[12] By focusing on when, where, and how speech takes place rather than focusing on the content of the message, speech regulation can often survive constitutional challenge.

Narrow Tailoring and Social Media Regulation.

In *Packingham v. North Carolina* the Supreme Court determined that a North Carolina law, which prohibited convicted sex offenders from using social networking websites that allow minors to create accounts, violated the Constitution.[13] The Court agreed with the State that convicted sex offenders should not have access to vulnerable victims such as children, but concluded that the law in question went too far. North Carolina's law, the Court concluded, stifled lawful speech as the means to suppress unlawful speech.

Packingham demonstrates the importance of narrowly tailoring speech regulation to avoid suppressing lawful speech. *Packingham* said that more specific laws than the one at issue in the case might survive constitutional scrutiny. For example, the Court said that a law prohibiting a sex offender from engaging in conduct that often precedes a sexual crime, such as using a website to gather information about a minor, would not violate the First Amendment. Precluding access to social networking sites, on the other hand, eliminates access to principal sources of knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. In sum, the law prevents users from engaging in the legitimate exercise of First Amendment rights.

Packingham also demonstrates speech regulation's challenges in a world where technology provides new and different ways to communicate. Justice Kennedy remarked on these challenges in the majority opinion in *Citizens United*, discussed above for other reasons, when he said the Court must "decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker."

Identifying Speech.

Determining whether conduct is "expressive" and thereby protected by the First Amendment is an important first step in determining whether a law or practice is constitutional. Regulation will enjoy greater legal protection if focused on non-expressive conduct rather than speech in the constitutional sense. Determining whether behavior constitutes speech can be difficult.[14] Case law articulating whether speech is present is sometimes imprecise and inconsistently applied, and unfortunately a recent case missed an opportunity to offer additional clarification on what constitutes speech.

Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Commission implicated a number of important First Amendment issues including what forms of expression constitute "speech."[15] The case involved a cake shop which refused to create cakes for same-sex weddings because of the owner's religious beliefs. The owner argued that decorating cakes is a form of expression protected by the First Amendment, and the government could not legally compel him to engage in expression against his will. A same-sex couple filed charges of discrimination with the Colorado Civil Rights Commission against the cake shop alleging discrimination based on sexual orientation under Colorado's Anti-Discrimination Act. Discussion of what constituted speech was prominent throughout the oral argument at the Supreme Court, and many expected further clarification on the definition of speech when the court issued its decision.

Unfortunately, the Court chose not to address many of free speech issues raised in *Masterpiece Cakeshop*. Instead, the Court ruled in favor of the cake shop owner because the Colorado administrative agency was explicitly hostile to the owner's religious beliefs. The scope of this case's impact is still unclear, and some issues raised in the case will likely remain unsettled pending the outcome of future cases.

Attorneys should not assume speech is present. Only if conduct constitutes speech should the analysis turn to whether the speech is entitled to constitutional protection.

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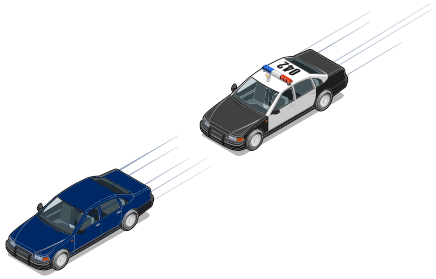
Navigating the Legal Landscape of Police Pursuits

ROBERT HIGGASON, *Senior Assistant City Attorney, City of Houston, Texas*



INTRODUCTION

The suspect flees and the police go after him. An officer's charge to enforce the rule of law, preserve the peace, and maintain order means that he cannot simply permit the suspect to escape. Vehicular pursuits—high-speed car chases—can present substantial dangers to officers, third persons, and the fleeing suspect himself. The officer in pursuit must consider all of those. Legal and practical concerns intermingle in the officer's decisions whether to pursue, how to pursue, and when and how to end the pursuit. Officers and the attorneys who advise and defend them must know the law that informs and judges those decisions.

I. Review of Legal Framework

A quick review of qualified immunity and *Monell* will cover the standards for officer and municipal liability.

A. Section 1983 and Qualified Immunity

Under 42 U.S.C. § 1983, police officers can be held civilly liable for violating a person's constitutionally protected rights.[1] To enable officers to work effectively without constant fear of being subjected to Section 1983 suits for doing their jobs as they were trained, the Supreme Court has held that officers are entitled to qualified immunity.[2]

Officers are not required to prove their entitlement to qualified immunity in the first instance. Once they plead it in good faith, the burden lies with the plaintiff to overcome it. It helps to think of qualified immunity as roughly the default position or as a rebuttable presumption. To defeat qualified immunity in a Section 1983 case, the plaintiff must show that the officer violated the plaintiff's (or decedent's) constitutionally protected rights, but that is not enough. The inquiry into whether any officer is entitled to qualified immunity turns on the **objective reasonableness** of his actions in light of **legal rules clearly established at the time**.[3] Even if an officer violates a suspect's constitutionally protected rights, the officer will be entitled to qualified immunity if that right was not clearly established at a level of specificity that would have put the officer on notice that his action was unconstitutional.[4]

B. *Monell* Liability

A municipality is not vicariously liable for unconstitutional acts of its employees. Municipal liability arises from unconstitutional conduct directly attributable to the municipality itself through official action.[5] Plaintiffs must show: (1) a policy maker; (2) an official policy; and (3) a violation of constitutional rights, the "moving force" of which is the policy or custom.[6] Under Section 1983, a city can be held liable only for constitutional violations resulting from an official policy or custom.[7]

If the *Monell* elements are not followed, the municipal liability inquiry collapses into a *respondeat superior* analysis, which fails.[8] Moreover, a municipality will not be subject to liability merely for employing a tortfeasor.[9] Municipal liability requires deliberate action attributable to the municipality that is the direct cause of the alleged constitutional violation.[10]

II. Considerations—Legal and Practical

An officer observing a suspect's flight must evaluate the reasonableness of pursuing the suspect. This includes considering the seriousness of the offense. There is little time to decide this, and the officer often will have very limited information. Flight may be a signal that the suspect has a guilty mind and might be attempting to hide evidence of a more serious offense than what the officer has observed.

The officer must use caution during the pursuit, and this can be an issue in potential liability—particularly under state tort claims acts—but it is not the standard under Section 1983. The same is true of an officer's obligation

to follow her department's policies. This can be a possible disciplinary issue, which plaintiffs might use as a foundation for claiming that an officer didn't use the legally required care. Such arguments are likely to gain little or no traction, however, because following departmental policies is not the legal standard under Section 1983.

Pursuits can pose risks most obviously to the fleeing suspect, but also to the officers themselves and to third parties. Plaintiffs have to show that the officer acted with a deliberate intent to harm, a burden so high that plaintiffs rarely will meet it. That standard is not meant to encourage an officer's carelessness, but to enable the officer to pursue the fleeing suspect without having to pay extra attention to how one might drive in an ordinary situation.

Questions that might arise during the pursuit are whether the officer can reasonably continue the pursuit or if he should radio ahead for assistance or even abandon the pursuit.

Video footage from dash cams or body worn cameras during the pursuit can be very useful. If video contradicts plaintiff's version of the pursuit, it can help bring a quick end to a lawsuit, as in *Scott v. Harris*.[11]

III. Ending the Pursuit

At some point, officers will decide to bring the pursuit to an end. Officers may use a variety of methods to stop the fleeing suspect, ranging from relatively safe to deadly force. Officers must act in an objectively reasonable manner according to the information available to them at the time, and their conduct must not run afoul of clearly established law.[12] The means of ending the pursuit will depend on specific factors, including the seriousness of the initial offense, the conduct of the suspect during the flight (which can constitute multiple additional offenses), information about the suspect that might signal his intentions (e.g., threats and reasons to believe the suspect is armed), the visibility, weather, location, amount of traffic, presence of pedestrians or other bystanders, and availability of escape routes for the suspect. Department policies should be broad enough for officers to use their discretion. The plan on how to stop the suspect will likely develop along the way, and when multiple officers are engaged in the pursuit, that plan will develop through real time communications.

A. Deadly Force

The following trio of Supreme Court cases provides a helpful lens through which to view police means of ending high-speed car chases.

Mullenix v. Luna[13]

At one end of the spectrum is deadly force. The legal analysis of using deadly force to end a police pursuit is illustrated effectively in *Mullenix v. Luna*, which began with an attempt to serve an arrest warrant and ended with an officer fatally shooting the suspect.[14] A great deal happened in between those beginning and end points, which ultimately led to the decision to use deadly force to stop the fleeing suspect.

Israel Leija, Jr., was the subject of an arrest warrant. Sergeant Randy Baker of Tulia, Texas Police Department followed Leija to a drive-in restaurant to serve the warrant. Leija sped off and entered Interstate 27, and Sergeant Baker gave chase. Joining the pursuit were officers from multiple jurisdictions, starting with Texas State Trooper Gabriel Rodriguez. On I-27, Leija "led the officers on an 18-minute chase at speeds between 85 and 110 miles per hour."[15] Leija called the police dispatcher, said he had a gun, and threatened "to shoot at police officers if they did not abandon their pursuit."[16]

Officer Troy Ducheneaux from Canyon PD joined the chase and manned a spike strip placed beneath an overpass. State Trooper Chadrin Mullenix also responded, and he thought of disabling Leija's car by shooting it. Mullenix took a position with his rifle on the overpass above Ducheneaux and the spike strip, and he awaited authorization to fire at the approaching vehicle.[17] Mullenix saw Leija approaching, with Rodriguez in pursuit, and Mullenix fired six shots. None of the shots hit the car's "radiator, hood, or engine block[,]" but four rounds "struck [Leija's] upper body[,]" killing him.[18]

The district court denied qualified immunity for Mullenix, and the Fifth Circuit affirmed. In reversing, the Supreme Court noted several significant aspects of the pursuit, providing the context for Mullenix's decision to fire: (a) upon Sergeant Baker's attempt to serve the arrest warrant, Leija immediately fled, leading multiple officers from various agencies on an 18-minute chase at speeds reaching 110 miles per hour; (b) Leija called the police dispatcher twice and stated

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Robert W. Higgason is a Senior Assistant City Attorney for the City of Houston, a position he has held since September 2013. He represents the City in state and federal appellate courts in cases involving labor and employment issues and civil rights claims, as well as general business and tort litigation.

Before joining the City's Legal Department, Mr. Higgason was in private practice for 20 years, focusing primarily on civil appeals. Before opening his solo appellate practice, he worked for two major international law firms for several years. He also worked for the First Court of Appeals in Houston as a briefing attorney and research attorney and for an appellate boutique firm in Houston.

Mr. Higgason received his Doctor of Jurisprudence from the University of Houston Law Center in 1991. He also has a Master of Arts in philosophy from the University of Houston and an undergraduate degree in Christianity and psychology from Houston Baptist University.

that he was armed and intended to kill officers; (c) Officers deployed three sets of spike strips, which are a less lethal means of stopping the vehicle, but which also present a potential danger to the officer; and (d) Trooper Mullenix fired at the motor of Leija's car, with the result that Leija was killed unintentionally. These aspects of the pursuit were relevant to the Court's conclusion that Leija presented an immediate threat of severe physical harm.[19] The Court held that the law was "not beyond debate" that Mullenix's action to stop the pursuit was unconstitutional, so he was entitled to qualified immunity.[20]

Scott v. Harris[21]

The pursuit in this case began when speeding motorist Victor Harris (clocked at 73 in a 55), responded to the officer's flashing lights by accelerating to flee from the police.[22] He exceeded 85 mph on a two-lane road as Georgia county Deputy Timothy Scott and other officers joined the pursuit. During his attempt to flee, Harris pulled into a shopping center parking lot, where he found himself "nearly boxed in by the various police vehicles."[23]

Harris found a way out of the parking lot, colliding with Scott's police car on the way, and resumed his flight down the two-lane highway.[24] Scott followed and "took over as the lead pursuit vehicle."[25] The chase would soon come to an end: "Six minutes and nearly 10 miles after the chase had begun, Scott decided to attempt to terminate the episode by employing a [precision tactical] maneuver, which causes the fleeing vehicle to spin to a stop."[26] But then, concerned that the maneuver could not be used safely at such high speeds, Scott instead "applied his push bumper to the rear of [Harris's] vehicle. As a result, [Harris] lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. [Harris] was badly injured and was rendered a quadriplegic."[27]

Harris sued Scott, alleging excessive force and unreasonable seizure. Scott filed a motion for summary judgment based on qualified immunity, which the district court denied, and the Eleventh Circuit affirmed.[28]

In reversing, the Supreme Court addressed the "threshold inquiry: whether Deputy Scott's actions violated the Fourth Amendment[,]" which required "determin[ing] the relevant facts."[29] Perhaps the most interesting part of this case is the stark contrast between the circuit court's version of the chase and the reality as shown by the dash cam video from Scott's police car. The Supreme Court characterized the lower court's description of the chase as though it gives "the impression that [Harris] rather than fleeing from police, was attempting to pass his driving test[.]"[30] Noting that the chase was "in the dead of night at speeds that are shockingly fast[,]" and describing in some detail what the videotape showed, the Court described the chase thus:

> Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.[31]

The Court follows that with a very important holding about evidence in a summary judgment proceeding:

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.
> That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.[32]

The Court also notes that when it evaluates the reasonableness of action taken by an officer who faces choices between two or more dangerous options, the Court considers the "relative culpability" of those whose lives are at risk:

> So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. **It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted.** Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.[33]

Scott v. Harris thus supplies two principles that can be valuable in many other cases: (1) in a summary judgment context, where video evidence contradicts the plaintiff's pleadings, the video prevails; and (2) in determining reasonableness of an officer's actions, courts should consider the relative culpability of those whose lives are at risk.

Plumhoff v. Rickard [34]

One night in West Memphis, Arkansas, Lieutenant Joseph Frothman stopped driver Donald Rickard because one of Rickard's headlights was out. Upon approaching the vehicle, Lieutenant Frothman noticed "an indentation, 'roughly the size of a head or a basketball' in the windshield of the car."[35] Frothman asked Rickard if he had been drinking, and Rickard said he had not. When Frothman asked Rickard to step out of the car, "Rickard sped away."[36]

Frothman began pursuit and was soon joined by five other officers, including Sergeant Vance Plumhoff. They pursued Richard east on I-40 toward Memphis, Tennessee, and attempted to stop him using a "rolling roadblock," but to no avail.[37]

There were multiple collisions between Rickard and various police cars, bringing Rickard to a momentary stop in a parking lot. Then Rickard accelerated against one of the police cruisers, at which time Plumhoff fired three shots into Rickard's car. As Rickard sped away again and continued his flight, two other officers fired 12 more shots toward Rickard's car, for a total of 15. "Rickard then lost control of the car and crashed into a building. Rickard and [his passenger] both died from some combination of gunshot wounds and injuries suffered in the crash that ended the chase."[38] The district court denied qualified immunity, and the Sixth Circuit affirmed.

In reversing, the Supreme Court held that the officers' conduct in collectively firing 15 shots into suspect's vehicle did not amount to excessive force. The court reasoned:

> Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road.
>
> . . .
>
> Under the circumstances present in this case, we hold that the Fourth Amendment did not prohibit petitioners from using the deadly force that they employed to terminate the dangerous car chase that Rickard precipitated. In the alternative, we note that petitioners are entitled to qualified immunity for the conduct at issue because they violated no clearly established law.[39]

The Supreme Court's dual holding here is significant: first, the officers did not violate Rickard's constitutional rights; second, they are entitled to qualified immunity because they did not violate clearly established law. In applying *Plumhoff* to other pursuit cases, either of those holdings would suffice for the officers, but the first holding—that there was no constitutional violation—also serves to undercut any *Monell* claims that might be brought against the municipality.

B. Less Lethal Means

The less lethal options for ending a pursuit are limited. Unlike some stationary scenarios, the option of waiting out a fleeing suspect is generally not available. The suspect could harm others during the pursuit, and the suspect could escape. In each of these three cases—*Mullenix*, *Scott*, and *Plumhoff*—the officers attempted a less lethal means to end the pursuit.

In *Mullenix*, the officers deployed three spike strips. However, because one of the officers was stationed by the first spike strip and Leija had already threatened to kill any officer he saw, Mullenix did not wait to see if the spike strip would safely stop Leija. That remains unknown and irrelevant to the analysis.[40]

In *Scott*, the officer used a maneuver to ram the bumper, which succeeded in ending the pursuit. Although it was less lethal, the suspect was severely and permanently injured.[41]

In *Plumhoff*, the officers attempted a rolling roadblock on Interstate 40, which was unsuccessful. The opinion does not explain why the rolling roadblock failed, but it did note that the vehicles were swerving through traffic at speeds over 100 mph and that the officers passed over two dozen vehicles.[42] It is no stretch to envision how these traffic factors could have contributed to the ineffectiveness of that effort.[43]

C. Abandoning the Pursuit

Officers have the option of abandoning the pursuit. The plaintiff in *Scott v. Harris* [44] presented this argument to the Supreme Court, which noted at least two reasons not to cease the pursuit:

> **First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go.** Had respondent looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. . . . **Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.**
>
> **Second, we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger.** It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red

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AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

The Supreme Court's Blockbuster Term: Are We all Historians Now?

Regardless of how each of us may feel about the outcomes of various blockbuster decisions from this last Supreme Court term, we can all likely agree that the decisions ranging from guns and abortion to the Establishment Clause and climate change were monumental.[1] In addition to reshaping significant areas of American life, several of these major decisions reinforced how courts and attorneys should approach constitutional questions.

Several years ago, Justice Kagan remarked during a speech that " "[w]e're all textualists[2] now." After this term, attorneys may say to themselves that "we're all historians now." For example, in *New York State Rifle & Pistol Ass'n v. Bruen,* in striking down New York's discretionary gun permit law, the Supreme Court provided a roadmap for how to determine whether a regulation infringes on a constitutional right: we must look to the text and history.[3] Similarly, when the Supreme Court decided *Dobbs v. Jackson Women's Health Organization* the next day, overturning *Roe v. Wade,* the Court reiterated that to determine whether a right exists in the Constitution, it must be "deeply rooted in the Nation's history and tradition."[4] And in abandoning the *Lemon* test in *Kennedy v. Bremerton School District*, the Supreme Court indicated it has "instructed that the Establishment Clause must be interrupted by 'reference to historical practices and understandings.'"[5]

To be fair, the Court has been trending in this direction for several years and *District of Columbia v. Heller* relied on text and history in finding an individual right to keep and bear arms (though it did not shut the door on means-end scrutiny).[6] But the cases from this term make clear both explicitly and implicitly, that when it comes to constitutional rights, advocates will need to support their arguments with historical analysis to win the day.[7] Reviewing the *Bruen* decision and treatment of the historical arguments can help illuminate how local government attorneys will need to don their historical detective hats going forward in some of these cases.

New York State Rifle & Pistol Ass'n v. Bruen

New York, like six other states, had a discretionary firearm licensing regime meaning that in addition to satisfying the objective criteria required under the statute, a prospective licensee would need to show some additional "special need" to carry a handgun outside of the home, separate from a generalized need for self-defense. New York's law had been in place for over 100 years. In striking it down, the Supreme Court rejected the "two-step framework for analyzing Second Amendment challenges that combines history with means-end scrutiny," a framework which the Supreme Court acknowledged had been adopted by every circuit court in the country.[8] Instead, the Court announced that to survive a challenge under the Second Amendment, if the plain text covers the individual's conduct, the government "must demonstrate that regulation is consistent with this Nation's historical tradition of firearm regulation."[9] We look to history, per the Court, because: "[t]he Amendment was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors."[10]

The Court acknowledges that "historical analysis can be difficult" but in some cases, the Court indicates the analysis will be straightforward. In terms of what is "straightforward,"[11] consider:

[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions

actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.[12]

Turning to New York's regulation, which the Court explained was enacted to address "handgun violence primarily in urban areas," the Court analyzed "historical precedent from before, during, and even after the founding" to see if that history "evinces a comparable tradition of regulation."[13] In explaining what regulations the current New York law would be compared to for this historical analysis, the Court noted it was not providing "an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment," but found at least two metrics relevant: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[14]

Once armed with what we are looking for in historical practices, we next need to consider when in history we should be looking because "when it comes to interpreting the Constitution, not all history is created equal."[15] Thus, the Court separated time periods into categories as follows: "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries."[16] The focus, the Court explained should be on the time period when the Second Amendment was adopted in 1791 and when the Fourteenth Amendment was ratified in 1868. "Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years."[17] But, the Court cautioned, if a practice prevailed from English common law to the founding, then that evidence would be relevant.[18] If, however, the evidence suggests that a regulatory practice from early English history had become "obsolete…at the time of the adoption of the Constitution," courts should not rely on such a historical analogue.[19] And the Court noted that courts should be "careful when assessing evidence concerning English common-law rights" as such practices cannot always be attributed to our founders.[20]

With those guideposts in place, the Court examined New York's historical evidence. New York pointed to several English regulations dating back as early as 1285 that supported a restriction on the public carry of firearms. But the Court rejected this history, explaining that a statute from the Middle Ages "has little bearing on the Second Amendment adopted in 1791."[21] And the Court explains that by the time we reach the Colonial American period, there was no longer any widespread prohibition on the public carry of handguns.[22] The Court also reviewed history from the latter half of the 17th century on both sides of the pond to find further support for its ultimate holding that regulation of public carry of firearms was not common. It then reviewed the founding era history, finding little evidence of American regulation of the public carry of firearms, rejecting the evidence New York submitted of three regulations at that time which supported its position.[23] The Court ultimately concluded "in the century leading up to the Second Amendment and in the first decade after its adoption, there is no historical basis for concluding that the pre-existing right enshrined in the Second Amendment permitted broad prohibitions on all forms of public carry."[24]

The Court also indicated "postenactment history" should not be given more "weight than it can rightly bear" despite language in *Heller* indicating that "evidence of how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century represented a critical tool of constitutional interpretation."[25] To reconcile its word of caution about post-enactment history with *Heller's* use of the same evidence, the Court explained that "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision."[26] But even under this scenario, the Court noted that if the post-enactment history contradicts the text, the text will control.[27]

In this case, the Court acknowledged that after the ratification of the Second Amendment, there was a proliferation of public-carry restrictions. But the Court did not find the types of restrictions relied on by New York to be analogous to the current regulatory regime. The Court similarly rejected New York's arguments that the time period leading up to and around the ratification of the Fourteenth Amendment supported the proposition that States could prohibit public carry of firearms, concluding the court decisions from that time period demonstrated that States could "lawfully eliminate one kind of public carry – concealed carry - so long as they left open the option to carry openly."[28]

Although New York was able to provide some historical support for its position from each relevant time period, ultimately the Court rejected its evidence as insufficient, stating:

…we will not stake our interpretation of the Second Amendment upon a law in effect in a single State, or a single city, "that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms" in public for self-defense. … Similarly, we will not stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption, governed less than 1% of the American population, and also "contradic[t] the overwhelming weight" of other, more contemporaneous historical evidence.[29]

Finally, the Court did not address whether courts should focus on the

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LISTSERV

BRAD CUNNINGHAM
Municipal Attorney, City of Lexington, South Carolina and IMLA Board Member

Mentoring and the Fine Art of Making a Difference

The IMLA ListServ is a great place to get advice and gain valuable information on navigating the challenging world of Municipal Law. It is a tool every Municipal Lawyer should have in their box. At times, I cannot imagine getting along without it. Through the ListServ, I have been introduced to dozens of learned colleagues, most of whome I have eventually met in person at IMLA events. And, for many, we maintain a friendship that has lasted for many years, bolstered by our common bonds. I would consider several IMLA members not only friends and colleagues, but also as mentors in many ways. There can be no more priceless aid than the help of a veteran colleague when you find yourself challenged.

Getting off the ground presently is a new IMLA Program designed to help younger attorneys navigate the wonderful world of Municipal Law. I would like to share with you some details of the program, giving credit to IMLA for establishing the guidelines.

Purpose and Scope
A mentor is someone who takes an active and invested interest in your career. They are not a supervisor or critic but someone who acts as a teacher or coach. The purpose of the IMLA Mentorship Program is to help support the career growth of attorneys new to the practice of local government law and to help facilitate networking between local government attorneys. The program endeavors to assist new local government attorneys in acquiring substantive knowledge, practical skills and professional judgment while also helping them with assistance resources for networking and professional engagement as well as how to maintain a healthy work-life balance.

Any communication between the mentor and the new lawyer arising out of participation in the program is for the sole purpose of guiding and teaching the new lawyer about the practice of law and the issues that the new lawyer is likely to face in the practice of law. The mentor is not assuming any responsibility or liability for any legal matter related to the mentee's work. The mentee should refrain from disclosing any confidential client information under the appropriate rules of professional conduct.

Guidelines for Mentees and Mentors
Once IMLA makes a mentor / mentee assignment, please establish contact within two weeks. The mentor should initiate contact. If the mentee does not hear from the mentor in this time, please email **info@imla.org** so that IMLA can help facilitate initial communication.

Both parties should prepare for your first meeting by thinking about your objectives for the mentorship relationship. Focus on your goals and make efficient use of your time. Use your first meeting to create a clear scope for the mentoring relationship. IMLA recommends that the mentor and mentee create a mentoring plan during this meeting. What do you hope to gain as the mentee? Mentor, how do you believe you can best help the mentee succeed? Ask yourselves these questions before your first meeting and come prepared to establish the objectives for the relationship. Remember that both parties are invested in the outcome of the mentoring relationship.

During your first meeting, you should go over your objectives, determine how you will handle confidential information. During this meeting, the mentor should give a brief career history, including describing any mentors that have impacted the mentor's career. The parties should discuss the mentee's career goals and interests. Both the mentor and mentee should actively listen and ask questions.

Mentor and mentee should also establish a schedule for regular check-ins with each other during this first meeting. Put the meetings on your calendars ahead of time. But having pre-established meeting times should not prevent the mentee from reaching out to the mentor with a more time-sensitive issue.

The goal of the mentor / mentee program is to build a supportive and meaningful mentor relationship. This can be done by providing constructive feedback and being respectful and responsive. There is no such thing as a "dumb question" in the context of this relationship and mentees should feel comfortable

asking their mentors questions.

Mentors should encourage mentees to attend IMLA events and should plan on meeting with their mentees in person at the outset of any IMLA conferences / events which they are both attending. Even if the mentor is unable to attend an IMLA event that the mentee will attend, the mentor should meet (via zoom or call) with the mentee before the conference to discuss objectives for the mentee to achieve from the event, including developing networking strategies and helping facilitate other introductions for the mentee for those that will be in attendance. Mentors should also encourage mentees to get involved in IMLA via a variety of available options, including working groups, sections, by participating in webinars, writing articles or papers, or speaking at conferences.

Fellow colleagues, I am telling you this can be a valuable tool and make a big difference in a young lawyer's life and career. How many of you remember that feeling where you were thinking "Am I the only one in this room who doesn't know what is going on," or "Am I the only one who doesn't recall the details of that issue or that case?" "Am I the only one who doesn't know what that legal jargon means or what that word means?" The answer to all of these is typically a resounding "NO!"

I thank the IMLA Board of Directors and staff for their work in establishing this program and I hope everyone out there, veterans and young lawyers alike, will take a role in this important development program. If you are interested, please look to the IMLA webpage or reach out to IMLA staff for more information or answers to your questions. Kudos to IMLA!

Turning to a more personal note in this area, I was not always a Municipal Lawyer, as I practiced real estate law and related litigation before making the leap into this wonderful world. In fact, I had a mentor in private practice as well.

Allow me to introduce you to Rex Casterline, my original mentor in private practice. Rex is from Prince George's County Maryland but made his way to the University of South Carolina School of Law in Columbia where he met his wife Renae and decided to stay in the area. They have raised two wonderful daughters here, Karis and Kaleigh.

Rex was raised by hearing impaired parents and grew up using sign language largely to communicate. I even used him as a translator in court several times for hearing impaired clients, and also later for zoning and building applicants here at the Town of Lexington.

I was once a young struggling lawyer with a wife at home and a brand-new baby girl. Desperately in need of a job, a classmate suggested I talk to Rex. We hit it off immediately, and he gave me my first real job. He gave me my first real court experience and supported me with advice as I went up against one of the most powerful trial lawyers in the State of South Carolina during only my second year of practice. He was also the first to slap me on the back and give an "atta boy" when I got the client out of that case on Summary Judgment. Of course, he didn't take any credit, but it was largely because of him.

That is the kind of guy Rex has always been, and he has always shown it in his work and life. He has reveled in a marvelous mixture of work/life balance. When not in his day ritual as one of the finest real estate lawyers in South Carolina, Rex continued his contributions to the area, particularly to the young people of the community.

Rex became a youth leader at Centennial ARP Church in Columbia, where he has served as the Clerk of Session. He has served on numerous denomination committees and boards. He also became active in Erskine College and Bonclarken Conference Center. Over the years, Rex has "mentored" and guided numerous "god-children" through the challenges of growing up in this crazy world. For decades, he has given and given to his community. He proved there is life beyond the practice of law and serves as a shining example of what lawyers can do for others and for the community.

Rex died suddenly and unexpectedly last week while on vacation with his wife and friends in Florida. The news hit me like a sack of cement as I got to the office and logged into my computer last Tuesday morning. Recent humorous Facebook posts showed he had just navigated a visit to Buc-ees. For a while, I sat and staired at the message. Wow! He was even representing the Town currently on a Real Estate matter. I am not too old or proud to admit my eyes welled up at the thought of this loss. The man threw me a lifeline and set me sailing in the right direction early in my career, and I can never forget him for it.

By all accounts it appears half of Columbia showed up for Rex's memorial service. It was a true testament to the impact he left on the lives of many. Rex was a model for what lawyers can and should do inside and outside the office. Thanks and Godspeed, Rex Casterline…

I hope many of you can take advantage of the IMLA Annual Conference in Portland. Perhaps I will see you there. This annual event is an invaluable event for IMLA members, and over the years has helped strengthen the mentorship I received from many IMLA colleagues. If you are a young lawyer attending, don't be afraid if you think you won't know anyone. I have been there too. I'll be hosting the 11th Annual Listserve/Water Cooler Reunion as a dine-around event. This is a great time to get to know people if you don't already know them, and to meet people if you are new to IMLA. Folks usually have a great time, and where else can you get the Brad Cunningham Guarantee of "If you don't have a good time, I'll pay for your food and drinks!"

The prosecution rests, your honor…

YOUNG LAWYERS

TODD SHEERAN,
City Attorney,
City of Bluffdale, Utah
and IMLA Board Member

Five Reasons to Become a Municipal Lawyer

Several years ago, after my wife graduated with a Master of Science in Nursing and I graduated from law school, she read a *Forbes* article titled "America's Most & Least Trusted Professions." Without even reading the article, you may have guessed that nurses were at the top of the list and lawyers were near the bottom. She jokingly stated, "together we make one mildly trusted person."

Assuming you are happy with your decision to become a lawyer, there is still the decision of the *type* of lawyer you want to be: business, bankruptcy, tax, real estate, family law, criminal, estate planning, and so on. During law school, I thought that I would likely be a real estate/property attorney, one who was definitely in private practice. After passing the bar exam, I worked at a small full-service private law firm. Each attorney had a couple of specialties, and I provided support to those attorneys. It was fun being able to learn the various disciplines but family law (i.e. divorces) was where I was needed most. About a year later, another local full-service law firm offered me a job. The pay was a little better and this firm was busier, much busier. I started handling all my own cases with 90% of them being divorces.

For those first couple of years, I actually didn't mind doing divorces. I felt like I understood the law well enough, and it gave me courtroom experience while I built relationships with my clients and other attorneys. As time went on, however, I noticed that I struggled with "leaving work at work." I wasn't sleeping or eating well and was generally more stressed than normal. I needed a change. I needed it for me and I needed it for my young family. After attending a municipal conference, I received an email stating that a mid-size city was looking to hire a staff attorney. Because the firms I worked for each represented small towns and districts, I had a very *very* basic knowledge of municipal law. Notwithstanding my limited knowledge, I felt like this type of change would be a good thing for me, so I applied for, and later accepted, the job.

I never imagined that I would be a public municipal lawyer. *C'est la vie*. Now that I've worked exclusively for cities for the past five years, I want to give you my top five reasons to become a municipal lawyer.

Diversity of Laws

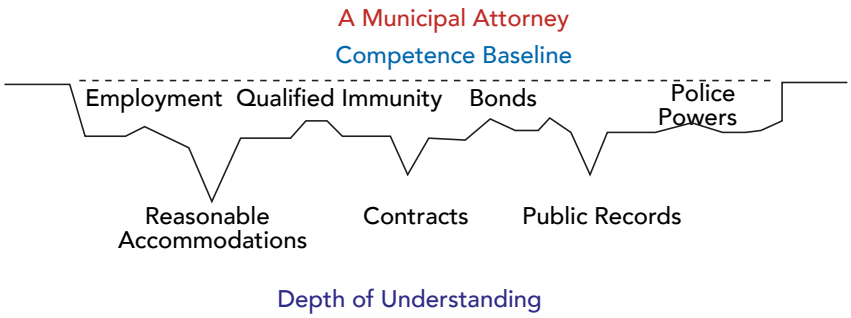
One thing I love the most about being a municipal lawyer is you get to study how various laws affect a municipality as opposed to specializing in just one or two areas of the law. While I have more knowledge in some areas of the law over others, I'm mainly a general practitioner i.e. a jack of all trades but master of none. As one attorney put it, municipal attorneys have mile-wide knowledge that goes a foot deep and family law attorneys have foot-wide knowledge that goes a mile deep. (See my depiction on the next page).

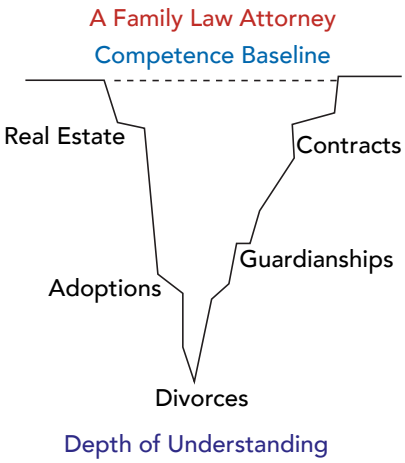
Because of the diversity of applicable laws, I never know what may come through my door. One day might be an employment issue, another day might be drafting a development agreement for a mixed-use commercial/residential project, and another day might be representing the city on a public records appeal. But I like the diversity. I like researching something that I am unfamiliar with. I like picking other municipal lawyers' brains for knowledge and guidance. The diversity of municipal law fits the *type* of person that I am.

Lifestyle

Billable hours are terrible. And with some firms, they "say" you only need x amount of hours, but the unwritten rule is you need x + y in order to make partner one day. When I was in private practice, I never had problems hitting my hours, so I can't squabble too much. But collecting money from clients was way more stressful than actually hitting my billable hours. And when you're trying to collect money from people going through a terrible situation, ugh, it's the worst.

Even though I work just as many hours as I did in private practice, I have an easier time leaving work at work. I rarely get a bad night's sleep because of work and I'm eating just fine (*probably too fine*). I think this is because I generally have less emotional attachment in the contract I drafted or public records request I reviewed. Accordingly, I like the lifestyle this profession gives me and my family.





Making a Difference

As noted at the beginning of this article, attorneys get a bad rap and we are the targets of many jokes. If being an ordinary lawyer is low on the perceived ethical and trusted list, being a *government* lawyer is way lower than that, probably even beating the notorious car salesperson.

So why would someone subject themselves to be a low-life corrupt municipal lawyer? I recently read a partially satirical article by then-city attorney, Kelly Butler. She believes that we, as municipal lawyers, do our jobs because we have a "moment" (like a natural disaster, school shooting, political scandal, etc.) and that moment helps us realize that "[o]ur presence, our help, our mind, our experiences will make a difference for our city and its people…" While I have not had a "moment" in my legal career, I do agree that municipal lawyers *can* make a difference and those differences can be big or small.

For example, a resident in my last city contacted me and asked whether the city had a certain restriction in city code. I answered that we did not and he then explained his situation, which involved his insurance company, and asked for a letter from me stating that we did not have this certain restriction. I thought, *no big deal, it'll take me 10 minutes to draft*. I drafted the letter, sent it to this resident, and didn't think about it again until another resident, who happened to be running for the mayor's seat in the upcoming election, approached me months later. The mayoral candidate said that she had been out campaigning and ran into this resident who praised me for being helpful to him in a difficult situation.

I Kinda Like the Crazy

If you have ever watched the satire mockumentary *Parks and Recreation*, you'll sympathize and understand that the funny and crazy scenarios that are portrayed in the city of Pawnee are not too far off from the real thing. While the 'crazies' don't happen all the time, they definitely do happen from time to time.

I'll give one example. The background is that a developer wanted to rezone 4.6 acres behind a Christian church from one-acre residential units to a 55+ residential community that had 28 units (a total density of 6.1 units per acre). In this city, six units per acre was considered "high density." Relative, I know. This meeting had it all: signs, custom made shirts, yelling, swearing, cheering, clapping, booing, and the old lady who got tired and fell asleep *on the ground* right in front row just a couple feet from the podium. At one point during the meeting, the mayor essentially called a councilmember a hypocrite and this councilmember freaked out, wagging fingers and all, then motioned to go into closed meeting to discuss the "character and competence" of the mayor. Classic.

Being a municipal lawyer exposes you to good stories that your friends will enjoy. You're welcome.

Making Life-Long Connections

In one particularly stressful situation where several media outlets were calling about political drama happening in my city, I just needed to talk to someone that I could relate to. I tried calling a close non-municipal lawyer friend, but I could tell, as hard as he tried, he wasn't really getting the situation and the legal nuances I was dealing with. I then called another city attorney and it was so comforting to have this colleague calm me down, re-focus me on the issues at hand, and help guide me through the steps I needed to take.

What I've noticed about municipal lawyers is that we're a tight knit group. We help each other when issues arise. We laugh about things going on in our cities and towns. And we sympathize during the hard times. These relationships, as well as all the relationships I've been blessed with, have added immeasurable happiness to my life.

If you do decide to become a lawyer, look at your personality and traits and see what *type* of lawyer you want to be. If you do take the plunge and become a municipal lawyer, consider joining municipal organizations, like IMLA, and start making connections with other good people. ML

INSIDE CANADA

MONICA CIRIELLO
Ontario 2015

Family Damages, Lenient JPs, and More

Bring One Claim, Get Six Free? Collective and Individual Damages
Korda v. City of Montreal, 2022 QCCQ 4252 https://canlii.ca/t/jqz2j

The Plaintiffs are two adult property owners and four children, all of whom reside together in a borough within the City of Montreal (City). In the summer of 2017, the borough experienced severe flooding, causing significant water damage at the Plaintiffs' home. The Plaintiffs filed six identical applications against the City seeking damages of $5,000 each, totaling $30,000. The City filed a motion to dismiss, submitting that the Plaintiffs are family and all live in the same home.

HELD: City's motion is dismissed.

DISCUSSION: In response to the City's motion to dismiss, additional particulars were filed by each of the six Plaintiffs claiming his or her own individual "moral damages" connected to the flood. In reviewing the case law pertaining to moral prejudice, the Court found that a non-pecuniary damage cannot be considered collective, rather it is an individual claim unique to each individual person, *Romano* v. *Ville de Montréal,* 2018 QCCQ 3793. The Court found that the particulars filed by each of the six Plaintiffs detailed specific individual property including clothes, toys and books. The Court held that if each of the six Plaintiffs can prove, on a balance of probabilities, individual ownership and damage, he or she can succeed on a distinct claim. The Court highlighted that only one of the six Plaintiffs can make a claim for an indivisible asset such as the family home. Further, each distinct claim cannot exceed $15,000 as outlined under section 538 of the *Code of Civil Procedure*:

> A plaintiff may voluntarily reduce the amount claimed to $15,000 or less, but cannot divide a claim exceeding that amount into two or more claims not exceeding that amount, under pain of dismissal of the application. […]

The Court directed the parties to case management to provide a further particular pertaining to joint property; City's motion was dismissed.

COVID-19 is not 'Exceptional Circumstance' Justifying Fine below Mandatory Minimum
Toronto (City) v. 723187 Ontario Incorporated, 2022 ONCJ 308 https://canlii.ca/t/jqblk

The Respondent, a landlord in Toronto, was charged and convicted under the *Cannabis Control Act*, 2017, S.O. 2017, c. 26, Sched. 1 for knowingly permitting the property to be used in relation to the unlawful sale and distribution of cannabis. The mandatory minimum fine under the *Act* is $25,000, yet the Justice of the Peace (JP) reduced the fine to $4,000 with one year to pay. The City of Toronto (City) appealed the fine amount imposed.

HELD: Appeal granted.

DISCUSSION: During sentencing, the JP provided short reasons as to factors taken into consideration for the fine, including: the seriousness of the matter, the Respondent's age, potential COVID-19 financial impacts on a property owner such as the Respondent, and a fundamental acceptance that the Respondent was likely not to commit the same offence again. The JP thus reduced the fine to $4,000. The City argued that despite the factors considered by the JP, there was no justification or guidance from s. 59(2) of the *Provincial Offences Act (Act)* to justify a substantial departure from the minimum fine of $25,000. Section 59(2) of the *Act* provides the Court discretionary authority to grant relief from the minimum fines in "exceptional circumstances":

> Although the provision that creates the penalty for an offence prescribes a minimum fine, **where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice, the court may impose a fine that is less than the minimum or suspend the sentence.** (emphasis added)

Minimum fines are drafted with the intent to have a deterrent effect in public welfare offences. In reviewing the evidence before it, the Court found no submissions by either party which would allow the JP to conclude exceptional circumstances and that imposing the $25,000 minimum fine would be unduly oppressive or otherwise not in the interest of justice. The Court found that the JP erred, and as a result the Court did not owe deference to the JP's decision when it reviewed to impose a sentence it saw fit, *R v. Lacasse,* 2015 SCC 64. The City sought an increase

from the mandatory minimum fine, submitting that $40,000 was appropriate. The City relied on the evidence that despite a warning Notice of Contravention letter directed to the Respondent five weeks prior to being charged, the Respondent continued to allow the ongoing illegal sale of cannabis at the property. The Respondent argued that the Court should consider the pandemic to be an exceptional circumstance within the meaning of s.59(2) and submitted that a fine less than $25,000 was appropriate. Recognizing the severity of the matter the Court imposed a $25,000 fine. In noting that a fine of this magnitude would likely be a burden for a corporation of the Respondent's size, the Court utilized s. 66(2) of the *Act*, extending the Respondent's time to pay to 24 months.

Interpreting a City Bylaw is Question of Law

Gellarne Holdings (2001) Ltd. v. City of Edmonton, 2022 ABCA 262 https://canlii.ca/t/jr5bg

The City of Edmonton (City) received and approved a development permit to demolish three General Industrial Uses Buildings, and construct a new General Industrial Uses building on the same property. The City's zoning bylaw permitted General Industrial Uses on the property which included; the processing of raw materials, making, manufacturing or storage of goods. Following this approval, Gellarne Holdings (Applicant) appealed the development permit to the Land and Property Rights Tribunal (Tribunal) submitting that the new proposed development use was a major or minor impact utility service, which is explicitly prohibited under the City's zoning bylaw. The Tribunal denied the appeal, holding that the new proposed development fell within the General Industrial Use and was in compliance with the City's zoning bylaw. The Applicant appealed.

HELD: Appeal granted.

DISCUSSION: The *Municipal Government Act,* RSA 2000, c M-26, provides that a party seeking to an appeal a decision of a Tribunal must obtain permission which may be granted on a question of law or jurisdiction and if the appeal has a reasonable chance of success. The Applicant submitted that the Tribunal erred in law or jurisdiction, by failing to address whether the proposed use of the new proposed development was a major or minor impact utility service, misinterpreting the definition of General Industrial Use and failing to provide reasons for the decision. The Corporation that obtained the development permit argued that the appeal did not have a reasonable prospect of success, while the City did not take a position on the matter. In reviewing the evidence before it, the Court was satisfied that the Tribunal failed to consider whether the new proposed development use was a major or minor impact utility service as defined under the City's zoning bylaw. The Court held that the Applicant met the test for permission to appeal, concluding that the interpretation of a City bylaw is a question of law, *CFPM Management Services Ltd v. Edmonton (City),* 2020 ABCA 62) and the appeal will determine if the Tribunal erred in law.

Justice of the Peace Erred When "Tinkering" with Joint Sentencing Submissions

Toronto (City) v. Nawrocki and Zest For Living Etobicoke Inc., 2022 ONCJ 307 https://canlii.ca/t/jqb4c

During the height of the pandemic, a City of Toronto (City) by-law officer responded to a complaint that a non-essential business was operating contrary O. Reg 82/20 of the *Reopening Ontario Act (a Flexible Approach to COVID-19), 2020,* S.O. 2020 c. 17. Following an investigation, Zest for Living Etobicoke Inc. (Corporation) and Ms. Nawrocki its sole director, were charged. The director and Corporation pled guilty. A joint sentencing submission was put before and rejected by the Justice of the Peace (JP). The City appealed, arguing that the JP erred by rejecting the joint sentencing submissions.

HELD: Appeal granted.

DISCUSSION: The joint sentencing submissions put forward by the parties provided that the director receive a suspended sentence and a 6-month probation order, and the Corporation receive a fine of $5,000. The JP declined to impose the penalties, instead ordering a suspended sentence without probation against the director and lowering the fine of the Corporation from $5,000 to $3,000. The Supreme Court of Canada in *R v. Friesen*, 2020 SCC 9, provided that a Court can only intervene to vary a sentence when a sentencing judge made an error in principle that had an impact on the sentence. The Court found that the JP erred in imposing a suspended sentence without ordering probation against the director. The language in both the *Criminal Code*, RSC 1985, c C-46 and the *Provincial Offences Act*, grants the Court the power to suspend the passing of sentence and direct that the person convicted of the offence comply with conditions in a probation order. On consent the City sought a short probation period of only six months and the Court found this was an appropriate and fit sentence. As for the Corporation, the Court referenced *R v. Manca*, 2019 BCCA 280 where a sentencing judge's rejection of a joint submission was considered on appeal.

Ultimately the Court found that the sentencing judge erred in rejecting the joint submission as the one-month difference in time served between the joint recommendation and the sentencing judge's order could not be reasonably said to "leave reasonable and informed persons… to believe that the proper functioning of the justice system had broken down." Applying the same logic to the matter before it, the Court held that the JP should not have "tinkered" with the $5,000 joint sentencing submission and replaced it with a seemingly arbitrary $3,000 fine. The appeal was allowed. ML

DAY IN THE LIFE

NGHIEM DOAN,
City Attorney for
City of League City, Texas

A New Start in Texas

ML is pleased to introduce members of our IMLA community. Meet Nghiem Doan, City Attorney for the City of League City, Texas-

ML: Tell us a bit about yourself, starting with your early years—

ND: I was born in Saigon, Vietnam in 1973 and came to the US with my family in 1980. I think we entered the States as political refugees.

ML: What do you remember about the immigration experience?

ND: As a seven year-old, I was oblivious to legal considerations such as whether we were entering as asylum seekers or political refugees. I know that we spent nine months in two Indonesian refugee camps waiting for admittance to the US. The second of these camps was the Galang Refugee Camp, where refugees were housed until approved for resettlement.

ML: Where did you go after that?

ND: After receiving approval for resettlement, we were ferried to Singapore where we stayed for a week, then were flown to San Francisco (via Tokyo), and finally to Houston,



where my uncle lived, because he worked for NASA.

ML: And where did you grow up?

ND: Pearland, Texas (a suburb of Houston).

ML: Who were your inspirations growing up, and why?

ND: My parents were my inspiration. They demonstrated courage to flee a communist regime that had taken over their homeland. They showed me what it means to work hard as they were rebuilding their lives once we got to the US. They taught me and my siblings the importance of education and how it unlocks endless possibilities.

ML: What was your favorite school subject?

ND: Math (it's an Asian thing…)

ML: So how did you end up going to law school, and where did you go?

ND: I discovered that I didn't like engineering! I received a BA from the University of Texas, and my JD from the University of Houston Law Center. I later earned an MA in Public and Private Management from the University of Houston at Clear Lake.

ML: What has been your career path since graduating from law school?

ND: I have worked exclusively as in-house counsel for municipalities, beginning in 1999 with the City of Pearland. I learned a lot in that role about managing legal challenges faced by a rapidly growing city, including economic development, land use, real estate transactions, and employment issues. It was great experience for my move to League City in 2015.

ML: What does being a local government attorney mean to you?

ND: It means doing the people's work, serving my fellow citizens at the level of government that actually impacts them the most. I know that

my client trusts me enough to be their voice, and therefore I repay that trust by serving my client to the best of my abilities.

ML: Have you visited Vietnam since you left?

ND: No, I've never been back, although I would like to visit.

ML: What do you think about when you think of Vietnam and what it is to be Vietnamese? Do you continue any Vietnamese traditions or celebrations?

ND: Because I left Viet Nam at such an early age (seven), I don't have much memory of the physical place itself, certainly not any innate feeling that it is my home country. Therefore, my construct of being Vietnamese comes more from being around my family, my relatives, and engaging in activities that I identify culturally as Vietnamese. Houston has a large Vietnamese population, so there is a "Vietnam-town" area of the city, where we often go enjoy authentic Vietnamese cuisine, visit the temple on days of memorial for deceased loved ones, or to observe Tet celebrations. Because Vietnamese people tend to push their children into health professions (doctors) or science (engineers), people like myself who came to the U.S. as children tended to gravitate to those fields. I have seen that trend change, as more U.S.-born children of immigrants are now entering the legal profession. It makes me proud that I am part of the first cohort of Vietnamese attorneys.

ML: How can local governments be more inclusive to Asian Americans, in the community and the legal field?

ND: My experience with local governments is that they are already inclusive to Asian Americans as employers, both in legal and nonlegal fields. An area for improvement is in community events--I never see commemoration of an Asian holiday or day of observance. But I realize that I've only lived in smaller cities without a sizable Asian community that would really appreciate such events. **ML**









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INTERNATIONAL

LAND USE REGULATION IN SPAIN AND THE UNITED STATES

By: David Warner, Principal Counsel,
Maryland-National Capital Park and Planning Commission,
Upper Marlboro, Maryland

Despite significant differences in their legal systems and historical development, Spain and the United States regulate the use and development of land in remarkably similar ways. Each country follows a decentralized model where land use laws and regulations are primarily the responsibility of local government with the judiciary acting as interpreters and arbiters. Regional bodies are authorized to develop plans that guide municipal control through authority granted by each country's constitution or national legislature. When land use policies are imposed by the central government, they are generally targeted to areas of specific concern, such as the environment, public safety, or social welfare.

Efforts at land use planning and policy existed long before Spain became the unified country that exists today. In the early 18th century, for example, ad valorem taxation was a feature of life in the Kingdom of Aragon under Spanish King Philip V and municipal ordinances in Madrid regulated building construction. Similarly, in the future United States, those hearty souls who settled Jamestown in 1607 were offered land titles before the decade was out, assuming they survived, and lands were platted in Cambridge (Newtown), Massachusetts as early as 1633. The all-encompassing authority of the Crown in both countries did not obliterate private ownership and development; rather, the emergence of international trade (mercantilism) promoted entrepreneurship and the advancement of the individual. Through the influence of philosophers such as Thomas Hobbes, John Locke, and Adam Smith, central authorities recognized the incentives inherent in the private ownership of land and the resultant need to regulate how such land would be used to best advance the monarch's interests.

In the 19th century, however, increasing urbanism accompanied by the Industrial Revolution imposed new demands on cities due to activities on private property that impacted others. Backed by a supportive judiciary, nuisance laws, restrictive covenants, prohibitions on the location of offending uses, and health and safety codes emerged in the United States as methods for advancing public welfare through exercising greater governmental control over how private property was used. In Spain, where monarchical and republican forms of government traded places throughout the century and industrial development was slow to take place, larger cities such as Madrid and Barcelona regulated building construction methods and, in early efforts at zoning, limited locations where offending uses could be conducted.

In the 1920s, the administration of Spanish Prime Minister Primo de Rivera introduced a broad-ranging set of municipal regulations intended to establish greater control and efficiency over local government. The regulations formally introduced provisions for zoning authority that were further expanded in the 1930s with the introduction of regional planning such as Catalonia's 1932 "Zoning Distribution Plan." At the same time, in 1926, the United States Supreme Court was validating the many municipal zoning ordinances adopted by cities in the first two decades of the 20th century setting in motion the sophisticated array of modern land use regulations prevalent in American society today.

The Spanish Civil War (1936-39) briefly interrupted the development of further land use policy in Spain and almost 40 years of Francoist dictatorship centralized government authority. Surprisingly, land use planning was one area where local decision making was afforded some independence. In 1956, the regime introduced the National Land Use Act prioritizing the regulation of agricultural land and allowing development through the approval of urban plans. Instead of expropriating land, the government sought to give local communities discretionary authority over where development would best occur. Although it eventually failed to achieve its goals, with few plans adopted and land use decisions remaining extremely political, the law was considered forward-thinking for its time and is still considered

the foundation of modern land use law in Spain. Land use policy in the United States, meanwhile, was becoming more and more decentralized in the 1950s, especially as Americans began leaving cities for newly built subdivisions. These residential communities, often transforming former agricultural lands, demanded new or expanded public services and municipalities turned to developers to fund them. Subdivision regulations and plans, often adopted by newly incorporated municipalities, required developers to fund the schools, parks, streets, and utilities necessary to serve the many new residents.

In the 1960s and early 70s, Spain experienced rapid industrialization that substantially transformed its society and culture with large parts of its population relocating to cities and creating the same planning problems that had bedeviled American cities in the early part of the century. The death of Francisco Franco in 1975 created further uncertainty as to which direction land use authority, and more importantly all government authority, would advance in the future. Spain chose to return to a democratic form of government and the new constitution of 1978 introduced a quasi-federal form of government perfect for reinvigorating the local control that had been intended by the 1956 Act.

Today, similar to the United States, with its federal government, states, counties, and municipalities governing the use of land, Spain has four levels of government led by a national government, 17 autonomous communities (Comunidades Autónomas), 50 provinces, and approximately 8,000 municipalities. Like the United States, each level of government plays a role in the regulation of land use, with the greatest control at the municipal level advancing urban plans approved by each autonomous community. Autonomous Communities, for example, define the requirements for the development of suitable and unsuitable land and the municipalities determine what properties satisfy those definitions and administer them accordingly. The United States follows a similar path, with planning power reserved to the states that then delegate to counties and municipalities, or through constitutional home rule, the authority to effectuate land use plans, adopt zoning, subdivision and related ordinances, and the power to administer and enforce those laws. Both national governments, however, still intervene to varying degrees in areas of national and regional concern that can impact how local land decisions are made. Nowhere, perhaps, is this more prevalent than in the area of environmental law where the United States Congress, for example, has enacted numerous laws protecting air, water, endangered species, and marine life as well as the remediation of contaminated sites and the regulation of solid waste. In Spain, comparative national legislation such as the Land Use Act of 2007 mandate that development projects assess the impacts of projects on sustainability while other national laws require the evaluation of flood risks or prohibit development altogether in areas deemed natural or technological risks.

Unlike the United States, however, Spain is more closely tied to its international neighbors through its membership in the European Union. While the EU has no express authority to govern land use in its member states, its directives can impact a member's land use laws that are deemed to have extraterritorial impact. For example, the EU's Strategic Environmental Assessment Directive requires member states to integrate environmental assessments into their planning processes at the earliest possible stage to ensure more sustainable development. That authority was evident in the adoption by Spain of the 2007 Land Use Act that carried out the Directive's requirements.

Spain and the United States also regulate the impact of development on public facilities in different ways. One of the novel features of Spain's 1956 National Land Use Act, still applicable today, was the requirement that developers dedicate a fixed percentage of land to the municipality for public infrastructure and facilities no matter what impact the development may cause. In the United States, where impact fees and other exactions are required of developers in addition to the dedication of land, the Supreme Court has imposed limits on the ability of government to extract concessions based on principles of nexus and rough proportionality. Development agreements, however, are a popular vehicle in Spain for ameliorating the problems associated with the fairness of mandatory dedications.

Spain and the United States, of course, also operate under different systems of legal jurisprudence (civil vs. common law) that can impact how land use laws are evaluated. While an oversimplification, under Spain's civil law system, legal codes are the predominant authority and judicial decisions are generally subject to what the law says. Under common law, United States judges are bound by precedent and can apply judicially developed doctrines even where statutes are silent in order to achieve a fair result. In the area of land use law, for example, the aforementioned body

Continued on page 35

Amicus *cont'd from page 19*

time the Second Amendment was adopted or when the Fourteenth Amendment was ratified, instead noting that there was an "ongoing scholarly debate" on that subject.[30] In this case, the Court concluded that the historical evidence regarding the public understanding of the Second Amendment at both time periods supported its decision and it therefore did not need to resolve that debate.[31]

Conclusion

After touring over 700 years of history, where does that leave us? Although the Court provided clarity around *what* the test is (text, history, and tradition), the picture is far from clear as to what history is germane, how much historical evidence is necessary, and what constitutes a historical analogue, among other outstanding questions. Justice Breyer highlights this issue in his dissent in *Bruen,* when he critiques the majority's rejection of New York's historical arguments, explaining:

Some of the laws New York has identified are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here. But if the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York's law, what could? Sadly, I do not know the answer to that question. What is worse, the Court appears to have no answer either.[32]

Further muddying the waters on how the historical analysis should proceed, the joint dissent in *Dobbs* critiques the majority's historical analysis in that case for citing to laws dating back to the 13th century by quoting to the majority from *Bruen* (which was issued the day before), which stated: "Historical evidence that long predates [ratification] may not illuminate the scope of the right"[33] This posture evokes some obvious inquiry: What historical evidence is relevant? And should advocates scan their history books dating back to the Magna Carta?

Justice Barrett authored a concurrence in *Bruen* where she also points out unanswered questions, including what post-ratification time period would be relevant to determine the original public meaning. The majority in *Bruen* tells us that the most relevant historical evidence comes from the time of ratification of the right at issue – 1791 - or possibly at the time the Fourteenth Amendment was ratified – 1868 – when the Bill of Rights became applicable to the States. But it leaves open which of those two time periods is the most relevant, because in this case it found them both pointing in the same direction. Justice Barrett's concurrence indicated that in her view, historical evidence from the mid-to-late 19th century is not adequate to help determine the original meaning of the Bill of Rights.[35] But no other Justice joined her concurrence, so it is unclear if she would garner support for that position.

Finally, even if we knew which evidence was the most relevant (it seems evidence around either the Founding or ratification of the Fourteenth Amendment would fit the bill), Justice Breyer's dissent points out the practical limitations of this mode of analysis. As he notes, "[c]ourts are, after all, staffed by lawyers, not historians."[36] Ever the pragmatist, Justice Breyer points out that lower courts do not have the staff or resources to conduct this type of historical analysis. That may be true, but given the emphasis on text, history, and tradition during this Supreme Court term and in prior recent cases, lawyers and lower court judges may find themselves becoming armchair historians.

Police Pursuits *cont'd from page 13*

> lights. **The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness.** Instead, we lay down **a more sensible rule:** A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.[45]

The two reasons articulated here illustrate the tension that can exist among competing interests within constitutional parameters. Here, the conflict lies in protecting the public *from the criminals* while protecting the public *from dangers attendant to the attempt catch the criminals*. Police frequently face choices where they must very quickly evaluate a relatively safe course of action that is consistent with their mission of protecting the public. The perspectives from *Scott* might serve as a guide for other fact patterns aside from high-speed car chases.

IV. Standard for Liability

A. Deliberate Intent to Harm

County of Sacramento v. Lewis[46]

After responding to a call to break up a fight, Officer Murray Staff "saw a motorcycle approaching at high speed. It was operated by 18-year-old Brian Willard and carried Philip Lewis, respondents' 16-year-old decedent, as a passenger. Neither boy had anything to do with the fight that prompted the call to the police."[47] Officer Stapp and Deputy James Smith pursued the motorcycle.

The motorcycle and patrol car reached speeds up to 100 miles an hour, with Smith following at a distance as short as 100 feet; at that speed, his car would have required 650 feet to stop.

The chase ended after the motorcycle tipped over as Willard tried a sharp left turn. By the time Smith slammed on his brakes, Willard was out of the way, but

Lewis was not. The patrol car skidded into him at 40 miles an hour, propelling him some 70 feet down the road and inflicting massive injuries. Lewis was pronounced dead at the scene.[48]

The district court granted summary judgment, and the Ninth Circuit reversed, holding that "the appropriate degree of fault to be applied to high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security[.]"[49]

In reversing, the Supreme Court held: (1) plaintiff's allegation that the pursuit was undertaken with deliberate indifference to the passenger's survival was insufficient to state substantive due process claim;[50] (2) the Fourth Amendment reasonableness standard did not apply because a police pursuit is not a "seizure;"[51] and "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment[.]"[52] The Court concluded:

> Regardless whether Smith's behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, **it does not shock the conscience**, and petitioners are not called upon to answer for it under § 1983. The judgment below is accordingly reversed.[53]

Without deliberate intent to harm, officers are generally protected from federal liability in high-speed pursuits.

B. Spectrum of Culpability

***Sauers v. Borough of Nesquehoning*[54]**

In May 2014, Officer Stephen Homanko was traveling southbound on Route 209 in the Borough of Nesquehoning, a small town in eastern Pennsylvania, when he observed a driver in a yellow Dodge Neon in the northbound lane committing a minor traffic offense. Homanko turned around and began pursuit.[55] Considering that by the time Homanko could have slowed and turned around to head northbound, the traffic offender could have put significant distance between them, Officer Homanko radioed ahead to a neighboring jurisdiction and requested that officers there stop the Dodge.[56] Homanko continued the pursuit and chased the vehicle at speeds over 100 miles per hour.[57] It appears that the chase subject might have been so far ahead of Homanko that he was unaware that he was being pursued. This suggests that the driver was not actively fleeing.

Officer Homanko never caught up with the driver of the Dodge. Instead, he lost control in a curve, went into a spin, crossed the center line into oncoming traffic, and crashed into a different vehicle, which contained Michael Sauers and his wife, Carola R. Sauers.[58] The crash seriously injured Mr. Sauers and killed his wife.[59]

Homanko was charged and pleaded guilty to vehicular homicide, which required proof of "reckless or grossly negligent driving, and reckless endangerment."[60] Sauers brought this Section 1983 suit based on a "state-created danger" theory.[61] Homanko filed a motion to dismiss on grounds that Sauers "did not plausibly allege a state-created danger claim" and on grounds of qualified immunity.[62]

The district court denied Homanko's motion, concluding "that the law was clearly established in May 2014 that 'any reasonable officer would have known that pursuing a potential traffic offender in excess of 100 miles-per-hour under the[] circumstances [alleged in the complaint] gives rise to a state-created danger claim."[63] On appeal, the Third Circuit focused on that issue, reasoning:

> Homanko has not appealed the District Court's determination that the complaint **adequately describes a constitutional violation**, and for good reason. The pleadings describe a police officer driving at speeds over 100 miles-per-hour on a two-way, undivided road to catch someone who had committed a minor traffic infraction. **There was no emergency at all**, and Homanko **likely did the most that was warranted when he radioed the police in a neighboring jurisdiction to stop the offender.** His **hyper-aggressive decision** to chase the Dodge cannot be justified.[64]

But then the court said:

> Nonetheless, to determine whether his conduct violated a clearly established constitutional right, we must take the time to define that right and explain why the conduct violated it.
> We accordingly define the right at issue here as one not to be injured or killed as a result of a police officer's reckless pursuit of an individual suspected of a summary traffic offense when there is no pending emergency and when the suspect is not actively fleeing the police.[65]

The court held that this right was not clearly established at the time, but now it is.[66] The court vacated the district court's order and held that Officer Homanko was entitled to qualified immunity.[67]

The Third Circuit in *Sauers* recognized a spectrum of culpability based upon the intensity of the situation and the amount of time that an officer has to deliberate:

Split-second actions taken in a "hyperpressurized environment" will not shock the conscience unless the officer has an intent to cause harm."[68] This category is most deferential to the officer's discretion.

"Next are actions taken within a time frame that allows an officer to engage in hurried deliberation[,]" which will shock the conscience if the actions "reveal a conscious disregard of a great risk of serious harm."[69] This is the middle category, less deferential to the officer's decision.

"Finally, actions undertaken with

Continued on page 30

Police Pursuits *cont'd from page 29*

'unhurried judgments,' with time for 'careful deliberation,' will be held to shock the conscience if they are 'done with deliberate indifference.'"[70] This category is strictest in terms of expectations on the officer.

The question of what it takes to shock the conscience for purposes of liability will be a question of law, but it will depend upon the facts of each case. The Third Circuit also had allowed the plaintiff to proceed on a substantive due process claim under the Fourteenth Amendment based on a state-created danger theory. But since the law was not clearly established in Third Circuit until this case, the defendant officer was entitled to qualified immunity.[71]

Conclusion

High-speed police pursuits are very risky for the officers, for innocent bystanders, and for the fleeing suspects. Officers' duty to enforce the law and to protect the public presents challenges that private citizens will almost never have to face. Some situations require split-second judgment, and the law generally protects the officers even if they make a reasonable mistake. In evaluating objective reasonableness, courts will consider the relative culpability of those who are put in harm's way, with a greater protection for the innocent third parties and for the officer than for a fleeing felon. Unintended collisions, even with fatal injuries, are not enough to overcome the officer's qualified immunity. Plaintiffs must plead and show that an officer engaged in conduct that was objectively unreasonable in light of clearly established law. That is a high burden for a plaintiff, and well-trained officers will rarely conduct themselves in a manner that will expose themselves of their municipal employers to liability for serving the public and enforcing the rule of law. ML

Notes

1. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." 42 U.S.C. § 1983.
2. *See, e.g.*, Richardson v. McKnight, 521 U.S. 399, 407-12 (1997) (listing three purposes of qualified immunity).
3. Pearson v. Callahan, 555 U.S. 223, 243 (2009).
4. Vincent v. City of Sulphur, 805 F.3d 543, 547 (5th Cir. 2015) (*citing Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).
5. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 n.55 (1978).
6. *Id.* at 692-95.
7. Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 403 (1997).
8. *Brown*, 520 U.S. at 415.
9. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989).
10. *Id.* at 391-92.
11. 550 U.S. 372 (2007).
12. *See, e.g., Mullenix v. Luna*, 577 U.S. 7 (2015).
13. 577 U.S. 7 (2015) (Chadrin Mullenix was the Texas State Trooper who fatally shot fleeing suspect Israel Leija, Jr.; Beatrice Luna was the representative of Leija's estate.)
14. *Id.*
15. *Id.* at 8.
16. *Id.*
17. *Id.* at 9.
18. *Id.* at 9-10.
19. *Id.* at 18.
20. *Id.* at 19.
21. 550 U.S. 372 (2007).
22. *Id.* at 374-75.
23. *Id.* at 375.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 375-76.
29. *Id.* at 377-78.
30. *Id.* at 378-79.
31. *Id.* at 379-80 (internal footnote omitted). The Supreme Court also included this link to the 16-minute video on the Court's website: http://www.supremecourtus.gov/opinions/video/scott_v_harris.html. A six-minute version of the video is available on YouTube: https://www.youtube.com/watch?v=qrVKSgRZ2GY.
32. *Id.* at 380-81.
33. *Id.* at 384 (emphasis added; internal footnote omitted).
34. 572 U.S. 765 (2014).
35. *Id.* at 768.
36. *Id.* at 769.
37. *Id.*
38. *Id.* at 770 (internal citations omitted).
39. *Id.* at 777-78.
40. *Mullenix*, 577 U.S. at 9.
41. *Scott*, 550 U.S. at 375.
42. *Plumhoff*, 572 U.S. at 769.
43. *Cf. Orn v. City of Tacoma*, 949 F.3d 1167 (9th Cir. 2020) (distinguishing *Mullenix, Scott*, and *Plumhoff*):

> Clark has not argued that his use of deadly force was justified on the theory that permitting Orn to escape could have posed a threat to the safety of the general public. Nor is there any basis in the record for making such an argument. **A fleeing suspect's escape can pose a threat to the public when police have probable cause to believe that the suspect has committed a violent crime**, see *Garner*, 471 U.S. at 11, 105 S.Ct. 1694, but neither of the offenses for which Orn was wanted involved any sort of violence. **Such a threat can also exist when the suspect has driven**

in a manner that puts the lives of pedestrians or other motorists at risk, as by leading officers on a high-speed chase. *See Mullenix v. Luna*, __ U.S. __, 136 S. Ct. 305, 306, 309, 193 L.Ed.2d 255 (2015) (per curiam) (suspect drove at over 100 miles per hour and threatened to shoot police officers unless they abandoned the pursuit); *Plumhoff*, 572 U.S. at 776, 134 S.Ct. 2012 (suspect swerved between congested traffic lanes at speeds exceeding 100 miles per hour); *Scott*, 550 U.S. at 380, 127 S.Ct. 1769 (suspect engaged in "a Hollywood-style car chase of the most frightening sort"). **In such cases, officers have an interest in terminating the suspect's flight because the flight itself poses a threat of serious physical harm to others.** But to warrant the use of deadly force, a motorist's Prior interactions with police must have demonstrated that "he either was willing to injure an officer that got in the way of escape or was willing to persist in extremely reckless behavior that threatened the lives of all those around." *Latits*, 878 F.3d at 548 (internal quotation marks omitted).

Id. at 1176-77 (emphisis added).
44. 550 U.S. at 372 (2007).
45. *Id.* at 385-86 (internal citation and footnote omitted; emphasis added).
46. 523 U.S. 833 (1998).
47. *Id.* at 836.
48. *Id.* at 837.
49. *Id.* at 838.
50. *Id.* at 841.
51. *Id.* at 843-44.
52. *Id.* at 854.
53. *Id.* at 855 (emphasis added).
54. 905 F.3d 711 (3rd Cir. 2018).
55. *Id.* at 715.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 715-16.
63. *Id.* at 716 (brackets in original).
64. *Id.* (emphasis added).
65. *Id.* at 716-17.
66. *Id.* at 715 ("We hope, however, to establish the law clearly now.").
67. *Id.* at 718-19, 723.
68. *Id.* at 717 (citing *Haberle v. Troxel*, 88 5 F.3d 170, 177 (3rd Cir. 2018).
69. *Id.* (internal quotation marks omitted) (citing *Haberle*, 885 F.3d at 177).
70. *Id.* (citing *Haberle*, 885 F.3d at 177).
71. *Id.* at 723.

Land Use In Spain *cont'd from page 25*

of nuisance law especially prevalent in 19th century United States, both public and private, is a judicially developed common law tort enforceable by private actors absent of any applicable statute. As Lourdes Morate Martín noted, however, in the July-August 2021 issue of Municipal Lawyer, the distinction between civil and common law is lessening in Spain as a result of globalization.

The fact that two countries with different histories, languages, and cultures implement land use systems of such similarity reflects a theme common to people throughout the world: the desire for local control of land use decisions. This may stem from the fact that the impacts of development are felt most significantly by those in the surrounding community who, therefore, have the greatest interest in adopting laws to achieve the community's goals. As issues such as environmental sustainability, affordable housing, and social cohesion take on national significance, the evolution of land use laws in Spain and United States will help inform how solutions to such momentous issues can best be implemented.

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First Amendment *cont'd from page 9*

Identifying Protected Speech.
Not all speech is entitled to constitutional protection. For example, fighting words, obscenity, and threats all fall outside many constitutional protections.[16] The government may generally regulate unprotected speech provided the regulation does not discriminate by viewpoint.[17] "A law that discriminates on viewpoint not only discriminates based on content but also chooses a side concerning the regulated speech."[18] Prior to joining the Supreme Court, Justice Kagan used the following example to articulate the difference between content discrimination versus viewpoint discrimination: a content based law would prohibit using a billboard for political candidates, while a viewpoint-discriminatory law would outlaw using a billboard for Democrats.[19] In examining whether speech regulations comply with constitutional requirements, it is essential to understand whether the speech in question is protected speech.

Masterpiece Cakeshop failed to further clarify what speech is entitled to constitutional protection. Many prior decisions concluded that artistic expression does not need to include words or symbols to express a message, but not every message is constitutionally protected. The Supreme Court decided not to address whether cake decorating and similar artistic expression constitute "speech" and deserve First Amendment protection. The Court also elected not to address whether the Government can compel a business to engage in this form of expression. Further clarification on what constitutes protected speech awaits future case law developments, including in *303 Creative LLC v. Elenis*, involving a Colorado wedding website designer who refuses to serve LGBTQ nuptials, and prudent attorneys will advise their clients accordingly.

Identifying Commercial vs. Non-commercial Speech.
Whether speech is "commercial" can impact the constitutionality regulations, because commercial speech is entitled to less constitutional protection than non-commercial speech. Content-based regulation of commercial speech generally must withstand only intermediate scrutiny, and commercial speech receives different treatment in other respects as well. For almost 40 years the *Central Hudson* test has governed commercial speech.[20] To satisfy *Central Hudson* a restriction on commercial speech must meet the following four elements: (1) the speech at issue must concern lawful activity and must not be misleading; (2) the asserted government interest must be substantial; (3) the regulation must directly advance the governmental interest asserted; and (4) the regulation must not be more extensive than is necessary to serve that interest.[21]

Secondary Effects Doctrine.
The secondary effects doctrine says that a time, place, or manner regulation that targets the secondary effects of speech rather than targeting the speech itself only needs to satisfy intermediate scrutiny. "When the government enacts a content-neutral regulation on a class of conduct, citing the harmful secondary effects related to that conduct, i.e., the subsidiary effects or 'non-communicative impact' of the speech, courts presume that the government did not intend to censor speech, even if the regulation incidentally burdens particular instances of expressive conduct."[22]

A best practice for attorneys advising clients on secondary effects doctrine issues is to confirm whether a strong legislative record exists evidencing the purpose of reducing undesirable secondary effects rather than a desire to suppress protected speech.

First Amendment Audits.
First Amendment audits should not cause concern or anxiety for government staff familiar with the standards governing such encounters, which involve individuals or groups that film on government property to test their rights to video or enter a public space. Auditors often know their rights regarding entry, the right to film on government property, when they need to provide identification, and various other First Amendment rights. Confrontational audits where government employees ask the auditors to leave or otherwise interfere with the audit are often posted online.

Almost all First Amendment audit problems are preventable with proper training and planning before the audit takes place. For example, the right of entry and limitations on free speech can depend on the type of property involved. Public forums, designated public forums, and nonpublic forums may implicate different standards and rules governing the ability to enter the property and the free speech rights ordinary citizens may enjoy.

Public forums are areas that have been traditionally used for expressive activity like assemblies. Examples of public forums include streets, sidewalks, and public parks. Speech can be regulated in public forums by using reasonable time, place, and manner restrictions that are content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Designated public forums include areas the government has designated for use by the public as a place for expressive activity. Examples of designated public forums include municipal theaters, and meeting rooms at state universities. Speech can be regulated in designated public forums by using reasonable

time, place, and manner restrictions. Content based restrictions on speech in designated public forums must be narrowly tailored to achieve a compelling government interest.

Nonpublic forums include property that by tradition or designation is not a forum for expressive activity, and some public property is not a forum at all. Examples of nonpublic forums include airport terminals and polling places. Speech can be regulated in nonpublic forums by using reasonable time, place and manner restrictions, and courts have allowed limitations that prevent employees from being interrupted while performing their work on public property.

Before an audit takes place nonpublic forums and other restricted areas such as garages, offices, workspaces, and hallways should be identified and marked. For example, posting signs that say "employees only," "authorized personnel only," or "no admittance without official business" will eliminate many potential confrontations involving auditor access to non-public areas of your buildings. Employees should be educated on the limited access to these areas, and access restrictions should be consistently applied. Doors should be closed and locked, and windows should be secure.

Once buildings have been properly posted, the next step is to ensure staff is properly trained. Employees should not overreact, attempt to seize recording devices, or otherwise interrupt visitors that are not committing any crimes such as attempting to enter areas posted as "restricted" or otherwise causing a disturbance. Provided auditors are not breaking laws or creating a disturbance a best practice is to simply leave them alone. If an employee asks if they need help and they say "no" then no additional engagement is necessary.

Some auditors seek to provoke a response, but even if an auditor's intentions are not pure that does not negate their right to enter and film in public areas of your buildings. Training employees on issues related to First Amendment audits will ensure that your community avoids videos containing messy confrontations with your staff being posted online, will help avoid lawsuits against your community, and perhaps most importantly, will ensure that the rights of visitors to your buildings are not violated.

Conclusion.

This article contains a summary of some important issues to consider regarding laws and practices impacting speech, and some best practices for managing First Amendment audits. The discussion of the topics is not exhaustive, and speech-regulation analysis is often fact specific. Prudent municipal lawyers will take the time to ensure their communities' laws and practices comply with constitutional requirements so that they can advise their clients accordingly. ML

Notes

1. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1584 (2022).
2. Kennedy v. Bremerton School Dist., 142 S.Ct. 2407 (2022).
3. Pleasant Grove City v. Summum, 555 U.S. 460, 469, 129 S. Ct. 1125, 1132 (2009).
4. *Id.*
5. Citizens United v. Federal Election Comm'n, 448 U.S. 310, 130 S.Ct. 876 (2010).
6. Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 Fla. St. U. L.Rev. 765 (2015).
7. *Id.*
8. City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1466, 212 L. Ed. 2d 418 (2022)
9. Amanda Kellar, *Reed's Aftermath: Strict Scrutiny on Every Corner?*, Municipal Lawyer 22-23, 30 (October/November 2015).
10. Adam Liptak, *Court's Free Speech Expansion Has Far Reaching Consequences*, N.Y. Times (Aug. 17, 2015) available at https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html
11. Leslie Kendrick, *Content Discrimination Revisted*, 98 Va. L.Rev. 231, 237 (2012); *see also Free Speech Doctrine After Reed v. Town of Gilbert*, 129 Harv. L.Rev 1981 (2015).
12. Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753 (1989).
13. Packingham v. North Carolina, 137 S.Ct. 1730 (2017).
14. For an extended discussion on what constitutes speech for the purposes of the First Amendment *see* R. George Wright, *What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 Pepp. L.Rev. 1217 (2009-2010).
15. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S.Ct. 1719 (2018).
16. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
17. R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).
18. Anthony D. Lauriello, *Panhandling Regulation After Reed v. Town of Gilbert*, 116 Colum. L.Rev 1105 (2016).
19. *Id.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L.Rev. 413, 444-45 (1996).
20. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).
21. *Id.*
19. Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir. 2000).

Amicus *cont'd from page 28*

1. *See* New York State Rifle & Pistol Assn., Inc. v. Bruen, 597 U. S. __ (2022), Dobbs v. Jackson Women's Health Org., 597 U.S. ___ (2002), Kennedy v. Bremerton School Dist., 597 U.S. ___ (2002), West Virginia v. Environmental Protection Agency, 597 U.S. ___ (2002).
2. Harvard Law School, "The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes" (Nov. 25, 2015). Though she walked back that assertion in her dissent in *West Virginia,* 597 U.S. __ (2002) (Kagan, J. dissenting slip. op. 28).
3. *Bruen*, 597 U. S. __ (2022) (slip. op., at 10).
4. *Dobbs,* 597 U.S. ___ (2002) (slip. op., at 5).
5. *Kennedy*, 597 U.S. ___ (2002) (slip. op., at 23), *citing Town of Greece*, 572 U. S., at 576; *see also American Legion*, 588 U. S., at ___ (plurality opinion) (slip op., at 25).
6. District of Columbia v Heller, 554 U.S. 570, 595, 629 (2008).
7. *See Bruen*, 597 U. S. __ (2022) (slip. op., at 15-16).
8. *Id.* at 8. This Article focuses on this historical analysis in the decision, but local government attorneys should also take note of additional aspects of the holding, including the broader ramifications of the decision and limitations the Court put in place. First, it reiterated, again quoting *Heller,* that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 12, *quoting Heller,* 554 U.S. at 626. For example, the Court underscored that governments may still prohibit firearms from sensitive places, such as schools, government buildings, polling places, courthouses, and legislative assemblies, noting it was not providing an exhaustive list. *Id.* at 21. Though the Court did indicate that New York could not classify the entire island of Manhattan as a sensitive place. *Id.* at 22. To determine if another location was a "sensitive place," the Court explained that lower courts need only use "analogies to those historical regulations of 'sensitive places…" *Id.* at 21. However, the dissent notes the difficulty with this analysis, wondering whether subways, nightclubs, movie theatres, and sports stadiums could be classified as a sensitive place when there is "no obvious 18th- or 19th-century analogue." *See Bruen*, 597 U. S. __ (2022) (Breyer, J. dissenting slip. op. at 33). Those questions will need to be resolved in future cases. The Court also explained that there is historical support to prohibit the carrying of "dangerous and unusual weapons" though again those terms are not defined. *Bruen*, 597 U. S. __ (2022) (slip. op., at 12). And finally, both the majority and a separate concurrence by Justice Kavanaugh noted that the decision was not calling into question the constitutionality of the "shall issue" licensing regimes in 43 States. *Id.* at 30, fn 9; *Bruen*, 597 U. S. __ (2022) (Kavanaugh, J. concurring slip. op., 1).
9. *Bruen*, 597 U. S. __ (2022) (slip. op., at 24-25).
10. *Id.* at 11, *quoting Heller,* 554 U.S. at 599 (internal quotations omitted).
11. *Id.* at 16-17.
12. *Id.* at 17.
13. *Id.* at 18 (internal quotations omitted)
14. *Bruen*, 597 U. S. __ (2022) (slip. op., at 20).
15. *Id.* at 25.
16. *Id.*
17. *Id.* at 26.
18. *Id.*
19. *Bruen*, 597 U. S. __ (2022) (slip. op., at 26).
20. *Id.*
21. *Id.* at 32.
22. *Id.* at 33-34.
23. *Id* at 37-41.
24. *Id.* at 41-42.
25. *Bruen*, 597 U. S. __ (2022) (slip. op., at 26-27), *quoting Heller,* 554 U.S. at 605 (internal quotations omitted).
26. *Id.* at 27.
27. Id.
28. *Id.* at 52.
29. *Id.* at 59-60.
30. *Id.* at 29.
31. *Id.*
32. *Bruen,* 597 U. S. ___(2022) (Breyer, J. dissenting) (slip op., at 49-50).
33. *Dobbs,* 597 U.S. ___ (2002), Joint Dissent, at p. 13, *citing* New York State Rifle & Pistol Assn., Inc. v. Bruen, 597 U. S. ___, (2022) (slip op., at 26)
34. *Bruen,* 597 U. S. ___(2022) (Barrett, J. concurring) (slip op., at 2).
35. *Id.*
36. *Bruen,* 597 U. S. ___(2022) (Breyer, J. dissenting) (slip op., at 26).



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