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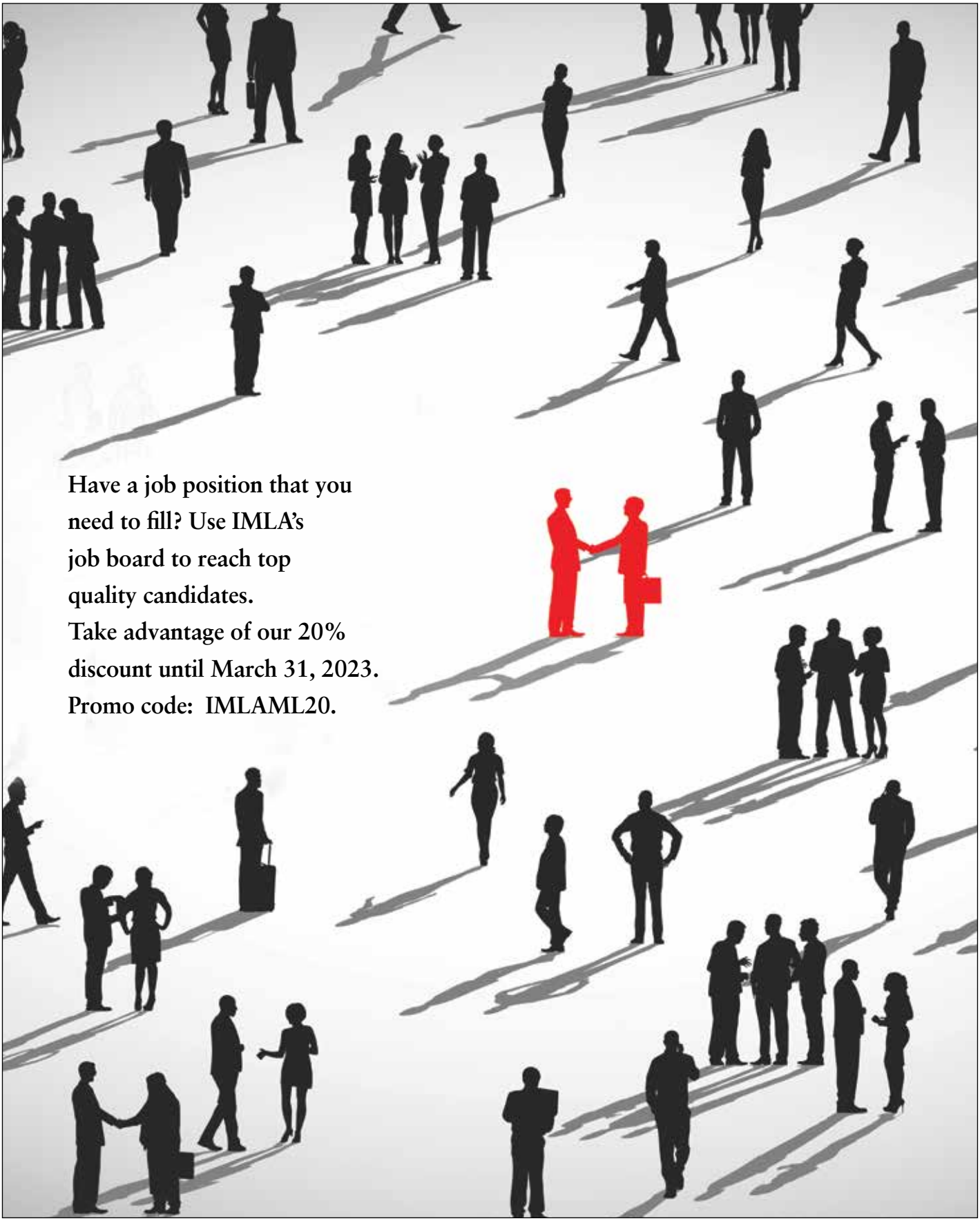
Saving the World: How Municipal Lawyers Can Help in the Fight Against Climate Change

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EDITOR'S NOTE



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

Artificial Intelligence

Mark Twain, who seemed to have an aphorism for every eventuality, framed the proposition thusly: "It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so." This observation is not only eminently quotable but serves as a proper entrée to this January-February 2023 *Municipal Lawyer*. We offer at the outset a message from IMLA President Lori Grigg Bluhm, who speaks firsthand about troubles discerning the known from the mythical: contested elections, disputed facts, and the challenges American democracy is now facing. And we place in prominence, as our cover story, a topic which also generates significant debate—climate change, in an article by Roger Horner, Senior Legal Editor for Thomson Reuters and formerly City Attorney for Brentwood, Tennessee. His note presupposes that mankind can take steps to counter the problem and calls on municipal attorney readership to play a role.

Our other feature is a near-treatise—some 6,000 words excerpted from a law review article more than five times longer—by Chapman College law professor Lawrence Rosenthal, who investigates why Section 1983 actions against police have not, by and large, resulted in major departmental reforms. In *Amicus*, IMLA Executive Director and General Counsel Amanda Karras discusses the increased burden on local government, at least in the Ninth Circuit, as the implications of *Boise* are fully manifested. Monica Ciriello, Director of Municipal Law and Licensing Compliance, Hamilton, Ontario, provides her usual *Inside Canada* look at recent cases of interest, this time from Ontario, Alberta, and British Columbia. And in *Listserv*, Brad Cunningham, IMLA Board member and Municipal Attorney, Lexington, South Carolina, gets down to the business implications of sports franchises in your town. Finally, we provide a glimpse of the recent Conference proceedings in Portland, and present to you the recipients of our 2022 IMLA Awards.

Returning to Twain's quip, today we are surrounded by disputed facts and realities. Elections and climate change join a lengthening list: contested national boundaries, solutions to global economic malaise, how to subdue a defiant virus. We choose here to refocus on a much less consequential diversity in human practice: it turns out that the logical salutation for an Editor's Note at this time—"Happy New Year"—is also subject to a variety of interpretations, depending on who is offering the greeting. Most may know that Rosh Hashanah begins in mid-to late September, or that the Chinese New Year occurs over a 15-day period beginning in late January, but those are merely two of the many alternates to a January One celebration. One source asserts that there are at least 26 different "New Years," from Diwali (late October to early November, for India's Hindus, Jains, and Sikhs) to Nyepi (Balinese New Year-early March in Indonesia), to Nowruz (Persian New Year, beginning March 20 or 21 for 4 days), to Songkran (mid-April in Thailand), to Igbo New Year (third week of February in Nigeria) and more. It appears that those who celebrate New Year's at midnight on December 31 may well be in the minority, worldwide.

Regardless, most IMLA members will presumably have counted January first as New Years Day. And most will no doubt have begun the year with at least one well-intentioned resolution. To that, another observer of the human condition, Oscar Wilde, has this comment: "Good resolutions are simply checks that men draw on a bank where they have no account." In the hopes that all of your checks are drawn on banks where you have an account, IMLA wishes you a great 2023.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



BY: LORI GRIGG BLUHM
City Attorney, Troy, Michigan
and IMLA President

Musings on the Mid-Term Election

I am proud to be a Michigan municipal attorney. In that role, I have been officially involved in the election process for over 30 years—more than 50 election cycles. I am fortunate that our municipality has non-partisan elections, and that I am appointed, and therefore not required to run for the City Attorney position. I remain publicly neutral on all candidates and issues, reject any and all pleas for endorsements or yard signage locations, and probably surprise a few people when they discover my political affiliation. I have worked several controversial federal, state, and local elections, including recall elections and elections with divisive initiative proposals-but none so troubling as this last mid-term election cycle. Beginning about 2016, there has been a pointed escalation in challenges to the integrity of our elections. My consternation is not with particular results or candidates, but with the distrust of a process so central to our political system.

Admittedly, Michigan may have had more acrimony than other states, since this was our first election utilizing the state and federal district map drawn by the Michigan Independent Citizens Redistricting Commission. This Commission was authorized by a citizen-initiated "Voters Not Politicians" ballot proposal passed in November 2018. Michigan's Constitution now empowers an independent Commission of thirteen citizens to perform this task. The new process, touted as a way to promote transparency and facilitate public engagement, was impeded by delay in the release of census data and by litigation and was scrutinized in the media. Despite these challenges, the Commission was able to complete its task in time for the 2022 election cycle.

The new maps drawn by the Commission significantly altered the boundaries and forced multiple incumbents to run against one other. Michigan lost some experienced officials through this process, and lost others to premature retirements. My belief is that the current political environment has led to significant turnover, since incivility is now acceptable and sometimes even encouraged. I suspect that this is also true in many other states.

Since roughly 2016, municipal attorneys have increasingly needed to respond to burdensome election-related lawsuits and freedom of information requests. We have provided guidance for multiple recount demands. We have assisted local clerks feeling apprehensive about the safety of election workers and having difficulty recruiting. We are also training for the possibility of election disruption, intimidation and/or violence. I believe this is happening nationwide; while I don't know if our Canadian colleagues face these same issues, I suspect elections there are engulfed in similar issues.

In my opinion, social media, coupled with a lamentable gap in education about the role and functions of government, has led to this erosion of civility. There has also been a lack of investment in investigative news reporting, leading many to use social media as their primary source of information.

Although we as municipal attorneys cannot avoid this reality, there are things that we can and should do. First, we must be models of courtesy, being agreeable even if disagreeing with others. Also, we are uniquely poised to provide civic education to the public, and should utilize every opportunity to do so. We should promote civility in all political discourse and support our elected and appointed officials in adhering to rigorous ethics codes. We should promote transparency in government at every level, and encourage participation in governance by a diverse and engaged constituency. And we should work to correct misinformation whenever possible.

I am writing this note just after receiving the results of a massive recount in Michigan, where allegations of systemic fraud were lodged. Results were challenged for two initiative proposals that had been overwhelmingly passed by the voters. As we frequently see, accusations of voter fraud garner headlines, but there is rarely any follow up to correct unfounded allegations: this recount revealed a mere 157 discrepancies in 700,000 ballots, and showed that a handful of persons voted both yes and no; rather than spoiling their ballot, they made an unsuccessful correction. Not even the most sensitive election equipment could capture this human error, and thankfully the recount result affirms the integrity of this most recent Michigan election. Although significant public resources were consumed to complete the recount, the results can be used to counter widespread allegations of voter fraud and start us on the path to reclaiming civility.

As we head into 2023, I reaffirm my determination to serve my community and my nation, doing what I can to promote civility, trust, and democracy. I know that my IMLA colleagues do the same, and it is an honor to be associated with each one of you. ML

Saving the World: How Municipal Lawyers Can Help in the Fight Against Climate Change

ROGER HORNER
Senior Legal Editor, Thomson Reuters Practical Law, Government Practice Service, Nashville, Tennessee



INTRODUCTION

Around the world, signs of climate change have been abundant in recent years. Extreme rainfalls, record heatwaves, devastating droughts, and widespread wildfires fill the news with alarming regularity. International efforts to slow down the effects of harmful greenhouse gases have been insufficient. However, the frequency and intensity of climate-related disasters have led to a call to action in both the public and private sectors.

In the United States, new federal legislation funding broad initiatives to reduce greenhouse gas emissions has passed. At the state and local level, some governments have adopted climate action plans and net zero emissions targets. Yet there remains much to do. Municipal lawyers who care about the environment and worry about climate change may think they have little or no ability to make a difference. However, they are in a key position to influence local government response to the climate crisis. Incorporating language into agreements and regulations governing procurement, project management, and land use can dramatically improve a municipality's environmental impact. This article provides information about the climate crisis and its potential local consequences for communities in the US. It also looks at ways local government attorneys can help carry out environmental goals and develop contracts and regulations that address climate.

I. What the Facts Show

While concerns about climate change have existed for decades, recent statistics and news accounts indicate that its effects are accelerating.

For example:

A. The ocean is warming. Since the mid-1990s, the heat content of the world's oceans has consistently exceeded the average levels for the preceding four decades.[1] Such a dramatic increase has ominous implications; once heat energy is absorbed in the ocean, it can continue warming the earth for decades.[2] (*See Fig.1 on next page.*)

B. Glaciers and ice sheets are melting. Eleven people died in July 2022 when a glacier collapsed in the Italian Alps due to a lack of winter snow and abnormally high summer temperatures, which combined to create unstable conditions. Himalayan glaciers have also shrunk dramatically; in Pakistan, accelerated glacial melt combined with monsoon rains in 2022 to create flooding that killed more than 1,300 people and left hundreds of thousands homeless. At the same time, losses from the world's largest ice sheet in Antarctica have doubled previous estimates over the past 25 years.[3]

C. Sea levels are rising. Higher sea levels create greater damage from storm surges, high tide flooding, coastal erosion, and wetland loss. Between 2000 and 2020, the frequency of coastal flooding more than doubled in places such as New York City; Norfolk, Virginia; Miami, Florida; and Charleston, South Carolina.[4] And rising sea levels are threatening the future in other parts of the world: the Maldives in the Indian Ocean, and cities such as Lagos, Nigeria; Dhaka, Bangladesh; Rotterdam, Netherlands; and Alexandria, Egypt.[5]

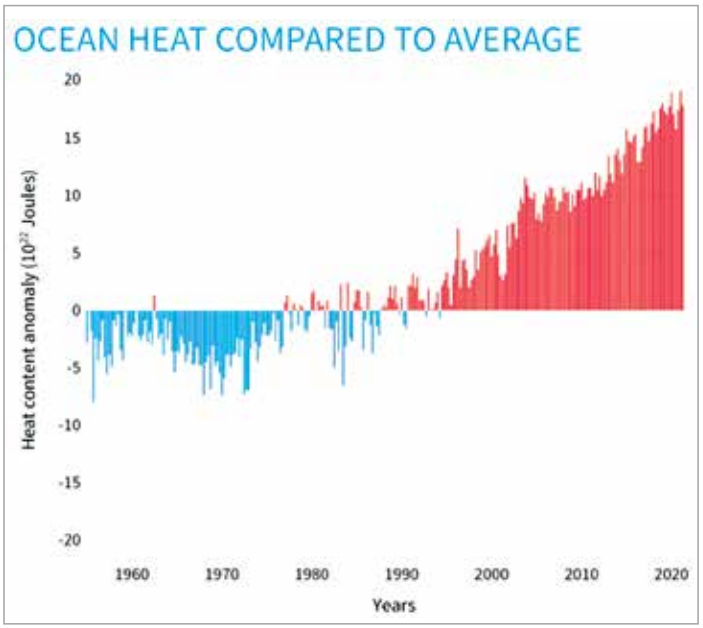

FIG.1

D. Temperatures are setting records. In 2022, new high temperature records were set in cities in:

- Australia in January;
- India in March;
- France, Norway, and Japan in June and the United Kingdom in July;
- China in July and August; and
- The US in June, July, and September.

The ten warmest Junes on record have all occurred since 2010, with June 2022 being the sixth warmest. [6]

E. Recent signs of climate change in the US.

1. Billion-Dollar Disasters.

According to the National Oceanic and Atmospheric Administration (NOAA), 20 separate weather and climate disasters hit the US in 2021, at a cost of $145 billion (see NOAA map below). The number of billion-dollar disasters in 2021 was second only to 2020, when 22 separate events occurred:[7]

2. Continuing Pattern in 2022.

Massive weather and climate disasters continued to hit the US in 2022, including events such as:

- A Nor'easter leaving more than two feet of snow in Boston in January.
- Flooding in June that closed Yellowstone National Park for the first time in 34 years.
- Massive wildfires in California in July.
- A drought covering more than 93% of Texas, causing water shortages and widespread loss of pastures, crops, and cattle.
- A thousand-year flooding event in Kentucky in late July and early August, resulting in 39 deaths, followed by flooding in August that shut down the municipal water system in Jackson, Mississippi.
- Back-to-back hurricanes in September, with Hurricane Fiona hitting Puerto Rico and Hurricane Ian flooding much of Florida before moving up the East Coast.

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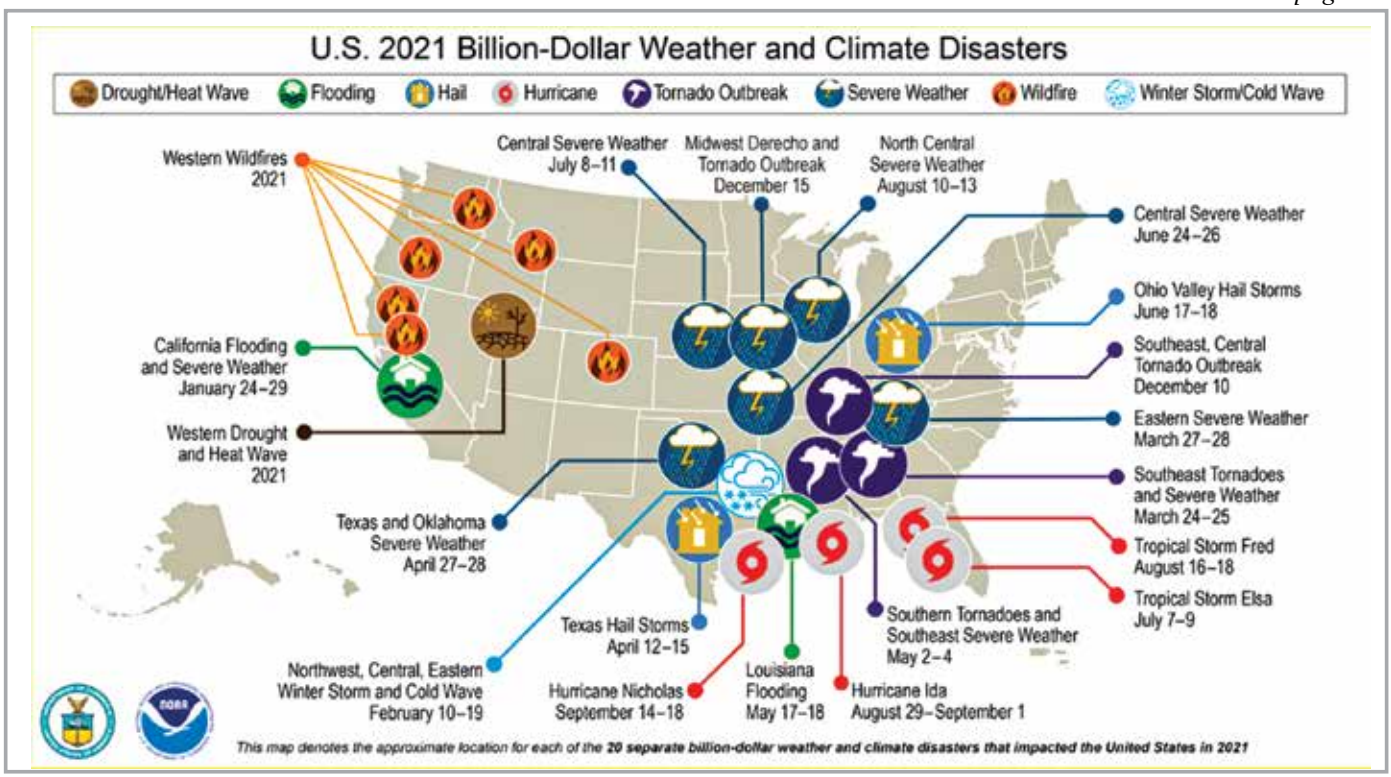
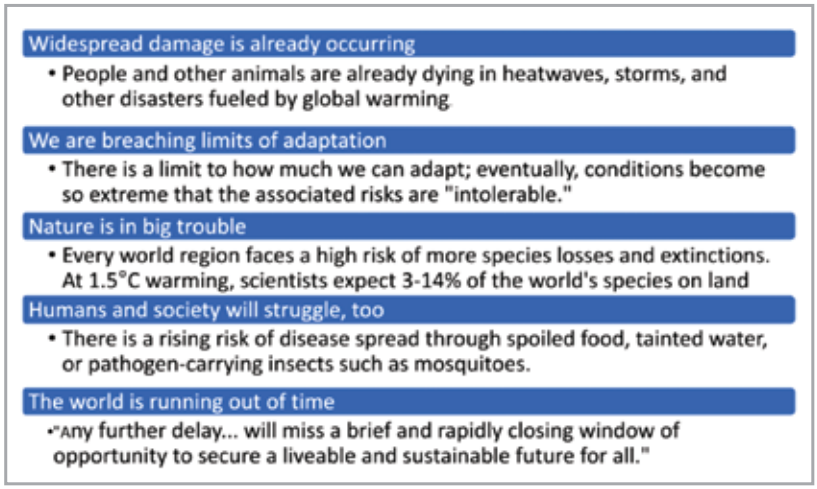


Climate *cont'd from page 7*

II. What the Future Holds

The Intergovernmental Panel on Climate Change of the United Nations (IPCC) issued its Sixth Assessment Report in 2022, calling for drastic action to ward off the increasingly dangerous impacts of climate change. Reuters News reported on key takeaways from the report, as shown below:[8]



A. The Paris Agreement and the Significance of 1.5° Celsius. In November 2016, the international treaty known as the Paris Agreement went into effect after it was ratified by 55 countries, including the US, that produce at least 55 percent of the world's greenhouse gas (GHG) emissions. The US withdrew from the Paris Agreement during the Trump Administration but re-entered it in 2021. Nearly 200 nations are now part of the Paris Agreement. Participants must periodically submit plans for curbing their emissions and report on their progress. Additionally, developed nations agree to help developing nations meet goals. Many municipal governments and hundreds of private companies across the world have also pledged to reduce their GHG emissions in furtherance of the Paris Agreement's goals.

The overall goal of the Paris Agreement is to:

- Limit global warming well below 2 degrees Celsius (3.6 degrees Fahrenheit) above pre-industrial levels
- Pursue efforts to limit the increase to 1.5 degrees Celsius (2.7 degrees Fahrenheit).

The planet is currently at 1.1 degrees Celsius above pre-industrial levels and scientists warn that the window is closing to reach the Paris Agreement's 1.5-degree goal. Given the frequency of climate disasters under current conditions, even an increase of 1.5 degrees will have major environmental and socioeconomic impacts. More concerning, the IPCC warns that if temperatures are allowed to increase by 2 degrees, the consequences will be extremely severe. For example:[9]

- 99 percent of the world's coral reefs will disappear, devastating the marine food chain.
- The West Antarctic ice sheet will be lost.
- Sea level rise will submerge large portions of coastal cities around the world.

B. The Effects on State and Local Governments. Mitigating climate change is difficult and costly. However, failing to take adequate steps will result in an economic, environmental, and human toll that far outweighs mitigation costs. State and local governments must be prepared to deal with problems such as:

- Rapid increases in sea levels. On average, NOAA predicts that sea levels along US coastlines will rise 10 to 12 inches.[10]
- High tide flooding. High tide flooding (HTF) occurs when ocean water at high tide covers low-lying areas. With rising sea levels, a full moon or changes in prevailing winds or currents can produce flooding that once only occurred during storms. HTF typically results in water spilling into streets and bubbling up from storm drains, requiring municipal response and remediation efforts. NOAA projects that the number of HTF days will increase dramatically in places such as those shown below:[11]

Location	High Tide Flood Days 2021	Projected 2050
Boston, MA	7	50-70
Baltimore, MD	8	65-105
St. Petersburg, FL	0	70-110
Corpus Christi, TX	4	110-150
San Francisco, CA	0	6-20

- **The disproportionate impact of weather disasters on minorities and lower-income populations.** While weather catastrophes can affect people of all races and income levels, where people live has a significant effect on their vulnerability. For example:[12]

  - Hurricanes threaten more counties with large African-American populations than any other community type.
  - Droughts disproportionately affect Hispanic populations in more rural areas.
  - Extreme rainfall events happen more frequently in largely African-American counties, working class counties, and blue-collar suburbs.

C. Climate Migration. As climate change and weather disasters make some areas increasingly dangerous, large segments of the population may shift to safer locations. In some cases in the US, hurricanes and wildfires have caused some residents to relocate to new areas, sometimes in another part of the country but sometimes relatively close. However, the likelihood, timing, and impact of mass migrations is difficult to estimate because:

- Migration may happen gradually in response to some climate issues and rapidly in response to others. Rising temperatures and droughts may result in a slow but steady pattern of population shifts, while more immediate catastrophes that result in widespread losses of life and property may cause a mass exodus.
- Even in areas threatened by adverse climate and weather events, many people are willing to accept the risks. For example, many coastal areas are still seeing significant growth and development, even as hurricanes happen with regularity and coastlines are retreating.

However, in planning for the future, communities may need to acknowledge the potential for:

- **Permanent migration away from the area.** Some parts of the world that are heavily populated may eventually become undesirable or even uninhabitable due to factors such as extreme temperatures or disappearing coastlines.
- **Temporary migrations and fluctuations.** Disasters that disrupt life and destroy homes may force residents to relocate. However, some may choose to return or the availability of affordable housing in a rebuilt community may attract new residents. For example, after a 2018 wildfire destroyed most of the town of Paradise, California, many of its residents had no choice but to move away. More recently, however, the town has seen a real estate boom, with both former residents and newcomers moving into new homes there.
- **Incoming migration.** People leaving areas due to climate-related causes may seek out places that will be relatively unscathed by climate change. A study published by ProPublica found that six of the ten counties with the least risks from climate change are in Vermont, while three are in Maine and one is in New York.[13] However, other factors can also influence individual decisions on where to relocate, including economic opportunities, healthcare availability, and proximity to family. In any event, some communities the US should expect to see population growth as a result of climate change.

D. Combining Manmade Hazards with Natural Hazards. In addition to understanding the ramifications of climate change, municipalities should consider how other hazards in or near the area can make adverse climate events even worse. For example, a natural hazard may trigger an accidental release of chemicals from a facility that makes, uses, handles, or stores hazardous substances. Out of 11,000 EPA-regulated facilities with extremely hazardous chemicals, 31% are in areas at risk for climate-related disasters:[14]

Facilities in Areas at Risk for Flooding, Storm Surge, Wildfire, or Sea Level Rise



E. Green Gentrification. Many cities have seen efforts to reclaim polluted areas for new development or provide climate-friendly features in urban residential areas. New green spaces, waterfront restorations, and other environmentally focused features can provide community benefits and enhance sustainability. However, they can also drive up property values and push lower income residents away. Even practical efforts such as elevating buildings and erecting seawalls to prevent losses from storm surges can attract residents with more money.

In east Boston, a carbon-neutral project provided a rehabilitated shoreline, stabilized seawalls, and waterfront apartments. However, the new development displaced former residents of the area and demand for residential units drove their prices above $1 million.[15] To avoid limiting green enclaves to wealthier occupants, new urban development will need to include a sufficient proportion of affordable housing units to address community needs.

III. Signs of Progress

A. New Climate Bill. In August 2022, the US Congress passed the Inflation Reduction Act (HR 5376), which includes almost

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Conflicts of Interest in Police Misconduct Litigation and What to do About Them

LAWRENCE ROSENTHAL,
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Civil actions for damages are arguably the leading vehicle for legal accountability in policing. Damages actions enable victims of police misconduct to act as private attorneys general with a financial incentive to unearth evidence of police misconduct.[1] Particularly important are actions brought pursuant to Title 42, § 1983 of the United States Code against those who deprive individuals of their rights under federal law.[2] Section 1983 imposes civil liability when public officials abuse their authority and thereby deprive individuals of their constitutional rights.[3] For example, the use of excessive force to effect an arrest by a police officer amounts to a violation of the Fourth Amendment's prohibition on unreasonable search and seizure and is actionable under Section 1983.[4]

Nevertheless, there is wide agreement that damages remedies have done little to curb police misconduct.[5] A variety of explanations have been offered, such as the strength of the qualified immunity defense available in actions brought under Section 1983 against state and local officials.[6] Yet the leading empirical study of qualified immunity found this defense is usually unavailing or unsuccessful, and plaintiffs obtain favorable judgments or settlements in a majority of Section 1983 cases brought against law enforcement officials.[7]

A perhaps more plausible explanation for the relative inefficacy of civil rights litigation for curbing police misconduct is suggested by Joanna Schwartz's study of twenty-six police departments that had been subject to external review; she found: "[L]aw enforcement officials only rarely have information about suits brought against their departments and officers . . . . Even less frequently do law enforcement agencies investigate claims made in lawsuits, review closed litigation files, or consider the dispositions of cases."[8] This article focuses on what may be the most important reason that public employers rarely learn about evidence of official misconduct unearthed in Section 1983 litigation—the ethical obligations of attorneys who represent police officers named as defendants in Section 1983 actions.

I. Ethical Obligations of the Officer's Attorney as a Roadblock to Accountability.

The general rule in tort law is that of *respondeat superior*—an employer is liable for the torts of an employee while acting within the scope of employment.[9] Section 1983 jurisprudence, however, does not permit plaintiffs to hold a public employer vicariously liable for the constitutional torts of its employees acting within the scope of their employment. In *Monell v. Department of Social Services of New York*,[10] the Supreme Court held that municipalities "may not be sued under § 1983 for an injury inflicted solely by its employees or agents," but, rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible for under § 1983."[11] The defense of qualified immunity, however, is not available to public employers sued under Section 1983 for customs or policies that cause deprivations of constitutional rights.[12] One might, therefore, suspect that civil rights plaintiffs might be willing to shoulder the burden of proving a custom-or-policy claim against an employer in order to avoid facing the

qualified immunity defense available only to individual defendants. The available data, however, is inconsistent with this supposition.

The most comprehensive examination of this issue is a study by Professor Joanna Schwartz, who reviewed the dockets of Section 1983 cases filed against police officers and other law enforcement officials in five judicial districts—the Eastern District of Pennsylvania, the Middle District of Florida, the Northern District of California, the Northern District of Ohio, and the Southern District of Texas, in 2011 and 2012. In her "docket dataset of 1,183 cases, ninety-nine cases (8.4%) were brought solely against municipalities and/or sought only injunctive or declaratory relief."[13] Thus, in more than nine of ten Section 1983 cases, individual public employees, entitled to assert the defense of qualified immunity, were named as defendants.

There seems to be good reason for plaintiffs to sue individual officers despite qualified immunity; that defense is usually unavailing or unsuccessful. Professor Schwartz found qualified immunity was raised in only 37.6% of all Section 1983 cases in which the defense was available,[14] and in those cases, qualified immunity was granted in full in only 12% of cases, and granted in part in only 5.9% of cases.[15]

Critically, the financial burden of liability is usually not experienced by individual public officials, but instead, by their employers. That is because police officers and other public employees frequently have the right to be indemnified for their legal costs arising from their conduct undertaken within the scope of employment. In their survey of state laws governing indemnification of public employees, Aaron Nielson and Christopher Walker found that nearly every state either requires or authorizes the indemnification of public employees for their legal costs arising from civil litigation based on acts within their scope of employment: twenty-three states require indemnification for state and local public employees, another thirteen require indemnification of state employees and, of these, eleven also authorize indemnification of local employees, five require indemnification of local employees only, and seven states authorize state and local governments to indemnify.[16] Indemnification of police officers and other public employees is also often required by collective bargaining agreements.[17] The ubiquity of indemnification has also been demonstrated by Professor Schwartz, who found: "[L]aw enforcement officers employed by the eighty-one jurisdictions in my study almost never contributed to settlements and judgments in police misconduct lawsuits during the study period."[18]

As part of their obligation to indemnify their employees for their legal costs arising from civil litigation, state and local governments are usually required or authorized to provide legal representation for their employees sued for acts within the scope of employment.[19] In her study, for example, Professor Schwartz found that "law enforcement officers are also almost always provided with defense counsel free of charge when they are sued," adding, "several government employees and plaintiffs› attorneys noted in their responses that officers are almost always represented by the city's or county's attorneys, or by attorneys hired by union representatives."[20]

The appointment of a lawyer to represent a police officer named as a defendant in civil litigation triggers the fiduciary duties owed by the lawyer to the officer. A lawyer's fundamental duty, of course, is to "zealously assert[] the client's position under the rules of the adversary system."[21] Thus, the officer's attorney must guard the interests of the client, not the client's employer. An attorney also has an obligation, by virtue of the attorney-client privilege, not to disclose confidential communications with the client made for the purpose of obtaining or providing legal representation.[22] Beyond that, a lawyer may not use any information obtained during the course of representing a client to the disadvantage of the client without that client's informed consent.[23] This obligation extends to information that is not provided by a client, nonconfidential, or otherwise protected by the attorney-client privilege: as the Modern Rules of Professional Conduct state, "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.[24] Nor may a lawyer paid by a public employer to represent an individual

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Lawrence Rosenthal, after graduating from Harvard Law School, where he won the Fay Diploma and was an editor of the Harvard Law Review, clerked for Judge Prentice Marshall of the United States District Court for the Northern District of Illinois and Justice John Paul Stevens of the United States Supreme Court. Professor Rosenthal entered the practice of law as an Assistant United States Attorney for the Northern District of Illinois, specializing in organized crime and public corruption prosecutions. Among other things, he brought the first racketeering case involving insider trading, and secured the longest sentence in the history of the district in an organized crime case (200 years). He subsequently joined the City of Chicago's Department of Law, where he was Deputy Corporation Counsel for Counseling, Appeals, and Legal Policy. In that capacity, he argued three cases in the United States Supreme Court, and supervised a large volume of complex litigation as well as legislative as policy matters. To his great embarrassment, Professor Rosenthal was named by Chicago Magazine as one of "Chicago's 25 Toughest Lawyers." Since then, he tries to be nicer. Professor Rosenthal joined the Chapman faculty in the fall of 2005. He also continues to engage in litigation in the United States Supreme Court and other appellate courts, usually on a pro bono basis.

public employee take direction from the public employer or otherwise act to the detriment of the individual employee who is, after all, the lawyer's client; the Model Rules provide that "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."[25]

The possibility that the interests of a police officer named as a defendant in Section 1983 litigation will diverge from the interests of the officer's employer is not remote. Section 1983 litigation involving allegations that a police officer has used excessive force, for example, may reveal information relevant to the question of whether the individual defendant has violated the excessive-force policies of the police department that employs the officer. Officers who use force in a manner that violates departmental policy, in turn, are likely to be exposed to a risk of internal discipline up to and including termination.[26] That reality gives rise to a potential conflict of interest between a police officer sued for misconduct and the department that employs the officer. In the course of representing an officer named as a defendant in a civil action alleging police misconduct, for example, the officer's lawyer may learn of information that, if disclosed to the officer's employer, might expose the officer to discipline for violating the department's policies.

Consider, then, the position of the attorney representing an officer in Section 1983 police misconduct litigation who learns of information, as a result of interviewing the client, conducting an investigation to defend the litigation, reviewing materials generated in discovery, or reviewing the evidence, that the plaintiff intends to present (or actually presents) at trial, which suggests that the police officer client has violated the excessive-force policy of the law-enforcement agency that employs the officer. In light of the attorney's obligation to protect the interests of the client, and the prohibition on disclosing even nonprivileged information adverse to the client, the attorney would be likely to conclude that the best course of action is to settle the lawsuit and avoid disclosing adverse information to the department that employs the officer. After all, given the ubiquity of indemnification, the client's financial interests are unlikely to be harmed by a settlement, but if the matter proceeds, there is a risk that information will come to the attention of the client's employer and could lead to discipline.[27]

Even if the case fails to settle and instead goes to trial, the attorney would retain an obligation not to disclose information to the officer's employer that is adverse to the client's interests. Indeed, the ethical obligations of plaintiffs' and officers' counsel may well align; as Professor Schwartz observed, "ultimately, plaintiffs' attorneys and officer-defendants often want the same thing—for the government to pay."[28]

The available empirical evidence, though limited, suggests that an information-flow problem exists. Professor Schwartz's finding that police departments rarely use information generated in litigation to assess policy and personnel, for example, suggests an information-flow problem.[29] Similarly suggestive is Marc Miller and Ronald Wright's conclusion, after surveying public records and published accounts, that there is a greater volume of settlements and judgments against officers in cases alleging police misconduct than can be explained by publicly available records, indicating that a substantial number of claims are likely resolved by settlements that the plaintiffs agree to treat as confidential:

> [M]any civil claims against police are resolved either before a case is filed, or through secret settlements and judgments sealed by courts. Police departments, cities and counties are settling strong cases, and perhaps even less strong cases, but they are requiring (and probably paying for) sealed agreements. In some places, it has become standard litigation strategy for cities to negotiate an agreement that binds the parties not to discuss the judgment and asks the judge to seal the discovery documents and the settlement agreement.[30]

It is hard to ignore the difference in information flow created by the absence of vicarious liability under Section 1983, as compared to areas of the law that apply the rule of *respondeat superior*. Under *respondeat superior*, tort plaintiffs can directly sue the deep-pocketed employer; indeed, there is little reason for a plaintiff to bother naming as a separate defendant the individual employee who allegedly engaged in tortious conduct. Attorneys representing entities vicariously liable for the torts of their employees, moreover, can advise their clients to undertake cost-effective reforms that reduce their exposure to liability, even if they involve disciplining individual employees. Attorneys for police officer defendants, in contrast, are obligated not to disclose this type of information to public employers, at least when it could lead to discipline, a denial of indemnification, or other adverse consequences for the attorney's client. It is therefore small wonder that civil litigation has been less than fully effective in inducing public employers to identify problem officers, and to undertake reform and discipline as warranted in order to address police misconduct.

II. Converting the Attorney for the Officer into the Attorney for the Employer.

Insurance law points the way toward reform. An insurer

ordinarily has a contractual right to control the defense of litigation against the insured; given that the insurer is the party with a financial stake in the litigation, it is eminently reasonable that the insurer reserves a right to control that litigation.[31]

An interesting variation on an insurer's right to control litigation against the insured is found in section 2-302 of the Illinois Local Governmental and Local Governmental Employees Tort Immunity Act:

> If any claim or action is instituted against an employee of a local public entity based on an injury allegedly arising out of an act or omission occurring within the scope of his employment as such employee, the entity may elect to do any one or more of the following:
>
> (a) appear and defend against the claim or action;
> (b) indemnify the employee or former employee for his court costs or reasonable attorney's fees, or both, incurred in the defense of such claim or action;
> (c) pay, or indemnify the employee or former employee for, a judgment based on such claim or action;
> (d) pay, or indemnify the employee or former employee for, a compromise or settlement of such a claim or action.[32]

Thus, the Illinois statute, taken literally, authorizes a local government to elect to appear in its own name and defend a civil action against its employee, through its own attorney. In that event, the local government's attorney has an attorney-client relationship with the local government, not the employee named as defendant.

Nothing in either Section 1983 or the professional obligations of lawyers forbids such an arrangement; there is, after all, nothing in Section 1983 jurisprudence or the professional obligations of an attorney that requires the attorney to establish an attorney-client relationship with the individual named as the party in the case for which that individual will be indemnified. For example, a lawyer is obligated to refrain from taking actions that will harm the interests of a "client." As long as the lawyer makes it clear that he or she is representing the officer's employer, not the officer, and that the communications between the officer and the lawyer are not privileged, no attorney-client relationship is created between an officer and the lawyer for a public employer that has been tasked with defending the lawsuit against a public employee.[33] Consider the approach suggested for the initial interview conducted by a lawyer for a municipality with a police officer named as a defendant in a civil case in order to avoid creating an attorney-client relationship between the attorney and the officer:

> Good afternoon, Mr. Police Officer. My name is Ms. Lawyer, and I am counsel for the Town of Reddirt. Before we begin, it is very important that you understand my role here today. I have been retained by the Town; I am the Town's attorney. I am not your lawyer. I arranged this meeting so I could find out what you know about the Traveler matter that might help me in giving the Town legal advice. Our conversation is not protected by an attorney-client privilege as between us, so anything you tell me I may convey to the Town. You are not required to answer any of my questions, and you have the right to retain your own lawyer before talking with me. Do you understand what I have just told you? Do you have any questions?[34]

In the regime authorized by the Illinois statute, the same admonition would be appropriate, except that the sixth sentence above would be slightly revised: "I arranged this meeting so I could find out what you know about the Traveler matter that might help me in representing the Town, which will conduct and pay for the defense of the lawsuit against you, and also pay the cost of any settlement or judgment against you in that lawsuit, as long as you cooperate with the Town as it defends the case against you."[35]

Although the Illinois formulation appears to be unique, and the decided cases supply no indication that police departments in Illinois have employed the statute along the lines discussed above (perhaps because applicable collective bargaining agreements may require police departments to supply officers with lawyers who represent them in actions arising from actions within the scope of employment), there is no reason why the duties of police departments to their employers could not be crafted along these lines. Moreover, although the Illinois statute is unique, it is far from the only jurisdiction that permits a public employer to take over the defense of an action against its employee. A California statute, for example, provides: "[U]pon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought . . . on account of an act or omission in the scope of his employment as an employee of the public entity."[36] The duty imposed by this statute would be discharged if a public employer directed its own attorney to defend to defend the action brought against the employee and thereby "provide for the defense" of the Section 1983 lawsuit.

To the extent that applicable statutes, ordinances, or collective bargaining agreements are not as broad as those in Illinois and California, other jurisdictions could amend applicable statutes, ordinances, or collective bargaining agreements to make clear that the duty to indemnify police officers is conditioned on the ability of the police department or other public employer to control the defense of the officer through its own attorney, holding a fiduciary duty to the employer.

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Climate *cont'd from page 9*

$375 billion in funding for tackling the climate crisis. Large portions of this funding will go toward renewable energy production and tax breaks that encourage consumers to buy new or used electric vehicles. Estimates show that by 2030, the legislation will help reduce the nation's GHG emissions by 42 percent from their peak levels in 2005. The White House's goal is to reduce emissions by at least 50 percent by 2030.

1. **Help for State, Local, and Tribal Governments.** The new climate legislation includes provisions that support state, local, and tribal efforts to reduce GHG emissions, such as:

- Funding for the first national "green bank," which can also be distributed to state and regional green banks. Sixty percent of this funding must support projects such as community solar and environmental justice programs for disadvantaged communities.
- Grant programs for:
  - urban forests and parks; and
  - water supply in places without reliable domestic water sources.
- Support for air pollution reduction efforts at ports, such as climate action plans, zero-emission technology, and new equipment.
- A clean heavy-duty vehicle program to offset costs of zero-emission transit buses, garbage trucks, and school buses.
- State rebate programs for homeowners achieving demonstrated energy savings, including those in affordable housing.

(See "Governing: What Does the Inflation Reduction Act Do for State and Local Government?"[16] For more information on the new act and how it benefits cities, see "Columbia Law School: Cities & The Inflation Reduction Act."[17])

B. State and Local Government Initiatives. Some state and local governments have taken their own measures to move toward net zero goals. In some cases, these actions came in response to the Trump administration's walk-back of environmental protections, while other initiatives have come more recently. Examples of these state and local actions include the following:

- Cities and counties have adopted climate action plans setting targets for GHG emission reductions, along with steps for achieving their targets.
- Fairfax County, Virginia's plan includes:[18]
  - green building commitments for new buildings;
  - retrofitting at least 100,000 housing units with energy efficiency measures by 2030;
  - increasing transit and non-motorized commuting to 30% (including teleworking) by 2030;
  - increasing zero-emission vehicles to at least 15% of all light-duty vehicle registrations by 2030;
  - expanding tree canopies to 60%, with a minimum of 40% tree canopy coverage in every census block by 2030; and
  - diverting at least 90% of waste from landfills and incineration.
- Phoenix, Arizona has taken actions such as:
  - prioritizing a "cool corridor" program that aims to create "tree equity" and add much-needed shade in disadvantaged neighborhoods; and
  - piloting the use of "cool pavement" that reflects sunlight rather than absorbing it (*see" City of Phoenix: Cool Pavement Program."*)[19]
- The California Air Resources Board (CARB) has adopted a rule requiring all new cars and light trucks sold in the state to be zero-emission vehicles (including plug-in electric vehicles) by 2035. Eleven percent of the nation's light-duty vehicle sales occur in California. There are 17 other states that have followed California's lead on other vehicle rules. If these states follow suit on California's zero-emission vehicles, the requirement will apply to 40 percent of US light-duty vehicle sales. (*For more information on California's action, see "CARB: California moves to accelerate to 100% new zero-emission vehicle sales by 2035."*[20])

The Rocky Mountain Institute (RMI), a nonprofit focused on improving America's energy practices, provides State Climate Scorecards that evaluate the efforts of states toward reducing GHG emissions. In addition to California, the scorecards show Colorado, Illinois, New Jersey, New York, and Washington to be the farthest along with their policies. RMI identifies these policies as the best options for putting states on net zero pathways:[21]

- Investing in clean electricity infrastructure, such as wind and solar.
- Replacing air conditioners, furnaces, and water heaters with heat pumps.
- Prioritizing the use of electric vehicles.
- Shifting industrial activity from burning fossil fuels to electricity.
- Capturing methane and fixing leaks from fossil fuel infrastructure, including oil and gas sites, and landfills.

C. Sources of Help. City attorneys and other municipal officials may find pertinent resources and educational opportunities through government agencies and professional organizations such as IMLA. Additionally, nonprofits supporting local government efforts to fight climate change include:

- **C40 Cities**, a network of mayors from across the world, collaborating to halve the emissions of its member cities within a decade.
- **Climate Mayors**, a bipartisan network of US mayors committed to climate leadership.
- **Resilient Cities Network**, with members from around the

world working to protect communities from climate change and other urban challenges.
- **Local Governments for Sustainability**, a global network of local governments devoted to sustainability challenges.

1. The Chancery Lane Project.
The Chancery Lane Project (TCLP), based in the United Kingdom, is a pro bono initiative that brings legal professionals across the world together to collaborate, rewrite contracts, and create legal standards to tackle the climate crisis.[22] TCLP has developed a broad range of climate clauses. Although most of TCLP's current clauses are for use in the United Kingdom, many have potential applicability in the US, and efforts are ongoing to increase the number of TCLP's US-specific clauses.

In addition to drawing from its clauses, US attorneys can help further TCLP's work by contributing new climate clauses or joining the effort to adapt UK-focused clauses for use in the US. Pro bono opportunities are available for attorneys with diverse professional backgrounds and experience levels.[23]

2. Legal Pathways to Deep Decarbonization Project.
The Legal Pathways to Deep Decarbonization (LPDD) website[24] provides resources for legislators and advocates at the federal, state, and local level, including:
- More than 50 model laws focused on reducing GHG emissions, drafted by pro bono attorneys and peer reviewed by experts.
- Over 2,000 other laws adopted or proposed by state and local governments to reduce GHG emissions.

(*For information on drafting or peer reviewing model laws for the LPDD Project, or to receive monthly updates, see "LPDD: Get Involved").*

3. Sabin Center for Climate Change Law.
The Sabin Center develops legal techniques to fight climate change and provides up-to-date resources on key topics in climate change law and regulation. Its Cities Climate Law Initiative works with local government attorneys, sustainability staff, and others to provide guidance on the legal aspects of local carbon mitigation policies. The Sabin Center's work includes legal research and memorandums, policy drafting, amicus briefs, and webinars for policymakers. (*For a report identifying legal considerations for local climate policies across the buildings, transportation, waste, and energy sectors, see "Sabin Center: Cities Climate Law: A Legal Framework for Local Action in the U.S."*)[25]

IV. City Attorneys as Climate Change Fighters
Local government lawyers can help municipalities in the fight against climate change by:

- Recognizing an ethical obligation to provide advice on environmental policies that considers moral, economic, social, and political factors (*see "The Ethics of Fighting Climate Change," below*).
- Knowing how to talk about the fundamentals of climate change (*see "Becoming Conversant in Climate Change Terminology," below*).
- Acknowledging the risks climate change poses to segments of the community and the potential benefits of mitigation measures (*see "Recognizing Potential Impacts and Solutions in Your Community," below*).
- Identifying and advising on proposed measures in local government climate action plans (*see "Developing Climate Action Plans," below*).
- Putting goals to work in local government regulations and contracts (*see "Incorporating Climate Goals into Regulations and Contracts," below*).

A. The Ethics of Fighting Climate Change. City attorneys are subject to the same rules of ethics that apply to private sector lawyers but must learn how to apply those rules to the practice of municipal law. Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct includes this guidance:

> In rendering advice, a lawyer may refer not only to law **but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.** (Emphasis added.)

This rule recognizes that there is frequently more than just a legal issue involved when clients need their attorneys' advice. This may be especially true in municipal law, where local government actions can affect long-term quality of life issues for neighborhoods and residents. Preparing for and mitigating climate change in your community can involve many moral, economic, social, and political factors, in addition to legal considerations. (All of the states have adopted the ABA rules except for California, which has its own version of ABA Rule 2.1.)

B. Becoming Conversant in Climate Change Terminology.
There is no need for municipal lawyers to become climate scientists to understand climate change threats and the measures that can abate them. However, a basic understanding of commonly used terms and concepts is useful in advising on local government climate change policies.

1. Net Zero.
Policies and goals related to climate change mitigation often refer to the concept of "net zero." This refers to a balance between GHG produced and GHG removed from the atmosphere. Many governments and businesses have set goals to reach net zero by 2050, with incremental GHG reduction goals in the interim (*see "Developing Climate Action Plans," below*). While the White House has set emissions reduction goals for the nation as a whole, local governments can identify measures that are specifically tailored to their communities.

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INSIDE CANADA

MONICA CIRIELLO,
Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario

Mooted COVID Challenges, Intermunicipal Libraries, Roadway Hazards, and More.

City's COVID-19 Vaccination Verification Policy Challenged by Staff
Bowen v. City of Hamilton, 2022 ONSC 5977 https://canlii.ca/t/jsv5f

The applicants, 11 employees at the City of Hamilton (City), challenged the City's mandatory COVID-19 Vaccination Verification Policy (Policy). The Policy was implemented in August 2021 and requires all employees to provide proof of vaccination or a valid medical exemption. There was a termination provision for those employees that failed to comply, which was subsequently suspended in August 2022. The Applicants request a declaration that a termination provision within the Policy is a violation of their human rights under their right to privacy and their right to bodily integrity, contrary to s. 7 and s. 12 of the *Canadian Charter of Rights and Freedoms*, and sought to quash the City's Policy and declare the termination provision of no force and effect. The City brought a motion for an order that the application be dismissed on the basis that it was moot, as the contentious termination provisions of the Policy are no longer in effect. The Applicants argue that the application is not moot, although the termination provisions are suspended; the Applicants submit that the provisions are still within the Policy and could be reinstated at any time.

HELD: Application dismissed.

DISCUSSION: The Supreme Court of Canada decision *Borowski v. Canada (Attorney General)*, [1989] S.C.J. No 14, is the leading case on mootness. It provides "the doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question." To determine mootness, a two-pronged analysis is applied by the Court. First, it is necessary to determine if the dispute has disappeared and the issues have become academic; and second, if the response to the first is yes, it is necessary to decide if the Court should exercise discretion to hear the case. In assessing the first prong, the Court found that although the Policy remains in effect, the Applicants only challenged the termination provision. Since the termination provision was suspended by the City, the Court held that there is no current dispute between the parties, the dispute is merely hypothetical, as it is something that may or may not happen in the future if the City chooses to reinstate the provision.

The second prong of the analysis provides the Court discretion to hear a matter even if it is found to be moot. The Applicants argued that a court's view on vaccination policies would be a matter of important public interest. The Court disagreed, finding that any decision reached by the Court would be hypothetical and of little value. Furthermore, the Court was not persuaded to exercise discretion, finding that if it forced the parties to litigate the validity of the suspended termination provision it would be forcing the parties into an unnecessary adversarial battle. Furthermore, the Court also provided that as an adjudicative body, its role is not to write or legislate conditions of employment and there is no evidence before the Court that demonstrates that the applicants have suffered damages. The Court held that the application before it is moot and declined to exercise discretion to hear the moot application. Dismissed.

City's Request for Disclosure is a Fishing Expedition
Mostertman v. Abbotsford (City), 2022 BCSC 1769 https://canlii.ca/t/jsgmt

The Plaintiffs were impacted by the November 2021 Sumas floods in the

City of Abbotsford (City) and plead provisions of the Class Proceedings Act, R. S. B. C. 1996, c. 50 (Act) to certify the proceeding as a class proceeding. In support of the certification application, the Plaintiffs had affidavits and reports from experts, including a climate scientist and an engineer. The City filed a notice of application to the Court for disclosure of the affidavits and reports, arguing that the admissibility was central to the certification hearing.

HELD: Application dismissed.

DISCUSSION: Section 4(1) of the *Act* requires a Court to certify a proceeding as a class proceeding if all elements of the section are met. The Court notes that the application for certification is a critical step in the proceeding, and the Plaintiffs do have a responsibility to provide a basis to support the order sought, *Ernewien v. General Motors of Canada Ltd.*, 2005 BCCA 540. The City submitted that it needed access to disclosure to determine whether the experts are unbiased, independent, and impartial. The Plaintiffs argued that there is no obligation to disclose the affidavits and reports to the City at the interlocutory hearing, suggesting that this request was no more than a fishing expedition by the City. The question for the Court was to determine whether the Plaintiffs had disclosed sufficient information related to the experts, such that the Court and the City could evaluate the opinion. The Court held that if the City's application for disclosure was granted, then it would set a new the default position that prior to the certification hearing, parties would obtain disclosure of expert affidavits and reports. The Court held that routine disclosure of expert reports is unnecessary at the interlocutory stage, as there is sufficient and reasonable disclosure in the documents already available to the City and anything further would amount to a fishing expedition. The City's application was dismissed.

Intermunicipal Collaboration Frameworks: Are Libraries Included?
Cardston (Town) v. Alberta (Municipal Affairs), 2022 ABKB 802 https://canlii.ca/t/jt8kf

In the Province of Alberta, the *Municipal Government Act,* RSA 2000, c. M-26 (Act) requires municipalities that share common boundaries to enter into Intermunicipal Collaboration Frameworks (ICFs). The Town of Cardston (Town) and Cardston County (County) share a common boundary and entered into an ICF. The ICF made no mention of library services. The Town sought to include these services in the ICF but the County disagreed. The matter went before the Minister of Municipal Affairs, who issued a Ministerial Order (Order) to determine that third-party services such as libraries are not within the scope of services in the ICF. The Town sought judicial review of the Order.

HELD: Application for judicial review dismissed.

DISCUSSION: The Order provided that third-party services, including libraries, are not included within the scope of services of an ICF and it is inappropriate for two municipalities to negotiate a funding agreement between one another for the service. It was the Town's position that s. 17(2) of the *Act* includes library services, and any other third-party services shared by bordering municipalities are to be included in the ICF. The Minister and County argued that s. 17(2) of the Act and its legislative history, the intent of the *Red Tape Reduction Implementation Act*, SA 2020 c. 25 (RTRIA) and the Libraries Act, RSA 2000, c L-11 (Libraries Act) all seek to exclude third party services from ICFs and create libraries to be autonomous (third-party) entities. The Court reviewed the language and purpose of s.17(2) entitled "intermunicipal collaboration" which on its face builds on the notion of collaborative partnerships between municipalities sharing a common boundary, and the identification, delivery and funding of intermunicipal services. The Court noted that the term "services" is not defined in the Act but determined that a third-party service on its face is not a municipal or intermunicipal provided service. Third-party services are not delivered by or funded (exclusively) by a municipality. The Order reflects a harmonious reading of s.17(2) and the Libraries Act, recognizing the arm's length relationship that exists between libraries and municipalities in which they operate and the autonomy they have under the *Libraries Act*. The Court held that the Order was clearly articulated and ordered the Town and County to enter into an ICF excluding libraries, within the interpretation of s.17(2). Town's application for judicial review was dismissed.

Municipalities Do Not Insure Those Who Use Their Roads
Marsten v. The City of Grande Prairie, 2022 ABPC 236 https://canlii.ca/t/jt4dc

While driving on the road in the City of Grande Prairie (City) the Plaintiff's vehicle was damaged when she drove over a pothole. The damage to the vehicle included, a split tire, and damage to the tire rim. The Plaintiff sought damages from the City.

HELD: Claim dismissed.

DISCUSSION: The *Municipal Government Act*, RSA 2000, c. M-26 (Act) provides that any road in a municipality must be kept in a reasonable state of repair and a municipality is liable if the municipality knew or should have

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AMICUS

AMANDA KARRAS,
IMLA Executive Director and General Counsel

Litigation Trends Surrounding Homelessness

When you ask voters in Los Angeles, San Francisco, Seattle, Portland, and other major metropolitan areas in the West what their number one issue is, there is striking unanimity: homelessness.[1] And while homelessness may not be the top issue for voters in every locality around the country, many local governments are experiencing significant increases in unhoused people.[2] Homelessness was already an incredible challenge for local governments before the pandemic, given the intersection of so many different causative factors (from substance abuse to mental health challenges to housing scarcity and affordability, to name a few). But for many downtown corridors, the pandemic accelerated an already growing problem. Beginning in March of 2020, due to the increased spread of COVID-19 in congregate settings, the CDC advised against clearing homeless encampments if alternate non-congregate housing was not available.

For local governments in the Ninth Circuit, the pandemic came on the heels of another major development: the *Martin v. City of Boise* decision. In September 2018, a three-judge panel held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter."[3] Although the decision was both novel and sweeping, the opinion did offer a modicum of comfort to local governments, by providing that they could still regulate camping on public property by way of a footnote which stated:

> Naturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible… So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures…[4]

Thus, after *Martin*, local governments in the Ninth Circuit (accounting for 20% of the U.S. population) were hamstrung in their ability to enforce anti-camping ordinances. However, many local governments looked to footnote 8 of *Martin*, and regulated the time, place, and manner of camping--for example, by banning camping in front of schools or fire hydrants or camping in a way that impedes the right-of-way.[5]

Against this backdrop, it is perhaps unsurprising that we are seeing an uptick in lawsuits against local governments regarding homelessness. Indeed, local governments are being sued both by advocates for the homeless, claiming that local governments are violating the Constitution by clearing encampments, while also being sued by property owners and businesses who argue that local governments are violating the Constitution, state, and federal law by failing to clear the encampments. For example, in September 2022, disabled residents of Portland filed a class action lawsuit against the City, arguing that the City's failure to clear homeless encampments obstructing the right of way violates Title II of the ADA.[6] In August, Phoenix was sued by local businesses for the City's alleged failure to abate a public nuisance;[7] just a few months later, the City was sued by the ACLU on behalf of homeless individuals in Phoenix, claiming that the City is violating the Fourth, Fourteenth, and Eighth Amendments with its encampment cleanups.[8] And in 2021, the City

and County of Los Angeles were sued both by residents and business owners, arguing among other things, the City/County were liable for a state created danger, ADA violations, negligence, and violations of state nuisance laws for failing to adequately address the homelessness crisis.[9]

A more recent homelessness decision out of the Ninth Circuit will likely only make problems for local governments in this area more challenging. *Johnson v. City of Grants Pass* involves a class action lawsuit brought by those experiencing homelessness in Grants Pass, Oregon, a small city of 38,000.[10]

The City passed several ordinances related to the regulation of sleeping outside, which taken together made it nearly impossible to sleep outside with any form of bedding or shelter on public land in the City.[11] A violation of these ordinances resulted in fines, which would escalate if left unpaid. A separate "park exclusion" ordinance allowed police officers to bar someone from a city park for 30 days if they received two or more citations for violating park ordinances within one year.[12] If someone had received a park exclusion violation and was later found in a park, that could result in criminal trespass. The City amended its camping ordinance after *Martin* to make it clear that the involuntary act of sleeping without shelter in a park was not prohibited, rather what was prohibited was "camping" – i.e., sleeping with any bedding / shelter.[13]

The City had four temporary shelters, but two were explicitly religious and required residents to attend Christian worship services. Another was a "sobering center," which was just a place for intoxicated people to sober up and did not have beds. The fourth was a youth shelter. It was therefore undisputed that the City did not have enough beds for its homeless population and really did not have any shelter for adults who did not wish to stay somewhere that was overtly religious.

Shortly after the *Martin* decision was issued, three homeless individuals in Grants Pass filed a class action lawsuit against the City on behalf of those that are "involuntarily homeless", arguing its ordinances are unconstitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause and Excessive Fines Clause. The Ninth Circuit held that the district court did not abuse its discretion by certifying a class action in the case despite *Martin* appearing to require an individualized inquiry into whether the person was involuntarily homeless.[14] The Ninth Circuit reasoned that the class was defined as only those that were "involuntarily homeless" and therefore, no individualized inquiry was necessary as the City did not claim to have adequate shelter for all 600 homeless individuals in Grants Pass.[15] The Ninth Circuit affirmed the district court's holding that "the anti-camping ordinances violated the Cruel and Unusual Punishment Clause to the extent they prohibited homeless persons from 'taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.'"[16]

Judge Collins dissented, arguing that the class certification was inappropriate under *Martin's* requirement for an individualized inquiry into whether adequate shelter was available to the homeless person. Per Judge Collins:

> [T]he mere fact that a city's shelters are full does not by itself establish, without more, that any particular person who is sleeping in public does "not have a single place where [he or she] can lawfully be." *Id.* The logic of *Martin*, and of the opinions in *Powell* on which it is based, requires an assessment of a person's individual situation before it can be said that the Eighth Amendment would be violated by applying a particular provision against that person… Under *Martin*, the answer to the question whether the City's enforcement of each of the anti-camping ordinances violates the Eighth Amendment turns on the individual circumstances of each person to whom the ordinance is being applied on a given occasion. That question is simply not one that can be resolved, on a common basis, "in one stroke."[17]

The City of Grants Pass has filed a petition for rehearing en banc before the Ninth Circuit and as of this writing, that petition is pending. The City argues that the court should overrule *Martin* as it conflicts with Supreme Court precedent, is illogical, and unworkable. The City also argues that the decision does not honor *Martin's* purported limitations requiring individualized inquiries into homelessness and instead reduces *Martin* to a question of elementary math: does the jurisdiction have more people experiencing homelessness than available secular shelter beds.

IMLA joined an amicus brief filed by the League of Oregon Cities and other state leagues / municipal attorney associations in support of the City. The amicus brief highlighted the growing practical problems with encampments and the need for flexibility in crafting solutions. The amicus brief also advocated for clarity around local governments' abilities to enact reasonable time, place, and manner restrictions on camping if *Martin* is not overruled. IMLA continues to believe that the issues associated with homelessness should be addressed by the legislature, not the judiciary. There are challenging policy issues associated with homelessness and balancing public health, safety, and welfare concerns with the needs of a vulnerable population is exactly what legislatures are better equipped to handle than is the judiciary. ML

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LISTSERV

BRAD CUNNINGHAM,
Municipal Attorney, Lexington, South Carolina

Hey – Where Did Our Team Go?

As we wrapped up another fantastic IMLA Annual Conference in Portland, my mind reviewed the variety of topics we discussed in depth… Covid… Community / Police Relations…What to Do When Your Sports Team Leaves Town… Wow, that one struck home, as a rabid sports fan! Thoughts wandered to my friends in St. Louis, after losing the Rams… San Diego after losing the Chargers… The midnight elopement of the Colts from Baltimore and the return of football to Baltimore as the Browns bailed on Cleveland and turned into the Ravens…My brother's beloved Raiders moving to Las Vegas…

You get the picture. Some people say, "So what?" Well, the economic impact of a sports team goes far beyond the revenue generated for the owners. Just consider who gets a job because of maybe a football team. Hundreds of vendors…Contract work for police and security guards…Parking attendants… Concessions salespeople…Shuttle drivers… Huge laundry contracts for uniform cleaning… Advertising for local businesses… Cleaning companies for the stadium…This list could go on and on…

Also consider the lease income received from a sports franchise… Sales and use tax…Accommodations tax…additional meals and services provided to visitors and folks that otherwise might not have been in the city that day… parking revenue…entertainment taxes… Another list that goes on and on…. I'm not sure it is possible to accurately value the number of folks affected by the addition or loss of a sports team….

But it is possible to value the team itself. I extracted the following sample of team values from an article on ESPN.com. For each of the numbers, consider the taxes, etc., that go along with it.

***The Los Angeles Dodgers* – Major League Baseball (MLB)**

- $2.15 billion: Purchased by Guggenheim Partners in 2012 (e.g., Guggenheim Baseball Management)
- $2.75 billion: Forbes Team Valuation; Breakdown: Sport $500M; Market $1.355B; Stadium $441M; Brand $455M (April 2017)
- $4.1 billion: Money spent on sporting events in Los Angeles (2013)
- $462 million: Team revenue (Operating Income $-20.5M; Player Expenses -$275M)
- $148 million: Gate Receipts (2016)
- $67: Revenue per fan (2016)
- 1 million: Metro Area Population (2016)
- 7 million: Dodger game attendees (2016)

***The Tennessee Titans* – National Football League (NFL)**

- $25,000: Purchase price in 1959, still owned by the Kenneth Adams, Jr. family
- $2 billion: Forbes Team Valuation; Breakdown: Sport $1.422B; Market $262M; Stadium $215M; Brand $101M (September 2016)
- $19.7 million: Music City Bowl Game direct economic impact (2014)
- $342 million: Team revenue (Operating Income $73M; Player Expenses -$169M)
- $48 million: Gate Receipts (2016)
- $65: Revenue per fan (2016)
- 8 million: Metro Area Population (2016)

- 517,273: Titans game attendees (2016)

The New England Revolution **– Major League Soccer (MLS)**

- Investment unknown: The Revolution franchise was a part of the initial ten team league where the MLS owned the franchises and investors were "owners."
- $185 million: Forbes Team Valuation (September 2016)
- $192.2 million: economic impact of the Boston Marathon (2017)
- $27 million: Team revenue (Operating Income $7M, 2016; Player Expenses-$5,800,118M, 2017)
- Gate Receipts: Data unavailable at time of search
- $79: Revenue per fan (estimate: total team revenue divided by Revolution game attendees)
- 4.6 million: Metro Area Population (2016)
- 343,150: Revolution game attendees (2016)

The Minnesota Wild **– National Hockey League (NHL)**

- $225M (2008), $370M (2015): Purchase prices for the franchise
- $400 million: Forbes Team Valuation; Breakdown: Sport $81M; Market $148M; Stadium $122M; Brand $49M (November 2016)
- $1.3 billion: Money spent on sports stadiums in Minnesota (2011)
- $136 million: Team revenue (Operating Income $5.6M; Player Expenses -$74M)
- $55 million: Gate Receipts (2016)
- $31: Revenue per fan (2016)
- 3.5 million: Metro Area Population (2016)
- 781,879: Wild game attendees (2016)

The Phoenix Suns **– National Basketball Association (NBA)**

- $404 million: Purchase price (2004)
- $1.1 billion: Forbes Team Valuation; Breakdown: Sport $434M; Market $335M; Stadium $218M; Brand $113M (February 2017)
- $1 billion: Money spent on building sports stadiums and subsidizing big events (2014)
- $173 million: Team revenue (Operating Income $26.3M; Player Expenses -$85M)
- $36 million: Gate Receipts (2017)
- $23: Revenue per fan (2017)
- 4.5 million: Metro Area Population (2017)
- 708,639: Suns game attendees (2017)

It is easy to see that sports teams, both collegiate and professional can have an enormous effect on a local economy. A former neighbor of mine ran a franchise sandwich stand during baseball season, and then took the rest of the year off due to the revenue he earned during the season. Another friend did the same during race season, and these are only small examples. I would point out, however, that this issue isn't just limited to major metropolitan areas.

I grew up in Hendersonville, NC, nestled in the Western North Carolina mountains just below Asheville. We did not have a major league sports franchise, but we did have a minor league baseball team, the Single A Asheville Tourists. In 2021, minor league baseball contracted by 40 teams. Many Asheville area folks were worried they might be one of the cities losing out on a team. They did not, as a new agreement was signed with the Houston Astros for the city to field a minor league team. Astros General Manager James Click said:

"The Astros are very excited about partnering with the Tourists franchise and setting up roots in the City of Asheville is one of the most historic franchises in all of minor league baseball and we look forward to adding to that history."

"We are thrilled to receive the invitation from the Houston Astros to partner with them as part of their organization," said Tourists President and Owner Brian DeWine. "Baseball's return to Asheville this spring will give us a season we will never forget."

According to Sam Powers, Community & Economic Development director for the city of Asheville, "The economic impact of the Tourists baseball team is significant for the local business community in Asheville. Although not a direct major employer, the team annually utilizes hundreds of local residents as temporary seasonal employees to help make the trip to the baseball park for families a positive experience. The team's economic impact can be expected to exceed $10 million annually, based on over 200,000 baseball fans attending a game in Asheville."

The Tourists will have an even broader impact on the city, starting with a multi-year lease to use city-owned McCormick Field as their home. But its indirect contribution to the city's economic future is even greater.

"Having the Tourists downtown helps in our continuing revitalization in the South Slope district, making additional walkable options for pre- and post-game food and beverage customers for our downtown businesses," added Powers. "New capital investment and development continues to occur in the area near McCormick Field. It is great news for the city that the Tourists will continue to provide family entertainment and top-notch baseball, just as they have for a century." (Attributed to City of Asheville and the Biltmore Beacon)

So, here is one issue that can affect both our larger and our smaller cities across the country. Hey! We share something in common after all! ML

Climate *cont'd from page 15*

The best pathway to net zero is to reduce GHG emissions overall. However, local governments must rely on available technologies. Until these technologies are more developed, short-term success in reaching local government goals is likely to rely on offsetting GHG emissions with measures that remove GHG from the atmosphere.

2. Other Essential Terms.
Other terms that lawyers should know when drafting or reviewing climate-related contract clauses and regulations include: greenhouse gases, carbon footprint, carbon offset and carbon capture and sequestration. (*For definitions of these and other helpful terms, see Practical Law's "Glossary of Decarbonization Terms."*)

3. Recognizing Potential Impacts and Solutions in Your Community.
Municipal lawyers should know about the potential local impacts of various climate scenarios and be involved in the local government's plans for addressing those impacts. The municipality should consider the effects of:

- Regional phenomena, such as sea level rise and high tide flooding, along with increasing frequency of heatwaves, wildfires, storms, and extreme rainfalls.
- Specific local impacts on sections of the community, including low-lying areas, neighborhoods with basement apartments, and low-income neighborhoods.
- The potential for residents and businesses to leave or come into the community due to climate migration.

4. Taking the Right Actions.
There is no one-size-fits-all solution for local governments to address climate change. Municipalities should identify both short- and long-term measures that will improve their ability to withstand adverse climate events. These measures will depend on geographic location and many other factors, but may include steps such as:

- Improving public transportation and making communities more bike- and pedestrian-friendly.
- Using electric vehicles throughout the city's fleet and installing charging infrastructure at convenient locations for motorists who live and work in the city.
- Replacing surface asphalt parking with other options.
- Planting trees throughout areas that lack shade.
- Building seawalls and upgrading drainage systems.
- Tax abatements that encourage private sector businesses and property owners to take measures of their own.

5. Planning, Budgetary, and Legal Effects.
Efforts to counteract the impacts of climate change should be an element of the local government's comprehensive plan, zoning ordinance, and capital budget. From a legal standpoint, these efforts may require the city attorney's assistance with:

- Acquiring property and using eminent domain powers.
- Intergovernmental agreements.
- Grant funding from federal and state government sources
- Addressing affordable housing and other issues related to environmental justice.
- Assisting with drafting and enforcing zoning regulations and building codes.

C. Developing Climate Action Plans. Local government actions to fight climate change will be most effective if they are part of a coordinated approach, rather than scattershot efforts. Communities can be more assured that their actions are meaningful if they are part of a well-prepared climate action plan (CAP). At least 35 of the 50 largest cities in the US by population have adopted CAPs.[26] Local CAPs adopted or updated most recently include these:

Adopting CAPs is not just for large cities. Examples of smaller US cities with their own plans include:

- Grand Marais, Minnesota (2020 population, 1,426).[33]
- Aspen, Colorado (2020 population: 7,721).[34]
- Greenville, South Carolina (2020 population: 69,648).[35]
- Bloomington, Indiana (2020 population: 84,691).[36]
- Beaverton, Oregon (2020 population: 98,567).[37]
- Richmond, California (2020 population: 110,051).[38]

City/Name of Plan	Goal
Austin Climate Equity Plan [27]	Net zero GHG emissions by 2040
Columbus Climate Action Plan [28]	45% GHG reduction by 2030 (from 2013); carbon neutral by 2050
Memphis Area Climate Action Plan [29]	51% GHG reduction by 2035 (from 2016): 71% by 2050
Miami Forever Carbon Neutral [30]	60% GHG reduction by 2035 (from 2018); net zero by 2050
Raleigh Community Climate Action Plan [31]	80% GHG reduction by 2050 (from 2007)
San Francisco's Climate Action Plan 2021 [32]	61% GHG reduction by 2030 (from 1990); net zero by 2040

1. **Getting Started.**
Developing and following a CAP can be a daunting prospect. To ensure that the end result provides a meaningful but realistic pathway, local governments should:

- Consider joining with other nearby local governments to adopt joint plans or use the same consultants.
- Select and negotiate a contract with a qualified consultant. Reviewing CAPs adopted by other cities and inquiring about their experiences with the experts they used can be helpful in forming a list of potential consultants.
- Adopt a scope of work that describes the government's approach to building the CAP. For example, see the scope of work issued by Asheville, North Carolina.[39]
- Acknowledge the specific issues the local government will face (see Recognizing Potential Impacts and Solutions in Your Community) and scale the CAP to the community's size and abilities.
- Build buy-in from the community early on and engage stakeholders, including:
  - departments and agencies that are part of the government entity; and
  - members of the community or representatives of those served by the entity.
- Determine if funding for developing the CAP is available through grants, foundations, public utilities, or public-private partnerships.

2. Goals and Strategies.
To show that goals for reducing GHG emissions are not merely idealistic, a CAP must describe the government's strategies for achieving its goals. For example, to achieve the goal of reducing GHG emissions by 40% by 2030, 75% by 2040, and 100% by 2050, the City of Houston[40] developed strategies related to:

- Transportation.
- Energy transition.
- Building optimization.
- Materials management.

The local government may also want to hire a third party, separate from the consultant used to develop the CAP, to validate that the plan's goals and strategies are robust and realistic.

3. The Attorney's Role in Climate Action Plans.
While municipal attorneys may not play a central role in creating CAPs, they may need to:

- Assist in drafting or reviewing requests for proposals and contract documents for outside consultants and other necessary parties.
- Review agreements for grant funding used to develop the plan.
- Advise on the scope of the municipality's authority to carry out proposed climate-related initiatives, along with any preemptions of the municipality's authority under state law.
- Determine the legal implications of fulfilling the CAP and how implementation will involve the city attorney's office.

D. Incorporating Climate Goals into Contracts and Regulations. The municipal attorney must be mindful of the local government's climate-related goals when drafting and reviewing proposed contracts and regulations. Integrating climate clauses into legal documents and laws can be a critical part of implementing a city's climate action plan. However, even if the municipality has not yet adopted a CAP, contract terms and regulatory provisions can focus on environmental impacts and pave the way to a healthier future.

1. Using a Net Zero Mindset.
City attorneys can be instrumental in working toward local government net zero targets by incorporating provisions in contracts and regulations specifically aimed at furthering progress toward the targets. To ensure that potential contractors are like-minded about wanting to minimize their environmental impact, government entities can:

- Include their own net zero targets in bid invitations, requests for proposals, requests for qualifications, or other bid and procurement documents.
- Pre-qualify contractors to limit the pool of bidders to those demonstrating a commitment to green construction, manufacturing, or service delivery practices. Pre-qualification procedures can include asking each potential bidder to:
  - describe any net zero targets they have adopted; and
  - explain the measures they are taking and plan to take to achieve their net zero targets or to otherwise reduce their carbon footprint.

While net zero targets refer to a party's ultimate long-term goal for reducing GHG emissions, contract documents may also define:

- Net zero objectives, representing project-specific goals for the contract. These objectives are meant to move the parties closer to their ultimate targets.
- Net zero benchmarks, setting specific measures a contractor must reach to fulfill the net zero objectives.

2. Climate Goals in Construction Contracts.
Building construction, materials, and operations account for 39% of global carbon dioxide emissions (*see* "*World Green Building Council: Bringing embodied carbon upfront.*")[41] However, the traditional standards of care found in construction contracts do not explicitly require contractors

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to incorporate climate change mitigation or adaptation measures. As a result, government entities and their contractors often build facilities without climate-related risks or decarbonization in mind.

The local government should engage with the project team early on to determine how the project design, specifications, contract terms, and budget can address the government's climate-related expectations. Examples of clauses municipalities can include in contracts for construction of public projects include:

- Requiring the contractor to meet defined net zero objectives, including reaching net zero benchmarks at various stages of the project.
- Rewarding the contractor for meeting net zero objectives, instead of penalizing the contractor for failing to meet them. (*Practical Law subscribers can find sample language online – see "Contract Clauses for Government: Net Zero Incentives."*)[42]
- Prescribing practices for management of construction waste associated with the project, which in turn helps:
  - reduce landfill waste and associated greenhouse gas emissions; and
  - avoid pollution to waterways and other environmentally sensitive areas.

3. Climate Goals in Procurement Contracts.
To ensure that its purchases are environmentally responsible, municipalities should consider procuring equipment, supplies, and materials from sources that:

- Require less transportation.
- Use materials or components that are recycled or otherwise responsibly sourced.
- Reflect the supplier's or manufacturer's commitment to sustainability.

One option for purchasers to evaluate a vendor's corporate responsibility is to look into environmental, social, and government (ESG) ratings. Services like Sustainalytics provide ESG ratings for many industries (see "*Sustainalytics: Company ESG Risk Ratings*").[43] (*Practical Law subscribers can find more on ESG reporting and ratings online – see "Practice Note, ESG Disclosure & Sustainability Reporting Frameworks: ESG Data and Ratings Providers."*)[44]

4. Climate Goals in Other Local Government Contracts.
Local governments sometimes operate facilities with high energy usage or environmental impact, such as landfills, schools, jails, or convention centers. Attorneys may be involved in drafting stand-alone contracts or clauses that are part of broader contracts to address matters such as:

- Retrofitting facilities with energy-efficient appliances, systems, and lighting.
- Reducing single use plastics by vendors in cafeterias and other dining facilities.
- Landfill management practices that reduce GHG emissions and other adverse climate impacts.

In addition to seeking assistance from other cities with the same issues, US attorneys may be able to use some of the clauses developed by The Chancery Lane Project, discussed above. (*For TCLP's clause requiring suppliers to use fewer single use plastics, see "TCLP: Reduction of CO2 from Single Use Plastic."*)[45]

5. Climate Goals in Planning and Zoning.
Many cities already include climate-friendly features in their planning and zoning, without necessarily having a coordinated approach to climate change mitigation. For example, municipal plans and zoning regulations often provide for:

- Preserving open spaces and setting aside land for parks.
- Planting new trees and protecting existing trees.
- Incorporating bike lanes, sidewalks, and other pedestrian-oriented features into street infrastructure.

Beyond these measures, some cities anticipate and encourage higher usage of electric vehicles with incentives such as:

- Free parking on streets and in public garages (*see "LPDD Model Law: Municipal Ordinance for Alternative Fuel Vehicle Parking Benefits."*).[46]
- Designated parking spaces with charging stations at privately owned parking facilities (*see "LPDD Model Law: Designation of Parking Spaces for Electric Vehicles and Installation of Electric Charging Devices*).[47]

With the serious threats presented by rapid climate change, most cities will need to step up their efforts and be more intentional in using planning and zoning to focus on climate issues. For example, some cities have recognized that single-family zoning with large lot sizes contributes to both regional GHG emissions and the affordable housing crisis. In some cases, state laws or local zoning amendments now allow more than one home on lots previously limited to single-family residences.

Cities that have adopted climate action plans can use them as support for overhauling comprehensive plans and zoning ordinances. Municipal attorneys will need to assist in drafting and reviewing new zoning language to confirm that it is within the city's authority, is enforce-

Climate *cont'd from page 24*

able, and carries out the city's intentions.

6. Climate Goals in Building Codes.
To assure that buildings within the municipality are resilient and energy-efficient, the city attorney can assist in efforts like drafting and adopting:

- New building and property maintenance codes that emphasize energy-saving construction and operational practices. For example:
  - some communities have adopted "stretch codes" that go beyond the standards included in other building codes to emphasize higher energy savings. (*For more on stretch codes, see "New Buildings Institute: Stretch Codes.")* [48]
  - codes can require new residential dwellings to include *charging infrastructure for electric vehicles (see "LPDD Model Law: EV Ready Building Code for One- and Two-Family Homes.")*[49]
- Ordinances setting requirements for recycling of construction and demolition waste. (*For example, see "Austin, Texas: Construction and Recycling Ordinance.")*[50]
- Landscaping standards that rely on trees and other plantings that, once established, will provide shade but will not require extensive irrigation.

V. Selling Local Government Climate Policies
Climate policies at any level of government can be a hot-button issue. However, many communities have already adopted regulations, contract provisions, and policies that address climate concerns without necessarily pointing it out. Local government attorneys and officials can get around the political controversy that sometimes accompanies climate-related measures by:

- De-emphasizing terms and references that trigger negative reactions.
- Stressing that climate-related actions will result in:
  - long-term economic benefits to property owners, residents, and the community as a whole;
  - a healthier and safer living environment; and
  - preservation of the community's natural resources and scenic beauty for future generations.

Conclusion.
The federal government and large states can act on climate change in ways that have widespread influence. Municipalities have little or no control over matters such as whether fossil fuels continue to be drawn from their sources. However, since the US is composed of thousands of communities, actions on a smaller scale by each community play an important role in fighting climate change. Municipal attorneys must be prepared to lend their skills and expertise to the fight.

Notes.
1. *See* NOAA: Climate Change: Ocean Heat Content-https://www.climate.gov/news-features/understanding-climate/climate-change-ocean-heat-content
2. *Id*.
3. *See* Reuters: Glaciers vanishing at record rate in Alps; Satellite imagery shows Antarctic ice shelf crumbling faster than thought; and Pakistan looks 'like a sea' after floods, PM says.
4. *See* NOAA: 2022 Sea Level Rise Technical Report.
5. *See* World Economic Forum: These 11 sinking cities could disappear by 2100.
6. *See* NOAA: June 2022 was Earth's 6th-warmest on record.
7. https://www.climate.gov/news-features/blogs/beyond-data/2021-us-billion-dollar-weather-and-climate-disasters-historical
8. *See* Reuters: Key takeaways from the IPCC report on climate impacts and adaptation and IPCC: Climate Change 2022.
9. *See* KQED: Straight Talk on Temperature: Here's What 1.5 Degrees C Means.
To view impacts of different scenarios for coastal areas in the US, *see* NOAA: Sea Level Rise Viewer.
11. *See* NOAA: Tides and Currents.
12. *See* American Communities Project: Mapping Climate Risks by County and Community.
13. *See* ProPublica: New Climate Maps Show a Transformed United States.
14. *See* US Government Accountability Office: Chemical Accident Prevention: EPA Should EnsureRegulated Facilities Consider Risks from Climate Change.
15. *See* PBS NewsHour: How 'green gentrification' is pricing out longtime east boston residents; https:// www.pbs.org/newshour/show/how-green-gentrification-is-pricing-out-longtime-east-boston-residents.
16. https://www.governing.com/now/what-does-the-inflation-reduction-act-do-for-state-and-local-government
17. https://blogs.law.columbia.edu/climatechange/2022/08/22/cities-the-inflation-reduction-act/
18. *See* Fairfax County: Community-Wide Energy and Climate Action Plan, https://www.fairfaxcounty.gov/environment-energy-coordination/climate-planning-action.

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19. https://www.phoenix.gov/streets/coolpavement
20. https://ww2.arb.ca.gov/news/california-moves-accelerate-100-new-zero-emission-vehicle-sales-2035
21. *See* RMI: Sprinting Ahead: Just Five Policies Get States About Two-Thirds of the Way to Key Climate Goals.
22. https://chancerylaneproject.org
23. https://chancerylaneproject.org/get-involved/#sign-up
24. https://lpdd.org/pathways/
25. https://climate.law.columbia.edu
26. *See* Ballotpedia: Climate action plans in the 50 largest cities, https://ballotpedia.org/Climate_action_plans_in_the_50_largest_cities
27. https://www.austintexas.gov/sites/default/files/files/Sustainability/Climate%20Equity%20Plan/Climate
28. https://www.columbus.gov/sustainable/cap/
29. https://shelbycountytn.gov/DocumentCenter/View/37431/Memphis-Area-Climate-Action-Plan-2019-FINAL_4_JANUARY-2020
30. https://www.miamigov.com/files/4e5f26f7-2622-4c90834a- eaaa6aa3321e/Miami-Forever-Carbon-Neutral-FULL.pdf
31. https://cityofraleigh0drupal.blob.core.usgovcloudapi.net/drupal-prod/COR27/RaleighCCAP.pdf
32. https://sfplanning.org/project/san-francisco-climate-action-plan
33. CAP_Final.pdf (grand-marais.mn.us
34. https://www.aspen.gov/DocumentCenter/View/4506/Aspens-Climate-Action-Plan-
35. https://www.greenvillesc.gov/DocumentCenter/View/20686/Sustainability-Plan-PDF?bidId=
36. https://bloomington.in.gov/sites/default/files/2021-04/Bloomington%20Climate%20Action%20Plan%20040521%20Reduced.pdf
37. https://content.civicplus.com/api/assets/5b3ef548-2a25-47b4-afb5-10e0fa862109
38. https://www.ci.richmond.ca.us/DocumentCenter/View/40636/CAP-combined
39. https://drive.google.com/file/d/1cLnxIfmHmuPyKtcS2t-fRuzgZOqK1u-hT/view
40. For more on Houston's goals, *see* "City of Houston: Houston Climate Action Plan," at 20-21.
41. https://worldgbc.org/advancing-net-zero/embodied-carbon/
42. https://content.next.westlaw.com/practical-law/document/Ic6b67c01ab6011ec9f24ec7b211d8087/Contract-Clauses-for-Government-Net-Zero-Objectives?viewType
43. https://www.sustainalytics.com/esg-ratings
44. https://lpdd.org/resources/lpdd-model-law-municipal-ordinance-for-alternative-fuel-vehicle-parking-benefit https://lpdd.org/resources/lpdd-model-law-municipal-ordinance-for-alternative-fuel-vehicle-parking-benefit
45. https://chancerylaneproject.org/climate-clauses/reduction-of-co2-from-single-use-plastic/
46. https://lpdd.org/resources/lpdd-model-law-municipal-ordinance-for-alternative-fuel-vehicle-parking-benefits/
47. https://lpdd.org/resources/lpdd-model-law-designation-of-parking-spaces-for-electric-vehicles-and-installation-of-electric-charging-devices/
48. https://newbuildings.org/code_policy/utility-programs-stretch-codes/stretch-codes/48 of-electric-charging-devices/
49. https://lpdd.org/resources/lpdd-model-law-ev-ready-building-code-for-one-and-two-family-homes/
50. https://www.austintexas.gov/cd



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Police Misconduct *cont'd from page 13*

III. Conclusion.

In this fashion, the professional obligations of attorneys that prevent departments from making full use of the information unearthed in civil litigation can be overcome. A municipality could direct the attorneys that it retains to defend litigation brought against the police officers it employs to be alert to any evidence that might warrant discipline against the officer named as a defendant or suggest a need for systemic reform. The information unearthed by private attorneys bringing civil actions against police officers could therefore be leveraged to improve police training, supervision, and discipline, much as the doctrine of *respondeat superior* enables private employers to use civil litigation in this fashion. Indeed, municipal attorneys could enhance that process by performing their own investigation to assess the conduct of the officer named as a defendant.

To be sure, there is no substitute for the political will to pursue reform. If elected officials and police executives have no wish to pursue reform, it is doubtful that any program of civil liability can alter that state of affairs—officials dedicated to the status quo are likely to view litigation expenses as the political cost they must pay to pursue their vision of effective policing. But even departments desirous of pursuing reform and identifying misconduct are hampered by a system in which the plaintiff's incentive to settle a case in a manner that produces compensation for attorney and client alike aligns with the incentive of a police-officer defendant, and the officer's attorney, to resolve the matter in a fashion that minimizes the chances that the officer will face internal discipline. As long as this state of affairs persists, civil litigation's potential to address police misconduct will remain unfulfilled. If the defense of civil litigation is conducted by an attorney with a duty to the public, not the officer, an important obstacle to police reform can be removed.

Editor's Note: This article is adapted from Professor Rosenthal's note titled *Legal Ethics as Roadblock To Police Accountability*, 92 Miss. L.J. 1 (2022).

Notes

1. *See, e.g.*, Joanna C. Schwartz, *What Police Learn from Lawsuits,* 33 Cardozo L. Rev. 841, 846, 872 (2012) ("Whether motivated by their ethical obligations or the promise of a percentage of any recovery, plaintiffs' civil rights attorneys have strong incentives to uncover all evidence that might support their client's claims.").
2. *See* 42 U.S.C. § 1983 (2018) ("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, suit in equity, or other proper proceeding for redress . . . .").
3. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 184 (1961) (citation omitted) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)), overruled in part on other grounds by Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978) (holding, in an action against police officers for an allegedly wrongful search, that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.")
4. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 395 (1989) ("[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . .").
5. *See, e.g.*, Nat'l Res. Council, *Fairness and Effectiveness in Policing: The Evidence* 278-80 (Wesley Skogan & Kathleen Frydl eds., 2004); Samuel Walker, *The New World of Police Accountability* 32-33 (2005); Barry Friedman & Mario Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. Rev. 1827, 1867-70 (2015); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 954-59 (2014).
6. For arguments along these lines, *see, for example*, Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs,* 29 Touro L. Rev. 633 (2013); and Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1244-50 (2015).
7. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 19-47 (2017).
8. Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking,* 57 U.C.L.A. L. Rev. 1023, 1028 (2010) (footnotes omitted). Professor Schwartz focused on jurisdictions that have been subject to external review because those jurisdictions had made more information available about their policies and practices than most police departments, and she supplemented the information disclosed by the departments with interviews and correspondence with knowledgeable practitioners and experts. *Id.* at 1042-43.
9. *See, e.g.*, Restatement (Third) of Agency § 7.07(1) (2006) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment").

Continued on page 32





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Inside Canada *cont'd from page 17*

known of the state of repair; however, a municipality is not liable under this Act if the municipality proves that it took reasonable steps to prevent the disrepair from arising. Section 186(1) of *Alberta's Traffic Safety Act* places the onus of proof of damage on the party claiming it. The Court turned to the Plaintiff to demonstrate that she suffered damage to her car, and that damage was a result of the pothole, and that the City knew of the disrepair. The onus then went to the City to determine if it took all reasonable steps to prevent the pothole on the road.

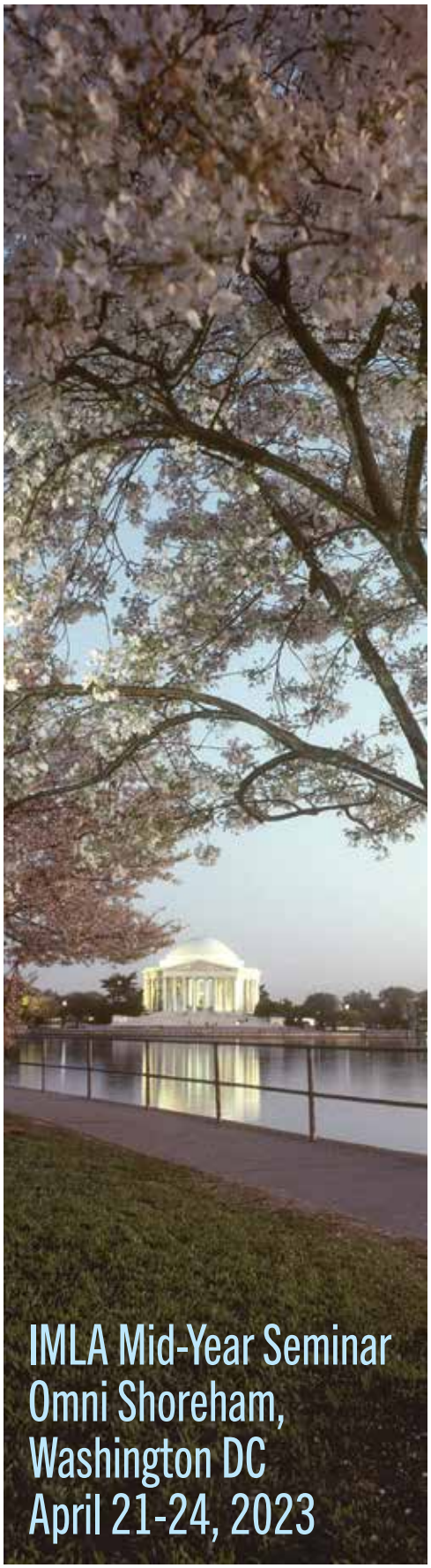
The Court was satisfied as both parties agreed there was damage to the Plaintiff's vehicle as a result of the pothole. Furthermore, the Court found it reasonable that the City was aware of the existence of potholes that required repair across the City has it had a dedicated pothole repair team to respond to these types of complaints. The onus turned to the City, who satisfied the Court that it had taken reasonable steps to prevent the pothole on road and ensure it was repaired in a timely fashion. The City's Director of Transportation explained that the City experiences wide temperature changes throughout the year, including a freeze-thaw cycle which causes potholes to develop constantly throughout the City. As a result, the City established a dedicated pothole repair team. Based on the City's records, the pothole had been previously repaired and was repaired again after the Plaintiff reported it to the City. As has been repeatedly held in case law, municipalities are not the insurers of those who use their roads and are not obligated to see that users of the road suffer no vehicular damage in all circumstances. The City's' duty of care was to ensure that ordinary drivers, acting reasonably, can travel safely on the roads. The Court held that the City satisfied that duty. Plaintiff's claim was dismissed.

Never Underestimate the Importance of a City Policy
Gooch v. The Corporation of the City of Penticton, 2022 BCCRT 1291 https://canlii.ca/t/jt8dj

The Applicant's vehicle was parked on a City of Penticton (City) street and was damaged when a stone from the street was kicked up by a passing vehicle, cracking the windshield. The Applicant claimed that the City failed to adequately clean the street and sought the cost of the deductible for the insurance company to complete the repair. The City submitted that it followed its street cleaning policy and is not responsible for the damage.

HELD: Claim dismissed.

DISCUSSION: Both parties accept that there was damage to the Applicant's vehicle. The onus is on the Applicant to prove on a balance of probabilities, that the City is responsible for the damage for failing to adequately keep the streets clean of debris, including stones. The City successfully argued that the Applicant failed to meet its onus to prove the claim. It was the City's position that it followed its street cleaning policy, and furthermore beyond photos of the damage to the windshield the Applicant failed to produce evidence of the repair cost or the insurance policy requiring the deductible be paid. The Tribunal was persuaded that the evidence produced by the Applicant fell short and did not meet the burden of proof. Based on this finding the Tribunal did not address the law around the operational and policy decision of the City nor determine if the City failed to adequately clean the street. Applicant's claim dismissed.



Police Misconduct *cont'd from page 27*

10. 436 U.S. 658 (1978).
11. *Id*. at 694.
12. *See* Owen v. City of Independence, 445 U.S. 622 (1980) (rejecting the defense of qualified immunity for governmental defendants facing custom, practice, or policy claims under Section 1983).
13. *See* Schwartz, *supra* note 7, at 27. Even this likely overstates the prevalence of claims against governmental defendants. Professor Schwartz noted of the cases in which only governmental defendants were sued: "In some of these instances, plaintiffs apparently intended to sue individual officers (indicated by the fact that they named Doe defendants) but were ultimately unable to identify the officers." *Id*. n. 82.
14. *Id*. at 29 tbl.2. There was considerable variation among the five districts studied, with qualified immunity raised in 54.7% of cases in the Southern District of Texas but only 23.9% of cases in the Eastern District of Pennsylvania. *Id*.
15. *Id*. at 36 tbl.6.
16. *See* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 Geo. L.J. 229, 269-72 (2020). *See also* Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 Fordham Urb. L.J. *587, 590-96 (2000);* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. Pa. J. Const. L. 797, 812-13 n.51, 819-20 (2007); Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 Iowa L. Rev. 1209, 1216-23 (2001); Dina Mishra, Note, *When the Interests of Municipalities and Their Officials Diverge: Municipal Dual Representation and Conflict of Interest in § 1983 Litigation*, 119 Yale L.J. 86, 101-02 (2009).
17. *See, e.g.*, Teresa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 Vill. L. Rev. 839, 865-67 (2017) (describing contractual indemnification obligations); Stephen Rushin, *Police Union Contracts*, 66 Duke L.J. 1191, 1221 (2017) (same).
18. Schwartz, *supra* note 5, at 912.
19. For examples of legislation authorizing the government to defend its officers, *see* Cal. Gov't Code § 995 (West 2020) (requiring a "public entity" to "provide for the defense" of civil actions against its employees); Fla. Stat. Ann. § 111.07 (West 2020) (authorizing state and local agencies to provide defense of employees); Idaho Code Ann. § 6-903(2)(i) (West 2020) (requiring defense of public employees); Iowa Code Ann. § 670.8 (West 2020) (same); Ky. Rev. Stat. Ann. § 65.2005(1) (West 2020) (requiring defense of local employees); Me. Rev. Stat. Ann. tit. 14, § 8112 (West 2020) (requiring governmental entities to assume defense of employees); Md. Code Ann., Cts. & Jud. Proc. § 5-302 (West 2020) (requiring local governments to assume defense of employees); Mass. Gen. Laws Ann. ch. 258, § 2 (West 2020) (requiring public attorneys to defend public employees); Miss. Code Ann. § 25-1-47 (West 2020) (authorizing defense of local employees); Mich. Comp. Laws Ann. § 691.1408 (West 2020) (same); Minn. Stat. Ann. § 466.07 (West 2020) (requiring municipalities to defend employees); Mont. Code Ann. § 2-9-305 (West 2020) (requiring defense of state employees); Nev. Rev. Stat. Ann. § 41.0339 (West 2020) (requiring defense of public employees); N.D. Cent. Code Ann. § 32-12.2-03 (West 2020) (requiring defense of state employees); N.J. Stat. Ann. 40A:14-155 (West 2020) (requiring defense of police officers); N.M. Stat. Ann. § 41-4-4 (West 2020) (requiring defense of public employees); N.C. Gen. Stat. Ann. § 143-300.3 (West 2020) (requiring defense of state employees); Ohio Rev. Code Ann. § 2744.07(A)(1) (West 2020) (requiring defense of local public employees); Or. Rev. Stat. Ann. §§ 30.285(3), 30.287(1) (West 2020) (requiring defense of state employees); 42 Pa. Stat. and Cons. Stat. Ann. § 8547(a) (West 2020) (requiring defense of local employees); 9 R.I. Gen. Laws Ann. § 9-31-8 (West 2020) (same); S.C. Code Ann. § 1-7-50 (2020) (requiring Attorney General to defend state and local employees); Vt. Stat. Ann. tit. 3, § 1101(a) (West 2020) (requiring defense of state employees); Wash. Rev. Code Ann. § 4.92.070 (West 2020) (requiring payment of costs of defending state employees); W. Va. Code Ann. § 29-12A-11(a)(1) (West 2020) (requiring defense of local employees).
20. Schwartz, *supra* note 5, at 915-16.
21. Model Rules of Pro. Conduct Preamble and Scope (Am. Bar Ass'n 2002). To similar effect, *see* Restatement (Third) of the L. Governing Laws. § 16 (Am. Law Inst. 2000) ("[A] lawyer must, in matters within the scope of the representation: (1) proceed in a matter reasonably calculated to advance the client's lawful objectives, as defined by the client after consultation.")
22. *See, e.g.,* Restatement (third) of the L. Governing Laws. § 68 (Am. L. Inst. 2000) ("[T]he attorney-client privilege may be invoked . . . with respect to: (1) a communication (2) made between [attorney and client] (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.")
23. *See* Model Rules of Pro. Conduct r. 1.6(a) (Am. Bar Ass'n 2012) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ."); *id*. r. 1.8(b) ("A lawyer shall not use information relating

to representation of a client to the disadvantage of the client unless the client gives informed consent . . . .”); Restatement (Third) of the L. Governing Laws. § 60(1)(a) (Am. L. Inst. 2000) (“[D]uring and after representation of a client . . . [a] lawyer may not use or disclose confidential client information as defined in [section] 59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client . . . ”); *id*. § 59 (“Confidential client information consists of information relating to representation of a client, other than information that is generally known.”)

24. *See* Model Rules of Pro. Conduct r. 1.6(a) (Am. Bar Ass’n 2012) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . .”); *id*. r. 1.8(b) (“A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent . . . .”); Restatement (Third) of the L. Governing Laws. § 60(1)(a) (Am. L. Inst. 2000) (“[D]uring and after representation of a client . . . [a] lawyer may not use or disclose confidential client information as defined in [section] 59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client . . . ”); *id*. § 59 (“Confidential client information consists of information relating to representation of a client, other than information that is generally known.”)

25. Model Rules of Pro. Conduct r. 1.6, cmt. 3 (Am. Bar Ass’n 2012); id. r. 1.8, cmt. 5 (“Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client . . . . Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules.”); Restatement (Third) of the L. Governing Laws. § 59, cmt. b (Am. L. Inst. 2000) (“This definition [of confidential client information that may not be disclosed by an attorney] covers all information relating to representation of a client, whether in oral, documentary, electronic, photographic, or other forms. It covers information gathered from any source, including sources such as third persons whose communications are not protected by the attorney-client privilege. It includes work product that the lawyer develops in representing the client, such as the lawyer's notes to a personal file, whether or not the information is immune from discovery as lawyer work product . . . . The definition includes information that becomes known by others, so long as the information does not become generally known.” (citations omitted)).

26. *See* Model Rules of Pro. Conduct r. 5.4(c) (Am. Bar Ass’n 2002); Restatement (Third) of the L. Governing Laws. § 134(2) (Am. L. Inst. 2000) (“A lawyer’s professional conduct on behalf of a client may be directed by someone other than the client if: (a) the direction does not interfere with the lawyer’s independence of judgment; (b) the direction is reasonable in scope and character, such as by reflecting the obligation borne by the person directing the lawyer; and (c) the client consents to the direction under the limitations and conditions provided in [section] 122.”); *id*. § 122(2) (“[A] lawyer may not represent a client if . . . in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.”)

26. *See, e.g*., Bur. of Just. Assistance, U.S. Dep’t of Just., *Police Chiefs Desk Reference: A Guide For Newly Appointed Police Leaders* 185 (2d ed. 2008) (“Rules and regulations usually proscribe specific behavior that will result in employees being disciplined for failing to follow the guidelines provided.” (footnote omitted)); Off. of Comm. Oriented Policing Servs., U.S. Dep’t of Just., *Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice* 53 (2012) (“A matrix specifies the nature of offenses or policy violations and associates them with specific penalty options or ranges of discipline. Within such a system, a policy violation falls within a certain class or category of violation that, in turn, corresponds to a particular range or set of discipline options that a decision-maker can consider according to the totality of the circumstances present in a given case.”); Lou Reiter, *Law Enforcement Administrative Investigations: A Manual Guide* § 1.2 (4th ed. 2019) (“Misconduct is an act or omission by an employee that if proven true would normally result in some form of discipline, sanction or remediation. This would include: 1. Commission of a criminal act, 2. Neglect of duty, 3. Violation of an agency policy, procedure, rule or regulation, core value, training standard, or 4. Conduct that may tend to reflect unfavorably upon the employee and/or agency.”)

27. *Cf*. Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 B.U. Pub. Int. L.J. 185, 199 (2005) (“On matters of discipline, the interests of police managers diverge from those of rank-and-file police officers. Police managers have a formal responsibility to direct their organizations and to maintain high standards of professionalism and integrity. This includes the responsibility to investigate alleged misconduct and appropriately discipline any employee found guilty of misconduct.”

Continued on page 34

Police Misconduct *cont'd from page 33*

(footnote omitted)).
29. Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 1101 Geo. L.J. 305, 335 (2020).
29. *See supra* text accompanying note 8.
30. *See* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 Buff. L. Rev. 757, 775 (2004) (footnote omitted).
31. *See, e.g.*, James M. Fischer, *Insurer-Policyholder Interests, Defense Counsel's Professional Duties, and the Allocation of Power to Control the Defense,* 14 Conn. Ins. L.J. 21, 54 (2008) ("Permitting the insurer to exercise exclusive control over the defense of the claim is a reasonable accommodation of the interests of both insurer and policyholder. These interests include the duties and obligations that both assume under the standard liability insurance policy, the express tender by the policyholder of the defense of the claim to the insurer, and the fact that the claim will be resolved within policy limits."); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L.J. 255, 284-85 (1995) ("[A]n insured who demands a defense thereby consents both to representation by company-selected counsel and to joint representation because of the context in which the demand is presented. The company is entitled to control the defense. The company expects to take the helm and can defend the liability suit effectively only if it is a co-client. In contrast, the insured has no right of control, and, in a full coverage case, has no reasonable expectation of asserting control (and perhaps no actual expectation as well). In these circumstances, it is proper to conclude that the insured, by demanding a defense, impliedly agrees to allow the company to become a co-client. To conclude otherwise would hold that an action not contemplated by the liability contract—that is, some further act conveying the insured's permission to allow the company to become a co-client—is a precondition for the company's exercise of the powers the liability contract conveys.") (footnote omitted).
32. 745 Ill. Comp. Stat. Ann. 10/2-302 (West 2020).
33. *See, e.g.*, Model Rules of Pro. Conduct Preamble and Scope (Am. Bar Ass'n 2002) ("Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so."); Restatement (Third) of the L. Governing Laws § 14 (Am. L. Inst. 2000) ("A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide services; or (2) a tribunal with power to do so appoints the lawyer to provide the services.")
34. Debra Bassett Perschbacher & Rex R. Perschbacher, *Enter at Your Own Risk: The Initial Consultation and Conflicts of Interest,* 3 Geo. J. Legal Ethics 689, 7004-05 (1990) (footnote omitted).
35. *See* 745 Ill. Comp. Stat. Ann. 10/2-302 (West 2020).
36. Cal. Gov't Code § 995 (West 2020) (emphasis supplied). The phrase "public entity" is defined to "include[] the state . . . a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State." *Id.* § 811.2.



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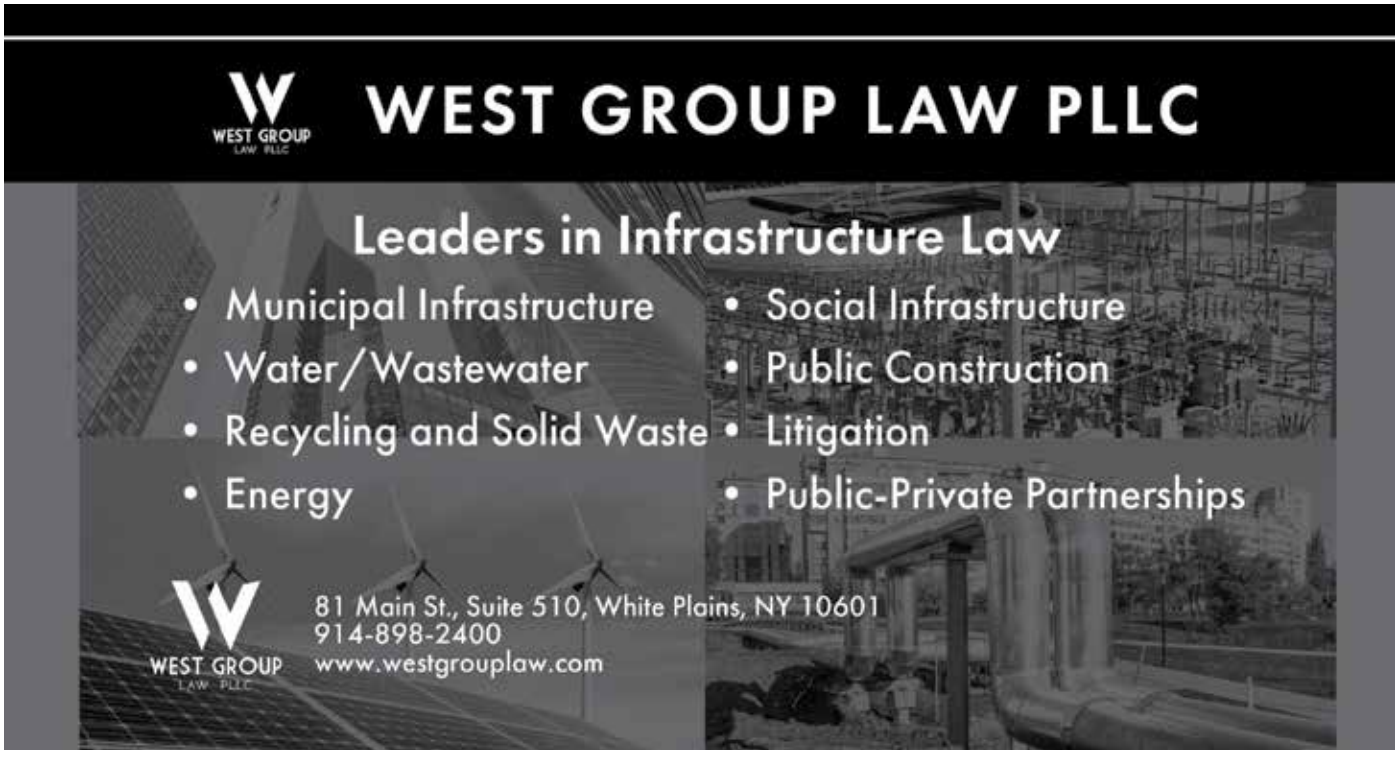
Amicus *cont'd from page 19*

Notes

1. Donna LittleJohn, *SCNG survey finds homelessness tops Los Angeles voter concerns*, Los Angeles Daily News, (Oct. 19, 2022), available at: https://www.dailynews.com/2022/10/19/scng-survey-finds-homelessness-tops-los-angeles-voter-concerns/; Hannah Scott, *Poll: Despite optimism, homelessness remains Seattle's No. 1 issue,* MyNorthwest, (Oct. 19, 2022), available at: https://mynorthwest.com/3677550/poll-shows-signs-optimism-other-surprises-among-seattlites/; Nicole Hayden, *Homelessness is the most important issue for Portland-area voters, Oregon/OregonLive poll finds*, Oregonlive, (Oct. 14, 2022), available at: https://www.oregonlive.com/politics/2022/10/homelessness-is-the-most-important-issue-for-portland-area-voters-oregonianoregonlive-poll-finds.html; Noah Arroyo, *How fed up are San Franciscans with the city's problems? New S.F. Chronicle poll finds pervasive gloom*, San Francisco Chronicle, (Sept. 13, 2022), available at: https://www.sfchronicle.com/sf/article/sfnext-poll-sentiment-17435794.php.
2. *See* Kathleen Ronayne, Michael Casey, Geoff Mulvihill, *Homeless surging in many cities in amid end to COVID assistance,* PBS News Hour, (Oct. 6, 2022), available at: https://www.pbs.org/newshour/nation/homelessness-surging-in-many-cities-in-amid-end-to-covid-assistance (noting that homelessness is up in places like Sacramento and Portland, but also Asheville, Prince Georges County, and South Dakota).
3. Martin v. City of Boise, 920 F.3d 584, 616 (9th Cir. 2019).
4. *Id*. at 617, n. 8. (emphasis added).
5. *See* Los Angeles Municipal Ordinance 187127 (replacing Los Angeles Municipal Code Section 41.18).
6. Tozer v. City of Portland, 3:22-cv-01336 (D. Or. Sept. 6, 2022).
7. *See* Juliette Rihl, *ACLU sues Phoenix over homeless sweeps, citations,* Arizona Republic (Dec. 1, 2022), available at: https://www.azcentral.com/story/news/local/phoenix/2022/12/09/simultaneous-suits-over-phoenix-homeless-camp-will-continue/69716233007/.
8. *Id*.
9. *See* LA All. for Hum. Rts. v. Cnty. of Los Angeles, 14 F.4th 947, 953 (9th Cir. 2021).
(vacating the district court's preliminary injunction due to the court impermissibly resorting to extra-record evidence and independent research to reach its conclusions).
10. 50 F.4th 787 (9th Cir. 2022).
11. *See* Grants Pass Municipal Code (GPMC) Sections 5.61.020; 5.61.030; and 6.46.090.
12. GPMC 6.46.350(A).
13. GPMC 5.61.010.
14. Johnson v. City of Grants Pass, 50 F.4th 787, 804-05 (9th Cir. 2022).
15. *Id*.
16. *Id*. at 808-09. Even though most violations of the ordinances in question resulted in fines, the Ninth Circuit concluded that the City's ordinances nevertheless violated the Cruel and Unusual Punishment Clause because a "local government cannot avoid this ruling by issuing civil citations that, later, become criminal offenses." The court noted that it was not addressing ordinances that solely provided civil infractions. *Id*. at 813.
17. Johnson v. City of Grants Pass, 50 F.4th 787, 823 (9th Cir. 2022) (Collins, J., dissenting).



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