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Consent Decrees: Patronage practices require continuation of consent decrees, but Circuit expresses "grave federalism concerns."

Shakman v. Clerk of Cook County, no. 20-1828 (7th Cir. Apr. 16, 2021).

The Seventh Circuit keeps in place two longstanding consent decrees barring patronage in Cook County but warns of an inherent conflict with the principles of federalism.

In 1969, Michael Shakman (Shakman), an independent candidate seeking a delegate position at the 1970 Illinois constitutional convention, filed a complaint on behalf of independent candidates and voters in the Northern District of Illinois. He alleged that city and county officials and entities—including the Clerk of Cook County, the Chicago Park District, the Chicago City Council, the Forest Preserve, and Cook County itself—were promising and awarding jobs in exchange for pledges of political support. He obtained a consent decree in 1972 (1972 Decree) barring county officials from "conditioning, basing or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to one who is at the time already a governmental employee, upon or because of any political reason or factor."

The 1972 Decree was augmented by a subsequent decree (1991 Decree) based on the Supreme Court's holding that the First Amendment's prohibition against patronage-based firings recognized in *Elrod v. Burns*, 427 U.S. 347 (1976), "extends to promotion, transfer, recall, or hiring decisions involving public employment positions for which party affiliation is not an appropriate requirement." Defendants were thus enjoined from conditioning hiring or promotions on any political affiliation or considerations and were

required to post "prior public notice of the opportunity to apply for and be hired for" all positions beyond a few specified exempt roles.

New complaints of patronage surfaced. The plaintiffs asserted that the Clerk's hiring practices were violating the 1991 Decree, by unilaterally changing the list of political positions exempt from hiring oversight, hiring new employees for non-exempt positions without publicly posting the openings, and punishing independent employees with disfavored job assignment rotation programs. The Clerk opposed the plaintiffs' request for appointment of a special master, characterizing the alleged violations as technical and trivial. The Clerk also went on the offensive by asking the magistrate judge to vacate the 1972 and 1991 Consent Decrees. In March 2020, the magistrate judge found that the Clerk violated the 1991 Decree and likewise found that the evidence strongly suggested that the Clerk's policy of rotating employees between offices was "instituted for the purpose of making life miserable" for certain longtime supervisors who did not come from "political pedigree[s]," in violation of the 1972 Decree. An appeal followed.

Shakman and others argued that the Seventh Circuit did not have jurisdiction to review the magistrate judge's appointment of a special master. The Circuit agreed: while 28 U.S.C. § 1291 authorizes appeals courts to review the "final decisions" of district courts, "enlisting the assistance of a special master is a tool district courts may use to help resolve ongoing disputes. The appointment does not terminate the litigation, however, and is thus not a final judgment appealable under § 1291."

However, the Circuit did have authority to review the magistrate judge's decision to leave the 1972 and 1991 Consent Decrees in place, and did so. While Rule 60(b)(5) authorizes the district court, "on motion and just terms," to relieve from a consent decree any party who demonstrates that "a significant change in facts or law warrants revision of the decree," *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992), the Circuit found no merit in any of the Clerk's arguments that (1) the plaintiffs lacked standing because none of them had personally been affected by the alleged violations; (2) political patronage presented nonjusticiable political questions akin to the one recognized by the Supreme Court in *Rucho v. Common Cause*; and (3) the magistrate judge misunderstood the Clerk's alleged violations which were merely technical, and not cause for continued enforcement. The Decrees thus remain in full effect.

In closing, however, the Circuit expressed "grave federalism concerns" over their seeming permanence:

> Do not let today's result cloud the grave federalism concerns we have with the fact that the Clerk of Cook County has been under the thumb of a federal consent decree for the last 50 years. . . . Such stagnation is intolerable. . . . Our federal structure, including the Article III Case or Controversy requirement, does not contemplate federal courts putting units of state or local government under what amount to static and permanent consent decrees. . . . Federal injunctions

interfere with local control over local decision making, and, in turn, local democracy does not work as our federal constitutional design envisions.

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Employment: Reassignment to vacant position is inadequate where employee can perform essential functions of current job with reasonable accommodation.

Wirtes v. City of Newport News, no. 19-1780 (4th Cir. Apr. 30, 2021).

Relying on analogous decisions in sister circuits, the Fourth Circuit reverses and remands in a case where alternatives to wearing a heavy "duty belt" could have allowed a police detective to remain in his current position.

Michael Wirtes (Wirtes) Wirtes was employed as a police officer with the City of Newport News (City) Police Department from 1997 through 2016, during which time he wore heavy "duty belts" supporting pepper spray, a gun, ammunition, a taser, a baton, handcuffs, a flashlight, a radio, and a body camera battery pack. He eventually developed permanent nerve damage known as "meralgia paresthetica," which caused discomfort, pain, numbness, and tingling to his waist, left leg, and thigh area. He was reassigned to a detective position which initially did not necessitate wearing of the duty belt, but eventually the belt was again required.

According to Wirtes, the City concluded that he could not perform the essential functions of his job as a detective and then offered him the options of either retiring early or accepting reassignment to a civilian position he did not want. He reluctantly retired early and then filed suit, alleging that the City failed to accommodate his disability in violation of the ADA. The district court granted the City's motion for summary judgment, finding that because Wirtes was offered reassignment to a vacant position, he could not make out a prima facie failure-to-accommodate ADA claim.

The Fourth Circuit reversed and remanded. While Fourth Circuit precedent had established that reassignment is a "disfavored" accommodation that employers are generally under no obligation to offer, it had not previously addressed the question before it: Whether reassignment to a vacant position is a *permissible* accommodation under the ADA when the employee wishes to stay in their current position and can perform the essential functions of that position with reasonable accommodations. The court took guidance from the Third, Seventh, Tenth and D.C. Circuits. "Every circuit court to have addressed this issue has concluded that an employer fails to accommodate its qualified disabled employee when it transfers that employee from a

position they could perform if provided with reasonable accommodations to a position they do not want."

The Fourth Circuit did not go so far as to hold that an employer can *never* reassign an employee when there exists a reasonable accommodation that would keep the employee in their current and preferred position:

> That broad question is not before us. Nor should this opinion be read in any way to restrict the ability of employers and employees to agree to a voluntary transfer. Rather, we simply reiterate that reassignment is strongly disfavored when an employee can still do their current job with the assistance of a reasonable accommodation, and that reassignment should therefore be held 'in reserve for unusual circumstances.'

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Home Rule: Mobile speed camera does not exceed City's home rule authority or violate driver's rights.

Downey v. City of Toledo, No. 20-3894, 2021 U.S. App. LEXIS 11173 (6th Cir. Apr. 16, 2021).

Affirming the lower court's grant to the City of Toledo's motion for summary judgment, the Sixth Circuit finds the Plaintiff failed to show that he faced an unconstitutional dilemma of having to choose between testifying to defend the seizure of his property and exercising his Fifth Amendment privilege against self-incrimination, based on a mobile speed camera reading, and failed to establish a due process violation.

In June 2018, an officer with the Toledo Police Department, operating a mobile speed camera, clocked a car owned by Patrick Downey (Downey) driving 71 mph in a 60 mph speed-limit zone. Pursuant to the City's "automated red light and speeding system, the speeding car was photographed and a "Handheld Speed Violation Notice of Liability" was sent to Downey. He appeared at an administrative hearing and moved to dismiss. The hearing officer denied the motion. Downey did not appeal, but refused to pay the $120 fine. The City sent him a notice of default, imposing a $25 penalty and notifying him that failure to pay could result in a civil action against him in Municipal Court; furthermore, failure to respond to the notice immediately could result in the towing or immobilization of his vehicle.

Downey filed a complaint seeking a declaratory judgment that the ordinance in question, "section 313.12" violated his rights under the Fifth and Fourteenth Amendments. Downey alleged that, because section 313.12 allows the City to pursue both civil and

criminal charges against an individual and provides that the only way an owner can contest liability is to provide an affidavit or give testimony, it forces that individual to choose between asserting his Fifth Amendment right against self-incrimination or his right to contest the seizure of his property. He alleged four additional due process claims: (1) the police officer's use of a mobile speed camera was not authorized by the City's automated red-light and speeding system, and thus the attempt to collect a civil penalty violated his right to due process; (2) the assessment of a $25 penalty violated his due process rights because he timely appealed the notice of liability; (3) any attempt to immobilize or tow his vehicle, as indicated on the notice of default, would violate his right to due process because the City opted to assess an additional penalty; and (4) section 313.12(c)(3) "unfairly shifted the burden of proof" to him, and the administrative hearing did not provide him with an opportunity to dispute whether a violation had actually occurred.

Downey moved for summary judgment. The City moved for judgment on the pleadings. Applying the summary-judgment standard to Downey's and City's motions, the court granted summary judgment in favor of the City on Downey's Fifth Amendment claim, because Ohio law prohibited the use of such testimony as evidence in other judicial proceedings and Downey was not faced with an unconstitutional choice between his Fifth Amendment rights and his Fourteenth Amendment rights. With his remaining claims, the court concluded that the City's administrative procedures provided a mechanism for Downey to challenge the speeding citation, including a challenge to the manner in which the administrative hearing was conducted. Therefore, the court held that Downey failed to establish a viable challenge to the City's procedures.

The Sixth Circuit agreed. On appeal, Downey asserted that the City's automated red-light and speeding system violates its home rule authority under the Ohio Constitution and subjects motorists to civil penalties for traffic violations for which they could also be criminally liable. He argued that Ohio's Constitution, which had such a rule, section 4511.098, did not apply to his case because the officer recorded the alleged violation using a mobile speed camera, which did not fit within the definition of "traffic law photo-monitoring device," but the Sixth Circuit found that Downey did not provide any authority to support that assertion, and the City's Municipal Code's definitions did not exclude mobile or handheld cameras. *See* Toledo Municipal Code § 313.12(b)(1). Thus, the Circuit held that the district court properly granted summary judgment to the City on Downey's claims that section 313.12 violated his Fifth and Fourteenth Amendment rights.

Downey's other due process claims failed. The Sixth Circuit found that the availability of an appeal process protected the $25 penalty, and his claim that any attempt to immobilize or tow his vehicle would violate his right to due process was purely conjectural. The Circuit also found that Section 313.12 gave Downey notice, a hearing, and an opportunity to be heard. He had not presented anything to rebut the City's evidence, nor did he appeal to the Municipal Court or the Court of Common Pleas.

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Protest: Preliminary injunction against police in public protest is temporarily extended; class certification is vacated due to lack of commonality.

Ahmad v. City of St. Louis, nos. 19-2062/2221 (8th Cir. Apr. 26, 2021).

The Eighth Circuit allows a six-month continuation of a three-year preliminary injunction against St. Louis police officers limiting their activities in response to violent protests but declines to certify a class of three protestors who allege differing constitutional violations.

In September 2017, following the acquittal of former police officer Jason Stokley for the 2011 shooting of Anthony Lamar Smith, St. Louis (City) police dealt with several days of extensive street protests. A large crowd threw objects at the mayor's house and others wearing masks and goggles roamed downtown, smashing windows and engaging in vandalism. Police declared the crowd an unlawful assembly, issued repeated orders to disperse, and eventually maced and arrested approximately 125 people.

Three plaintiffs--a protester who was maced, a person whose cell phone was seized and
searched as he filmed arrests, and an observer who was allegedly exposed to chemical agents and arrested--filed a complaint and moved to enjoin the police activities. They alleged that the City violated (i) the First Amendment by retaliating against plaintiffs for engaging in protected expressive activity; (ii) the Fourth Amendment because its custom, practice, and failure to train and supervise caused unlawful seizures and excessive force by police; and (iii) the Fourteenth Amendment when officers failed to warn before deploying chemical agents, failed to provide opportunities to disperse, and arbitrarily enforced two ordinances of the St. Louis Code. In November 2017, the court granted a preliminary injunction, referring the case to mediation. The City did not timely appeal the injunction, which was an appealable interlocutory order under 28 U.S.C. § 1292(a)(1).

No resolution had been achieved by May 2019, when the district court entered an order granting certification of a Rule 23(b)(2) class, denying the City's motion to dismiss and to dissolve the preliminary injunction. The City timely appealed both orders.

Preliminary Injunction: Modifying or dissolving a preliminary injunction "is proper only when there has been a change of circumstances . . . that would render the continuance of the injunction in its original form inequitable." The City based its motion to dissolve on F.R.C.P. 60(b)(5), which permits a party to obtain relief from a judgment or order if "applying it prospectively is no longer equitable." In *Horne v. Flores*, the Supreme Court confirmed that Rule 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if a significant change either in factual conditions

or in law renders continued enforcement detrimental to the public interest." 557 U.S. 443, 447 (2009). (cleaned up).

In denying the motion to dissolve, the district court concluded that the City had failed to show changed circumstances, characterizing its motion as "nothing more than an attempt to reargue the preliminary injunction motion with new counsel and more strident rhetoric." The Circuit agreed, for the most part. But in one crucial respect – the passage of significant time since the preliminary injunction was entered -- the City's motion did present a dramatic case of "changed circumstances." While most preliminary injunctions merely preserve the relative positions of the parties, the injunctive relief here subjected every St. Louis police officer exercising their responsibility to maintain public order and protect persons and property to the risk of being held in contempt for (i) enforcing facially valid ordinances prohibiting unlawful assemblies and refusals to obey dispersal orders unless protestors are "acting in concert to pose an imminent threat to use force or violence"; (ii) using "chemical agents . . . against any person engaged in expressive, non-violent activity . . . in the absence of probable cause to arrest . . . and without first issuing clear and unambiguous warnings. . ."; or (iii) issuing dispersal orders without "specifying with reasonable particularity the area from which dispersal is ordered . . . and providing sufficient warnings of the consequences of failing to disperse" and a reasonable "announced amount of time . . . to heed the warnings and exit the area."

That preliminary injunctive relief was reasonable "*pending a prompt trial on the merits of plaintiffs' claims for a permanent injunction*." (italics in original). But more than three years had elapsed. "The longer an injunction or consent decree stays in place, the greater the risk that it will improperly interfere with a State's democratic processes." Horne, 557 U.S. at 453. The evidence thus far proffered by the plaintiffs seemed insubstantial to the Circuit when considering the trial ahead: "A 'showing at trial of a relatively few instances of violations by individual police officers, without any showing of a deliberate policy on behalf of [the City, would] not provide a basis for equitable relief.' " Plaintiffs' burden on the failure to train and supervise claim was no less rigorous.

> The evidence at the preliminary injunction hearing relating to the events of September 2017, while relevant and sufficient to persuade the court to grant a preliminary injunction *pendente lite*, will not be sufficient to warrant permanent injunctive relief imposing the same levels of indefinite federal court control over the City's law enforcement responsibilities. As Judge Posner recently reminded Seventh Circuit district judges, "[t]he era of micromanagement of government functions by the federal courts is over." Chicago United Ind., Ltd. v. City of Chicago, 445 F.3d 940, 947 (7th Cir. 2006). 445 F.3d at 947.

While the City had not shown changed circumstances warranting immediate dissolution, an unending injunction was unsupportable. The Circuit allowed another six months: "[W]e affirm denial of the City's motion to dissolve the temporary injunction and remand with directions to vacate and dissolve the injunction no later than October 31, 2021, if it has not been replaced with a final order either granting a permanent injunction or denying injunctive relief."

Class Certification: The district court had defined the class as: "persons who will in the future participate in or observe non-violent public demonstrations and/or who record such public demonstrations and/or police activities at the public demonstrations for the exercise of constitutional rights of free speech and assembly in the City of St. Louis."

Under F.R.C.P. 23(a) class certification requires a showing of "numerosity, commonality, typicality, and fair and adequate representation." The district court concluded that plaintiffs satisfied each element. But the Circuit found the lower court's inquiry to be insufficient given that the relief sought was injunctive (as opposed to the more common damages-based class certification). F.R.C.P. 23(b)(2) allows for class injunctive relief, but because unnamed class members are bound without an opportunity to opt out, a Rule 23(b)(2) class requires even greater cohesiveness than a damages class. Thus, when three named plaintiffs attempted "to aggregate a plethora of discrete claims . . . into one super-claim'" against a government agency, without demonstrating "that the class members have been harmed in essentially the same way," the proposed Rule 23(b)(2) class was deficient.

Here, the three plaintiffs were not "bound together through preexisting or continuing legal relationships or by some significant common trait." One intentionally violated state and local ordinances when she was maced; one was allegedly recording the protest when police detained him and seized his phone; one was an "observer" of, not a participant in, the protests when she was arrested. They experienced different harms and alleged different constitutional violations.

When liability does not apply uniformly to the entire class, the relief sought is too individualized, and the cohesiveness necessary to proceed as a class under Rule 23(b)(2) is lacking. Given the plaintiffs' disparate claims, "the massive class action certified neither promotes the efficiency and economy underlying class actions nor pays sufficient heed to the federalism and separation of powers principles emphasized in *Rizzo v. Goode, Lewis v. Casey*, and other cases." Noting that various individuals had already sued the City and its police, the Eighth Circuit vacated class certification.

DISSENT: Judge Erickson agreed that the class certification should be vacated. But he believed the City's failure to appeal the preliminary injunction, which was an appealable interlocutory order under 28 U.S.C. § 1292(a)(1), divested the City of the opportunity to contest the merits.

"[I]f an injunction is granted, and not appealed, we lack jurisdiction to review an order that denies a request for reconsideration of that injunction." While the City captioned its motion as a request to "dissolve" the injunction, the essence of its motion was a request to reconsider the injunction. "That the City relied on evidence existing before the district court entered the preliminary injunction is fatal and should have ended the inquiry because we lack jurisdiction to review a request for reconsideration." Furthermore, while he shared the majority's concerns about the breadth of the preliminary injunction,

those concerns “do not obviate the requirement that a party seeking to dissolve a preliminary injunction must first demonstrate a change in circumstances.”

APPENDIX: The Preliminary Injunction

IT IS HEREBY ORDERED that plaintiffs’ motion for preliminary injunction is granted and defendant City of St. Louis and its agents, servants, employees, and representatives will not enforce any rule, policy, or practice that grants law enforcement officials the authority or discretion to:

1) Declare an unlawful assembly under St. Louis Code of Ords. §15.52.010 when the persons against whom it would be enforced are engaged in expressive activity, unless the persons are acting in concert to pose an imminent threat to use force or violence or to violate a criminal law with force or violence;

2) Declare an unlawful assembly under St. Louis Code of Ords. §15.52.010 or enforce St. Louis Code of Ords. §17.16.275(A) and (E) for the purpose of punishing persons for exercising their constitutional rights to engage in expressive activity;

3) Use chemical agents, including, but not limited to, mace/oleoresin capsicum spray or mist/pepper spray/pepper gas, tear gas, skunk, inert smoke, pepper pellets, xylyl bromide, and similar substances (collectively “chemical agents”), whatever the method of deployment, against any person engaged in expressive, non-violent activity in the City of St. Louis, in the absence of probable cause to arrest the person and without first issuing clear and unambiguous warnings that the person is subject to arrest and such chemical agents will be used and providing the person sufficient opportunity to heed the warnings and comply with lawful law enforcement commands or as authorized in paragraph 5 below;

4) Use or threaten to use chemical agents, whatever the method of deployment, against any person engaged in expressive, non-violent activity in the City of St. Louis, for the purpose of punishing the person for exercising constitutional rights; and

5) Issue orders or use chemical agents, whatever the method of deployment, for the purpose of dispersing person(s) engaged in expressive, non-violent activity in the City of St. Louis without first: specifying with reasonable particularity the area from which dispersal is ordered; issuing audible and unambiguous orders in a manner designed to notify all persons within the area that dispersal is required and providing sufficient warnings of the consequences of failing to disperse, including, where applicable, that chemical agents will be used; providing a sufficient and announced amount of time which is proximately related to the issuance of the dispersal order in which to heed the warnings and exit the area; and announcing and ensuring a means of safe egress from the area that is actually available to all person(s);

Provided, however, that paragraph (3) and (5) above do not apply to situations where persons at the scene present an imminent threat of violence or bodily harm to persons or damage to property, or where law enforcement officials must defend themselves or other persons or property against imminent threat of violence.

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Qualified Immunity: No First Amendment, false arrest, or excessive force claim where police detain motorist filming traffic accident.

Crocker v. Beatty, No. 18-14682, 2021 U.S. App. LEXIS 11480 (11th Cir. Apr. 20, 2021).

Affirming the lower court's decision, the Eleventh Circuit holds that a sheriff was entitled to qualified immunity when arresting the plaintiff photographing an accident and leaving him in a hot squad car for 30 minutes.

James Crocker (Crocker) parked on the shoulder of Interstate 95 after noticing an overturned vehicle. Deputy Sheriff Steven Beatty (Beatty) arrived, saw Crocker in the median taking photos, and, according to Crocker, seized his phone without warning or explanation, telling Crocker to drive to a nearby weigh station until someone from Florida Highway Patrol would follow up about the phone. When Crocker refused to leave without his phone, Beatty arrested him for resisting an officer and left him in a hot patrol car—with no air conditioning—for about 30 minutes before taking him to the local jail. County officials released him, returned his phone to him, and dropped the "resisting an officer" charge.

Crocker sued Beatty and Martin County Sheriff William Snyder (Snyder) under § 1983. He alleged violations of his rights under the First, Fourth, and Fourteenth Amendments on the grounds that Beatty (1) prevented him from taking photographs of government officials, (2) seized his phone and falsely arrested him, and (3) used excessive force during the arrest. Crocker also challenged his arrest under Florida law.

The district court granted Snyder's motion for summary judgment and granted Beatty's motion on qualified-immunity grounds with respect to all claims except the one alleging that his phone was seized in violation of the Fourth Amendment. Crocker filed a motion for reconsideration, which the court denied. Beatty filed an interlocutory appeal of the district court's order denying him qualified immunity on the phone-seizure claim, but the Eleventh Circuit affirmed. *Crocker v. Beatty*, 886 F.3d 1132, 1138 (11th Cir. 2018). Crocker prevailed on that claim at trial, and the jury awarded him $1,000 in damages. Crocker then appealed the district court's summary judgment order granting Beatty qualified immunity on the First Amendment, false-arrest, and excessive-force claims, which became final when judgment was entered following the jury verdict.

Upholding the district court's grant of summary judgment, the Eleventh Circuit concluded that Beatty was entitled to qualified immunity on all claims, because Crocker's First Amendment claim wasn't clearly established, Beatty had probable cause to arrest Crocker, and Beatty didn't use excessive force in the course of arresting Crocker (and the law underlying Crocker's excessive-force claim was not clearly established, in any event).

To receive qualified immunity, the officer must first show that he acted within his discretionary authority. This was undisputed in Beatty case; thus the burden shifted to Crocker to allege facts establishing both (1) that Beatty violated a constitutional right and (2) that the relevant right was clearly established at the time of the alleged misconduct.

In support of his First Amendment claim, Crocker cited *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000), which held that the plaintiffs had a First Amendment right, subject to reasonable time, manner, and place restrictions, to photograph or videotape police conduct. The Circuit framed the issue—regarding *Smith*'s application to the case—as whether every reasonable police officer in Beatty's position would have known that Crocker had a right to record the accident's aftermath, subject only to reasonable time, place, and manner restrictions. The Court of Appeals answered in the negative, holding that *Smith* did not apply with "obvious clarity to the circumstances," and Beatty was entitled to qualified immunity on Crocker's First Amendment claim.

The Circuit also affirmed the lower court's holding there was no Fourth Amendment violation as to Crocker's arrest. Beatty had probable cause: considering all the facts known to Beatty, a prudent person would believe that Crocker's car was parked on a limited-access facility in violation of Florida law. Furthermore, Crocker was taking pictures—not rendering aid—meaning he could no longer arguably qualify for the statute's Good Samaritan exception. Probable cause bars a claim for false arrest under Florida law just as it does under the federal Constitution; therefore, the state law false arrest claim also failed.

For Crocker's excessive force claim, he cited *Patel v. Lanier Cnty.*, 969 F.3d 1173, 1178 (11th Cir. 2020), which applies the Fourth Amendment's "objective-reasonableness" standard rather than the Eighth Amendment's "malicious-and-sadistic standard." While the district court had erroneously applied the old malicious-and-sadistic standard to grant summary judgment on Crocker's excessive-force claim, the same outcome would have resulted from the objective reasonableness test in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) which held:

> Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: [1] the relationship between the need for the use of force and the amount of force used; [2] the extent of the plaintiff's injury; [3] any effort made by the officer to temper or to limit the amount of force; [4] the

> severity of the security problem at issue; [5] the threat reasonably perceived by the officer; and [6] whether the plaintiff was actively resisting.

Patel, 969 F.3d at 1182 (quoting *Kingsley*, 576 U.S. at 397). Here, very little "force" was used and essentially no harm done. In the Fourteenth Amendment context—and the Fourth as well, for that matter—"[t]here is, of course, a *de minimis* level of imposition with which the Constitution is not concerned. Because Crocker's Fourteenth Amendment claim fails on the merits—and because the law underlying that claim wasn't clearly established, in any event—we hold that the district court correctly granted summary judgment for Deputy Beatty."

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