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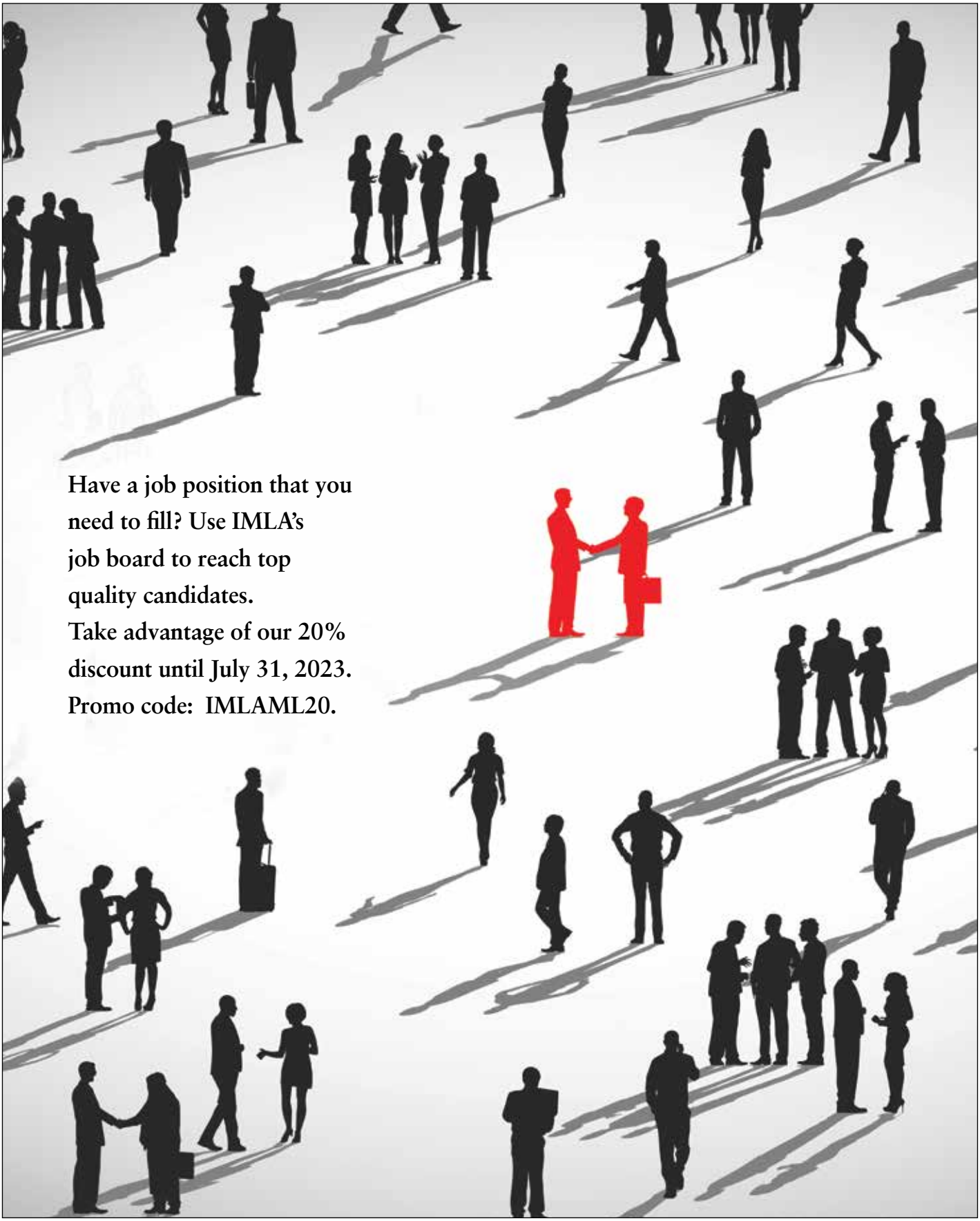
COMPELLED SPEECH: YOU CAN'T MAKE ME SAY THAT

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EDITOR'S NOTE



BY: **ERICH EISELT**
IMLA Assistant General Counsel and Director of Legal Advocacy

Meet Your New Paralegal

"Legal futurists have long anticipated technology's transformation of the legal industry, though the impact to date can best be described as evolutionary rather than revolutionary. The release of ChatGPT by OpenAI on November 30, 2022, may herald the beginning of the revolution." So says Andrew Perlman, in his article "Implications of ChatGPT for Legal Services and Society," appearing in the March-April 2023 issue of *The Practice,* published by the Harvard Law School Center on the Legal Profession.

Those whose law school memories include poring over stacks of reporters and shuffling through the pages of Shepards may well view the advent of Westlaw and Lexis as unsurpassingly revolutionary. But Perlman, who is Dean of the Suffolk University Law School and played a major role in updating the ABA Model Rules of Professional Conduct to reflect changes in technology, sees the prospect for a much greater evolutionary leap in our profession: "For the legal industry, ChatGPT may portend an even more momentous shift than the advent of the internet."

Whether Dean Perlman's assessment that ChatGPT could be more impactful than the net itself remains to be seen. But preliminary results are remarkable. Below is what ChatGPT delivered in about three seconds when I asked it to "describe the pros and cons of qualified immunity."

> Qualified immunity is a legal doctrine that shields government officials, including law enforcement officers, from civil liability for actions taken in the course of their official duties, provided that those actions do not violate "clearly established" constitutional or statutory rights.
>
> Here are some potential pros and cons of qualified immunity:
> Pros:
> 1. Protection for Government Officials: Qualified immunity provides protection for government officials, including law enforcement officers, who are carrying out their duties in good faith. This protection can help to prevent frivolous lawsuits and ensure that officials are not deterred from taking necessary actions to carry out their duties.
> 2. Balance of Interests: Qualified immunity helps to balance the interests of public officials and individuals who may have been harmed by official actions. It ensures that officials are not held personally liable for actions taken in the course of their duties unless they have violated clearly established constitutional or statutory rights.
> 3. Judicial Efficiency: Qualified immunity can help to promote judicial efficiency by preventing the court system from being bogged down by frivolous or meritless lawsuits against government officials.
>
> Cons:
> 1. Lack of Accountability: Critics of qualified immunity argue that it can shield government officials, including law enforcement officers, from accountability for unconstitutional or unlawful actions. This lack of accountability can undermine public trust in government and law enforcement, and may lead to a culture of impunity.
> 2. Narrow Interpretation of "Clearly Established" Rights: The standard for determining whether a constitutional or statutory right is "clearly established" can be narrow, making it difficult for plaintiffs to prevail in lawsuits against government officials. This can result in situations where officials who have violated constitutional rights are shielded from liability.
> 3. Disproportionate Impact on Marginalized Communities: Critics argue that qualified immunity can have a disproportionate impact on marginalized communities, who may be more likely to experience police brutality or other forms of official misconduct. This can exacerbate existing inequalities and undermine efforts to promote equal justice under the law.
>
> Overall, the debate over qualified immunity is complex and multifaceted. While it provides important protections for government officials, it may also undermine accountability and disproportionately impact marginalized communities. Policymakers and legal scholars are actively debating the merits and drawbacks of qualified immunity, and potential reforms to the doctrine are being explored.

The promise of generative AI and ChatGPT--in locating relevant caselaw, in editing and cite checking, and in researching and writing highly relevant text including pleadings, seems undeniable. But notwithstanding those benefits, your editor wishes to confirm that all other words in this issue, to the very best of management's knowledge, are the work product of sentient beings. We sincerely thank our contributors and hope you enjoy the May-June 2023 *Municipal Lawyer*.

Best regards,
Erich Eiselt

PRESIDENT'S LETTER



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

To My Dedicated and Informed Municipal Law Colleagues

Most of us chose a municipal law career in order to make a difference in our communities, and a governmental law practice provides daily opportunities to fulfill this mission. Our practices generally require much versatility, engaging us in many different legal specialties. In my case, the City charter obligates our office to take on criminal misdemeanor prosecution matters, in addition to everything else. It's been a few years since I've had to handle a criminal jury trial, but I do receive a significant number of diversion requests from criminal defendants that detail the devastating impact a criminal conviction will have on their lives and/or the lives of their families. Many of the stories are heart wrenching, and most, if not all, of the crimes are attributed to some type of a substance use disorder. I intentionally use this technical medical term, rather than saying "addiction," since I'm told by experts that it's less stigmatizing. We are surrounded by stories of how lives are disturbingly impacted by substance use disorders. For example, I just finished reading *Demon Copperhead* by Barbara Kingsolver--just one illustration of the unyielding grip of opioid, alcohol, or other drug dependencies.

As municipal attorneys, we can take some action to address substance use disorders. In the case of opioids, IMLA members were at the forefront of the nationwide effort to hold manufacturers, distributors, and pharmacies accountable for their role in the epidemic. I want to give Erich Eiselt and our colleagues on the IMLA Opioid Litigation Group a huge shout out for their work in educating us, and for in their zealous advocacy, which continues to this day. In my home state, there were two additional recent class action opioid settlements, and hopefully all of you are aware of the opportunities to recoup some of the costs that municipalities incurred and will continue to incur in addressing the epidemic. One potential use of this money, which has proven to make a difference in our community, is to provide support to a problem solving court.

As a criminal prosecutor, I have the privilege of serving on two problem solving courts, which are designed to address the root causes of crime and stop the cycle. In Michigan, according to the just released *FY 2022 Problem Solving Courts Annual Report* issued by our State Supreme Court, there are 109 drug therapy courts, 22 adult mental health courts and 28 veteran's treatment courts. These specialty courts follow best practices recommended by the National Association of Treatment Court Professionals, and are comprised of a diverse team that includes judges, prosecutors, defense attorneys, treatment professionals or psychologists, police officers, social workers, and peer recovery coaches. As a member of a drug therapy court team for many years, I have witnessed hundreds of success stories. Part of the success of the program is the support and encouragement given to the participants in a non-controversial and more informal setting. When the participants feel that the team, including the judge, are vested in their success, they are more likely to buy into the program. The therapists are a critical component and help to uncover root causes leading to substance use disorders. The peer recovery team members are also essential, since they are well versed in the many excuses and behaviors exhibited by persons with substance use disorders. Other team members assist in the participant's efforts to secure steady employment. The State has also offered some incentives, including the issuance of a driver's license for participants who agree to have ignition interlocks (breathalyzers) installed in their vehicles..

Many of your states have interdisciplinary problem solving courts, and they have demonstrated their value. Some states choose to reward successful drug treatment court participants with diversions, holding criminal conviction(s) in abeyance until the successful completion of a treatment court. This may bring with it some unintended consequences. In another example of how these issues can converge, IMLA's Legal Advocacy Committee has authorized participation in a petition to the U.S. Supreme Court in *Duarte v. Stockton*, a Ninth Circuit decision. In *Duarte*, a criminal defendant pled nolo contendere to resisting arrest, but received a diversion. After completing the diversion, he filed a Section 1983 lawsuit against the arresting officer and the department. Under *Heck v. Humphrey*, a guilty plea would generally preclude this type of a civil rights lawsuit against the officers and the municipality, but the Ninth Circuit found that because the plaintiff's criminal charge was ultimately dismissed due to completing the diversion, no "conviction" had occurred, and he was not precluded. IMLA's amicus activity in *Duarte* follows another case from last year, where a criminal defendant was granted a pardon after twenty years and was subsequently allowed to file a civil rights lawsuit against the government.

These are just some of the ways in which IMLA continues to be at the forefront of issues relevant to local government, and reaffirms my commitment to our organization.

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Compelled Speech: You Can't Make Me Say That

AIMEE ALCORN-REED,
Assistant City Attorney, Corpus Christi, Texas



INTRODUCTION

Because municipal governments tend to be the most accessible to citizens, they end up in the middle of controversial topics relatively easily. The City of Corpus Christi, Texas, like many municipalities, has a method for citizens to petition the City Council through initiative.[1] On November 8, 2021, Corpus Christi received a qualified Statement of Intent to Circulate Petitions Calling for an Initiative requesting that City Council pass an ordinance that, among other things, would require "Corpus Christi hospitals, medical facilities, health care professionals and pharmacies to provide information on COVID-19 early treatment protocols..."

When a qualified Statement of Intent to Circulate Petitions Calling for an Initiative is received, the City Attorney's Office is charged with drafting an ordinance, in legal form, that incorporates the substance of the text submitted.[2] In order to comply with the Charter provision, the City Attorney must determine which requested provisions comply with State and Federal law. For the reasons explored in this article, the provision listed above could not be included in an ordinance that complies with State and Federal law.

Freedom Not To Speak

The First Amendment of the United States Constitution, which is applied to states and local governments through the Equal Protection Clause of the Fourteenth Amendment, generally protects the right to freedom of speech.[3] The government (local, state, or federal) cannot prohibit private speech or abridge the right of its citizens to speak their own mind. On its face, however, the First Amendment does not address the potential that a citizen be required to speak or otherwise confess loyalty to a government.

As children, many Americans attended schools where they routinely recited the Pledge of Allegiance, sang "The Star-Spangled Banner," or otherwise showed respect or patriotism in the presence of the flag of the United States. Despite that common practice, some students, for religious or other reasons, might choose not to participate in such displays. The Gobitis children, for example, were Jehovah's Witnesses, aged ten and twelve, who attended a public school in Minersville, Pennsylvania, and refused to salute the flag as required daily.[4] The school district expelled the children.[5] Given the age of the children, compulsory school attendance laws required the parents to send the children to private school, denying a free public education to the family.[6] In reviewing the children's expulsion, the United States Supreme Court determined that the school district's requirement to salute the flag did not violate the First Amendment.[7] The Court reasoned that "[a] society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty."[8]

Following the *Gobitis* decision, the West Virginia Board of Education passed a resolution that required all teachers and students to salute the flag daily as a part of normal school activities.[9] Any child that refused to participate in the salute would be expelled for insubordination and could not be readmitted until he or she complied with the requirement.[10] Further, the parents or guardians of the child could be convicted for failing to send the child to school and face a fine and confinement in jail.[11] Parents brought a lawsuit seeking an injunction to prohibit the enforcement of this requirement against their own children and other Jehovah's Witnesses, whose religious beliefs did not allow them to participate in the salute.[12] The Court took this opportunity to reconsider the *Gobitis* decision.[13] In reviewing West Virginia's requirement that students salute the flag, the Court overruled *Gobitis* and held that a public school cannot compel students and teachers to salute the flag.[14] The Court empha-

sized that the very intent of the First Amendment was to ensure that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[15]

Over the years, the Court has expanded its holdings on compelled speech, determining, for example, that the government cannot prohibit residents from covering the state motto, "Live Free or Die" on their vehicles' license plates.[16] The Court has further found that prohibitions on compelling speech apply to parades,[17] space in an envelope[18] or a newspaper,[19] and hiring of a Scoutmaster.[20] The Court has also found limits, however, to the activity that is protected under the compelled speech doctrine. During the days of "don't ask, don't tell," Congress passed the Solomon Amendment, which required universities who receive certain federal funding to allow military recruiters equal access to students or lose the funding.[21] An association of law schools and law faculties sued, alleging that compelling the schools to allow military recruiters equal access to law students violated their First Amendment rights.[22] The schools, in protest of the military's treatment of homosexuals, wished to restrict military recruiters from interviewing students at the law schools, limiting them to interview locations at undergraduate facilities.[23] The Court found that the Solomon Amendment restricted the law schools' conduct, not its speech.[24] The Court further found that the Solomon Amendment did not restrict the law schools' right to freedom of association, including expressive association, as allowing military recruiters on campus does not make association with the law schools less attractive.[25] Because the law schools were free to express their disagreement with the military's policies while allowing access to recruitment facilities, the Solomon Amendment was a regulation of conduct, not speech.[26]

The question then remained as to whether compelled funding of speech was a regulation of conduct or speech. In 1977, in *Abood v. Detroit Bd. of Educ.*, the Court held that an agency shop arrangement that required all public-school teachers to make payments to the union, even if not union members, was constitutional.[27] The Court did, however, limit the expenditure of such funds to costs related to the collective-bargaining duties of the union.[28] Similarly, in 1990, the Court found that mandatory dues to the State Bar can fund activities that are germane to the practice of law, but not ideological or political activities that fall outside of the practice of law.[29] The Court went further in 2018, overruling *Abood* and holding that public employees cannot be forced to pay an agency fee to the union.[30] In *Keller v. State Bar of Cal.*, the Court held that "In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay."[31] Some cases have questioned the *Keller* decision related to compulsory State Bar dues because it relied on *Abood*, but the Court has since denied certiorari on a case challenging mandatory State Bar dues in Wisconsin.[32] Limitations on expending the funds for non-related purposes remain, however, even where professionals are required to pay dues.

Antidiscrimination and Strict Scrutiny

The line between regulating conduct and speech can sometimes be difficult to define. Antidiscrimination laws, prohibiting discrimination on the basis of sex, race, religion, or sexual orientation in the provision of services, are typically aimed at regulating the conduct of the person. Such laws may, however, inadvertently regulate speech when applied to certain expressive services. A Colorado anti-discrimination law, for example, has been applied to the baking of a cake for a homosexual wedding ceremony.[33] A homosexual couple was turned away from Masterpiece Cakeshop in 2012 when they inquired about a wedding cake.[34] The baker stated that he could not make the cake because doing so would violate his religious belief that marriage should be between one man and one woman.[35] The couple reported the baker to the Colorado Civil Rights Commission (Commission) which determined that the baker violated the antidiscrimination statute by refusing to provide services on the basis of sexual orientation.[36] The Court noted that, in determining whether the service at issue qualified as speech, there might be a difference between designing a unique cake or selling a pre-made cake.[37] While Justice Kennedy did opine, on behalf of the Court, that some services may qualify as protected forms of expression, the *Masterpiece Cakeshop* decision did not fully resolve the issue.[38] The Court ultimately sent the case back

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Aimee Alcorn-Reed has served as an Assistant City Attorney for the City of Corpus Christi for almost ten years. Ms. Alcorn-Reed received her law degree, with honors, from The University of Texas School of Law in 2012. Prior to law school, she obtained her B.A. in English and Spanish from The University of Texas at Austin in 2006 and her M.A. in Publishing and Writing from Emerson College in 2008. During her time with the City of Corpus Christi, Ms. Alcorn-Reed has handled multiple municipal law issues, including purchasing, economic development, municipal court prosecution, redistricting, and water. Her background in writing as well as her municipal work has left her particularly interested in the interplay between municipal governance and the right to freedom of speech.

due to improper handling of the Free Exercise issue at the Commission.[39] During the Commission hearing, commissioners were openly hostile toward the baker's claims regarding his religious beliefs, which prevented the baker from having a hearing that was neutral as to the religion.[40] The disposition of *Masterpiece Cakeshop* on a procedural issue has left open the question of the extent to which a state's interest in protecting the equality of disadvantaged or underserved communities may weigh against the right of an individual to refuse to perform a service that qualifies as speech.

Following the *Masterpiece Cakeshop* decision, a Circuit split remains. The Eighth Circuit, reviewing a Minnesota antidiscrimination statute, determined that the law at issue was not narrowly tailored to serve a compelling government interest sufficient for the regulation of speech.[41] In that case, a married couple, who owned and operated a videography business, wished to create a series of videos featuring opposite-sex weddings to promote their religious beliefs related to marriage.[42] The videographers sued Minnesota seeking an injunction to prevent Minnesota from enforcing the antidiscrimination statute, which would require the videographers to make similar videos for homosexual couples if they chose to make their desired videos about heterosexual marriages.[43] The Eighth Circuit determined that the antidiscrimination law cannot compel the videographers to make videos in violation of their religious beliefs.[44] While the court recognized the importance of regulating discriminatory conduct, the court found that "regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be."[45] The court did distinguish regulation of conduct, which an antidiscrimination law may do under the Constitution, and regulation of speech, which may include expressive conduct.[46] Thus, the court reasoned that it was the application of the law to speech, not the law itself, that violated the First Amendment.[47]

Alternatively, the Tenth Circuit, in reviewing a challenge to the same Colorado law at issue in *Masterpiece Cakeshop*, found that while the law may regulate the speech of certain vendors, such regulation was narrowly tailored to achieve a compelling state interest and survived strict scrutiny.[48] In that case, a website designer sued seeking an injunction to prevent the enforcement of Colorado's antidiscrimination law against her proposed new service of designing wedding websites.[49] The designer, while generally willing to provide other services to homosexual clients, stated that designing wedding websites for homosexual couples would violate her deeply-held religious beliefs regarding marriage.[50] In determining that the law met the strict scrutiny standard, the Tenth Circuit pointed out that "unique goods and services are where public accommodation laws are most necessary to ensuring equal access."[51] Essentially, the court reasoned that failing to protect access to unique, custom services for marginalized communities leaves such communities with only access to lower-quality generic services.[52] Protecting such equal access to services is a compelling government interest and the law is narrowly tailored to serve such interest.[53] The United States Supreme Court has granted the website designer's writ for certiorari and held oral arguments in *303 Creative LLC v. Elenis*.[54] At the time this article is being published, the Court has not yet issued its opinion. Perhaps the ultimate decision there will resolve the Circuit split and help legislatures determine which services are merely conduct and which qualify as speech. Further, the case may answer the question as to whether or how such applications of antidiscrimination laws might survive strict scrutiny.

Compelled Speech in Regulation of Profession

Another area where it might be difficult to distinguish between conduct and speech is in the regulation of a profession. Regulation of conduct related to a profession may often touch on speech. A requirement to take an oath of office, for example, would inherently require speech. Even so, the Court has allowed the government to require public employees to take an oath of office.[55] *Cole v. Richardson* holds that the government may not, however, require public employees to take oaths that impinge on their constitutional rights, such as oaths affirming a certain political beliefs.[56] The Court also held, in *Bond v. Floyd*, that it was improper to prevent an elected official from taking the oath of office where the official had made statements that were considered politically unfavorable, specifically, speaking out against the Vietnam War.[57] As seen in both *Cole* and *Bond*, the government may be able to require an employee or official to take an oath of office, but it cannot condition employment on specific political statements.

In regulating a profession, the government may also wish to impose restrictions on advertising. The State Bar in Ohio, for example, disciplined an attorney based on the content of an advertisement.[58] The complaint against the attorney in *Zauderer v. Office of Disciplinary Counsel* was based both on content that did not comply with the rules on attorney advertising and on failure to include required disclosures.[59] The Court found that attorneys cannot be disciplined for advertisements that contained truthful and nondeceptive language.[60] The state can, however, require an

attorney to include certain disclosures in advertising "as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers."[61] The Court determined, in another case, that the state can require a bankruptcy law firm's advertising to identify that the law firm is a debt relief agency and include the disclosures generally required in advertising of debt relief agencies.[62] While it seems apparent that the required disclosures regulate speech, such regulation is permissible when it is directed at commercial speech in a profession and serves the government interest of protecting consumers from deceptive marketing.[63]

The government also has an interest in regulating the medical profession, which may require certain disclosures. The Court has, over the years, allowed some regulation of speech that is incidental to the regulation of the medical profession. For example, the Court upheld a New York law that required medical professionals to disclose the names of people who were prescribed certain Schedule II drugs.[64] While that decision does not focus on the regulation of the content of speech, disclosure laws do require medical professionals to speak, whether they want to or not. The Court has also found that the government can require doctors to disclose certain information in order to obtain informed consent from patients.[65] In *Planned Parenthood v. Casey,* the Court considered a Pennsylvania law that required abortion providers to relay certain information to patients before performing the procedure.[66] The Court noted, in a plurality opinion, that this compelled speech was part of the "practice of medicine, subject to reasonable licensing and regulation of the State."[67] The Court further laid out that such regulations are permissible so long as the speech at issue is (1) truthful, (2) non-misleading, and (3) relevant to the medical procedure at issue.[68]

While the *Casey* decision was overturned along with *Roe v. Wade* in 2022, the decision overturning it focused on the issue of the right to obtain an abortion and did not discuss compelled speech.[69] *Casey* is still instructive as well because this reasoning was part of the basis for the holding in a subsequent case that was not overturned by *Dobbs*.[70] The Court, in *Nat'l Inst. of Family and Life Advocates v. Becerra*, looked at a California law that required crisis pregnancy centers to provide certain information to women.[71] The crisis pregnancy centers were generally pro-life establishments that provided some early pregnancy services, such as pregnancy tests and ultrasounds.[72] The law required that crisis pregnancy centers provide all women obtaining services with information about available state-sponsored services, including abortions.[73] The Court held that this requirement did not meet either the *Zauderer* or the *Casey* standard.[74] The required disclosure, which was not related to services that the clinics provided, could not meet the *Zauderer* standard, which requires that authorities may only compel explanatory wording in commercial speech that is factual and noncontroversial.[75] Further, the required disclosure was not necessary to obtain informed consent for any medical procedure as it was not related to a procedure offered at the clinic and was applied to all meetings with women "regardless of whether a medical procedure is ever sought, offered, or performed."[76]

In the context of state regulation of a profession, then, it is constitutionally permissible to compel some speech, as long as it falls into the boundaries laid out in *Zauderer*, *Casey*, and *Becerra*. Municipalities, however, are not states. The ability of a municipality to act is limited by state law and state action.[77] "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state . . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state."[78] In Texas, as in many states, the legislature has given the state medical board authority over the regulation of the practice of medicine and the state pharmacy board authority over the regulation of the practice of pharmacy.[79] While home-rule municipalities like Corpus Christi generally have discretion in adopting ordinances, municipalities in Texas do not have the authority to regulate a subject area that has been preempted by the state.[80] Accordingly, even though the state might have had authority to impose some regulations on speech in a medical setting, municipalities likely would not. Similar structures exist throughout United States, limiting the power of municipalities to compel speech even when the Constitution might give such authority to the state.[81]

Government Speech

Despite their limited authority to compel private speech, municipalities often require the posting of certain items, such as building permits. This sort of document qualifies as government speech, which is not subject to the First Amendment.[82] The government may use the funding available to it to express a government opinion or advocate for certain government policies.[83] Further, the Court has found that the government can compel funding of government speech.[84] In *Johanns*, the Court considered a challenge to the Beef Promotion and Research Act of 1985 which allowed the use of funds from an assessment on the beef industry for promotion and marketing of beef consumption.[85] The Court looked at previous cases, such as *Barnette*

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Removing and Banning Individuals from Public Property

MICHAEL KOSS,
Deputy City Attorney, City of Overland Park, Kansas

Municipalities often must deal with members of the public who disrupt meetings, harass employees, or even threaten to harm elected officials. In such instances, officials may seek to temporarily remove that person from public property or ban them from re-entering the property.

One common strategy municipalities use to ban a person from public property is to issue that person some sort of "no-trespass letter." No-trespass letters typically prohibit a person from re-entering public property in response to that person's prohibited conduct. If a person returns to public property after receiving a no-trespass letter, municipalities may have law enforcement remove the person from the property or pursue criminal trespass charges. Another strategy municipalities may use is seeking a protective order or injunction from a court banning a person from public property for a specified period of time.

When legal challenges are brought against municipalities for removing or banning a person from their property, those are typically brought on First Amendment grounds. However, the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.[1] A governmental entity has power to preserve the property under its control for the use to which it is lawfully dedicated.[2]

A person's right to continue to access public property, and the standard for limitations on that right, must be evaluated based on the circumstances of the removal and the character of the property.[3]

Removals and Bans from Traditional and Designated Public Forums

Public property that has traditionally been used by the public for assembly, debate, and other expressive activity is called a "traditional public forum."[4] Some examples included sidewalks, public streets, and parks.[5] "Designated public forums" consist of public property that has not traditionally been regarded as a public forum but has intentionally been opened up to expressive activity by a public entity (e.g. libraries, public meetings, municipal theatres).[6] As long as a municipality maintains the open character of a designated public forum, it is governed by the same standards as apply in a traditional public forum.[7]

If a municipality is considering removing or banning a person from a traditional or designated public forum, such actions should rarely (if ever) be based on the content of that person's speech. If a municipality removes or bans a person from a public forum based on the content of that person's speech and that removal is challenged in court, that action is likely to be subject to strict scrutiny and be struck down.[8]

If a person is removed from a public forum for content-neutral reasons (e.g. disruption, threats, harassment), the removal will survive legal challenge if a court determines the removal was narrowly tailored to serve a significant governmental interest (called "intermediate scrutiny") and leaves open ample alternative channels for communication.[9]

As an example, in 2011 the City of Austin's content-neutral no-trespass policy was subjected to intermediate scrutiny by a federal district court. The City had adopted a detailed criminal trespass policy that allowed the city to issue criminal trespass orders banning persons from specific property for certain periods of time based on the severity of the person's conduct. The policy also allowed for a post-issuance administrative review of the criminal-trespass notices by means of an informal review by the director of the relevant city department, and a right to appeal the notice to the City Manager.

The city used the policy to issue a criminal trespass notice to a protestor, prohibiting him from returning to any portion of the City Hall Plaza (a

traditional public forum) for a period of one year. The Plaza was later the site of an Occupy Austin protest, and protestor sued the city alleging that the ban violated his First Amendment right to participate in the protest. The court concluded that, even though the policy was content-neutral and a park across the street was available as an alternative area to protest, the city violated the protestor's First Amendment rights because it prevented him from engaging in any form of speech at the Plaza for the duration of the ban and the alternative location did not offer him an effective way to communicate to his intended audience.[11] The court reasoned that: 1) the ban was not narrowly tailored to the city's interests in preserving general use of the Plaza because the city did not avail itself to less restrictive alternatives such as enforcement of criminal trespass sanctions, and 2) the city did not provide sufficient alternative channels for communication because the Plaza was the "heart of the protest" and no other location provided an adequate means for the protestor's intended expressive activity.[12]

This case demonstrates that, even when a policy bans persons from public forums for reasons other than the content of the speech, municipalities must carefully draft and apply policies so their means of enforcement is narrowly tailored and they do not completely prohibit access to important public forums.

Removal and Bans from Nonpublic Forums

A nonpublic forum is public property which the government has not opened to public communication either by tradition or by designation. While a designated public forum is created when a municipality makes a property generally available to a certain class of speakers, a nonpublic forum is created when a municipality does no more than reserve eligibility for access to the forum to a particular class of speakers who must obtain permission to use it.[13] Some examples of nonpublic forums include the interior of police stations,[14] courthouses,[15] and city halls.[16]

Restrictions on access to a nonpublic forum will survive a legal challenge as long as they are reasonable in light of the purpose served by the forum and not an effort to suppress a specific viewpoint.[17]

An example of lawful ban occurred in *United States v. Albertini*, 472 U.S. 675 (1985). In *Albertini*, an individual was charged with trespassing on a military base after he had received a letter 9 years earlier forbidding him from reentering the base. He had originally received the no-trespass letter when he had entered the base and destroyed government property. The U.S. Supreme Court held that barring the individual from re-entering the base was reasonable because his previous receipt of the no-trespass letter was for prior acts of vandalism and the scope of the indefinite ban promoted the government's interest in assuring security of the base.[18]

However, courts have stricken down no-trespass orders barring access to nonpublic forums if they do not think the ban is proportionate to the interests served by the ban. In *Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2004), local officials issued Huminski a no-trespass notice for certain nonpublic forums (courthouses and adjacent grounds) after he sent letters to a judge and other public officials that they perceived as threatening and displayed protest posters in the courthouse parking area. The court ruled the no-trespass notices were unreasonable and thus violated Huminski's First Amendment rights because the notices were so expansive as to amount to "First-Amendment-Free Zones," which are disfavored even in nonpublic forums.[19] The court also assigned significance to the lower court's conclusion that the no-trespass notices were overly broad because (unlike in *Albertini*) Huminski never committed any prior misconduct on the courthouse grounds and his actions leading up to issuance of the notices were not disruptive to official court business.[20]

Despite the Second Circuit's ruling in *Huminski* disfavoring "First-Amendment-Free Zones," other circuits appear to disagree that absolute bans from nonpublic forums automatically violate a person's First Amendment rights.[21] Courts are more likely to agree with *Huminski*'s conclusion that any ban from nonpublic forums should be proportionate to the interest it is intended to serve. For example, another federal court has concluded that banning a person from all of a city's nonpublic forum facilities during work hours because they threatened a city employee might be reasonable with regard to those facilities the threatened employee works at but unreasonable with regard to all other facilities.[22]

Public Meetings

Many of the cases involving municipalities removing or banning individuals involve public meetings, where it is common for the public to ignore the rules of decorum or disrupt discussion by the elected officials. A public meeting is typically characterized as a "limited public forum," which is property limited to use by certain groups or dedicated solely to the discussion of certain subjects.[23]

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Removing Individuals *cont'd from page 11*

When a person is removed from a public meeting based solely on their actual disruption of the meeting and challenges that removal in court, courts will apply the same intermediate scrutiny used in other public forums and typically do not conclude the removal violates the First Amendment. However, municipalities must make sure the disruptive individual is removed because of their disruptive behavior and not based on the content of their speech. If it is unclear that a person's disruptive behavior was the actual basis for their removal from a meeting, a court is more likely to find a First Amendment violation.[25]

Additionally, removal policies and practices must be applied consistently. Even if a municipality has probable cause to arrest a person for disrupting a meeting, a plaintiff may be able to overcome a presumption the arrest was constitutional with evidence showing similarly situated individuals were not arrested even though they engaged in the same sort of disruptive activity.[26] Although courts generally permit the removal of disruptive individuals from the actual meetings they are disrupting, they are far less likely to accept banning persons from attending future meetings because of prior disruptive behavior. In *Barna v. Bd. of Sch. Dirs.*, 143 F. Supp. 3d 205 (M.D. Pa. 2015), a school provided the plaintiff with a no-trespass letter saying he was permanently banned from attending school board meetings because of several incidents at meetings where he alluded to the fact that his friends have guns and that he "may have to come after all of yous;" where he raised his voice, became confrontational, and challenged the school board president to a fight; and where he "uttered '[s]on of a bitch' within earshot of meeting attendees, including some children."[27] Despite the plaintiff's inappropriate conduct and that the school district still permitted him to submit written questions to the board, the court concluded that prohibiting him from attending future meetings violated the First Amendment. The court stated that, "the government cannot prohibit future expressive activity as a result of past unlawful conduct."[28]

Numerous other courts have concluded that, although a person's disruptive behavior justified their removal from the meeting they disrupted, that behavior did not justify removal from future meetings.[29] If a municipality does feel compelled to ban an individual from a future meeting based on previous disruptive behavior, the municipality should strongly consider providing the individual with a process for requesting readmission or to challenge the ban.[30]

In addition, before removing or banning a person from a public meeting, municipalities should research whether such action conflicts with their state's open meeting laws.[31]

Due Process

Municipalities should also be cognizant of the Fourteenth Amendment when removing or banning individuals from public property. Several federal circuit courts have held that the Due Process Clause protects a person's right to travel to and remain at public places of their choice, and a government must provide a person with notice or an opportunity to be heard and present evidence prior to depriving a person of that right.[32] In these jurisdictions, municipalities should provide meaningful due process to any person before banning them from public property.

However, a plurality of circuit courts (including the Second, Seventh, and Tenth Circuits) appear to hold that the Fourteenth Amendment only protects a right to travel from place to place and does not provide a right to cross any *particular* parcel of public land or gain admittance to a *specific* government building.[33] Within these circuits, individuals do not have a due process right to access specific public places such as community centers and municipal buildings.

Therefore, municipalities should research case law from their respective circuit to determine the extent to which due process rights should be afforded to persons prior to removing or banning them from public property.

Policy Recommendations

Municipalities should strongly consider adopting policies that address the circumstances for removing or banning individuals from public property.

First, policies should not contemplate removing a person from public property based on the content of a person's speech. Instead, justifications for removals should be content-neutral, generally applicable, and not target a specific group. Some appropriate justifications include preventing disruption of public business and protecting public safety.

The policy should also clearly spell out what specific conduct can result in removal or a ban from public property in order to avoid a challenge for being void for vagueness. The prevention of the prohibited conduct should meaningfully advance important governmental interests. To the extent possible, the removals and bans should be limited to the specific public properties necessary to advance those government interests.

The policy should not grant unduly broad discretion in determining whether to remove or ban a person from public property. Instead, the policy should contain adequate standards to guide the appropriate official's decision.[35]

The policy should establish the duration of bans based on specific conduct, or list what factors will be considered in determining that duration. The policy should not use one ban duration that applies regardless of different conduct.[36]

For removals from public meetings, municipalities should outline clear, content-neutral justifications that are focused on eliminating disruptions during the meetings. Chairs and enforcing officers should be trained on these justifications, admonished to never take action based on a person's specific viewpoint, and advised to apply the policy consistently. Policies should also avoid imposing prospective bans from public meetings; however, if prospective bans are contem-

plated, individuals should be provided a process for requesting readmission or challenging the ban.

Municipalities should also consider providing meaningful due process to persons prior to removal or imposition of a ban, especially if the municipality is located within circuit that recognizes a due process right to access public property. This might include notice of the reason for the proposed ban, an opportunity to challenge the ban, and a convenient means of applying for readmission to the property.

Notes

1. United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129, (1981) (First Amendment does not guarantee access to property simply because it is owned or controlled by the government.).
2. *See* Greer v. Spock, 424 U.S. 828 (1976).
3. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
4. *Id*.
5. *Id*.
6. Koala v. Khosla, 931 F.3d 887 (9th Cir. 2019).
7. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948 (1983).
8. *Id*.
9. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see also* Sanchez v. City of Austin, No. A-11-CV-993-LY, 2012 U.S. Dist. LEXIS 190686, at *14-15 (W.D. Tex. Sep. 27, 2012).
10. Sanchez 11. Id.
12. *Id*.
13. Ark. Educ. Tv Comm'n v. Forbes, 523 U.S. 666, 679 (1998).
14. First Def. Legal Aid v. City of Chicago, 319 F.3d 967, 968 (7th Cir. 2003); *see also* Fighting Finest, Inc. v. Bratton, 95 F.3d 224, 231 (2d Cir. 1996).
15. Huminski v. Corsones, 396 F.3d 53, 90-91 (2d Cir. 2005); s*ee also* Mezibov v. Allen, 411 F.3d 712, 718 (6th Cir. 2005).
16. See Hansen v. Williamson, 440 F. Supp. 2d 663, 679 (E.D. Mich. 2006).
17. Ark. Educ. TV Comm'n v. Forbes, 523 U.S. 666, 677 (1998); *see also* Huminski v. Corsones, 396 F.3d 53, 92 (2d Cir. 2004) (constitutionality of the restrictions in the trespass notices as applied to nonpublic forums based on whether restrictions of expressive activity are reasonable and viewpoint neutral).
18. United States v. Albertini, 472 U.S. 675 (1985).
19. Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2004).
20. *Id*.
21. *See* USPS v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981); *see also* Moore v. United States Postal Serv., 159 F. App'x 265, 267 (2d Cir. 2005).
22. *See* Vincent v. City of Sulphur, 28 F. Supp. 3d 651, 657 (W.D. La. 2014) (even if the notice of trespass for nonpublic forums was reasonable with respect to city hall for the protection of elected officials, not reasonable for the courthouse, the police station, or the city business center because there is no indication that those individuals could be found there).
23. *See* Barna v. Bd. of Sch. Dirs., 143 F. Supp. 3d 205 (M.D. Pa. 2015).
24. *See* Galena v. Leone, 638 F.3d 186 (3d Cir. 2011) (temporary ejection of a disruptive participant from a municipal meeting did not violate the plaintiff's constitutional rights); see also Eichenlaub v. Twp. of Indiana, 385 F.3d 274 (3d Cir. 2004) (upholding the constitutionality of removing a speaker from a township meeting to prevent "badgering, constant interruptions, and disregard for the rules of decorum."); *see also* Brown v. City of Jacksonville, 2006 U.S. Dist. LEXIS 8162, at *8 (M.D. Fla. Feb. 16, 2006) (upholding barring a person who makes "personal, impertinent or slanderous remarks or who shall become boisterous").
25. Hirt v. Unified Sch. Dist. No. 287, 2019 U.S. Dist. LEXIS 70477, at *43 (D. Kan. Apr. 24, 2019) (factual dispute about whether conduct or speech caused ban resulted in court denying summary judgment as to the retaliation claim).
26. Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019).
27. Barna v. Bd. of Sch. Dirs., 143 F. Supp. 3d 205, 229 (M.D. Pa. 2015).
28. *Id*. at 221.
29. *See* Brown v. City of Jacksonville, 2006 U.S. Dist. LEXIS 8162, at *8 (M.D. Fla. Feb. 16, 2006); *see also* Surita v. Hyde, 665 F.3d 860, 872 (7th Cir. 2011).
30. *See* McDonough v. Garcia, 2022 U.S. Dist. LEXIS 61082, at *26-27 (S.D. Fla. Mar. 30, 2022).
31. Hirt v. Unified Sch. Dist. No. 287, 2019 U.S. Dist. LEXIS 70477, at *13 (D. Kan. Apr. 24, 2019) (Kansas Open Meetings Act does not guarantee attendance for every individual).
32. *See* Lu v. Smith, 2016 U.S. Dist. LEXIS 119127, at *10-11 (D. Mass. Sep. 2, 2016) (plaintiff sufficiently alleged a property rights violation because he was on public property and he had a right to access that public property; *see also* Lutz v. City of York, Pa., 899 F.2d 255, 268 (3d Cir. 1990) (right to move freely about one's neighborhood or town, even by automobile, is a fundamental right); *see also* Willis v. Town of Marshall, 2003 U.S. Dist. LEXIS 16967, at *32-35 W.D.N.C. June 20, 2003) (Fourteenth Amendment protects the freedom to move about in public places and attend gatherings open to the general public occurring in public fora and ban from public property requires minimum measure of procedural protection); *see also* Vincent v. City of Sulphur, 28 F. Supp. 3d 626, 642 (W.D. La. 2014) (individual's procedural-due-process rights were violated when officers issued the no-trespass warning for alleged threat to kill mayor without providing him with notice and an opportunity to be heard); Sheets v. City of Punta Gorda, 415 F. Supp. 3d 1115, 1127 (M.D. Fla. 2019) (recognizing a constitutionally protected liberty interest to be in parks or other city lands).
33. Williams v. Town of Greenburgh, 535 F.3d 71, 76 (2d Cir. 2008) (right to intrastate movement does not create a "right

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Compelled Speech *cont'd from page 9*

and *Wooley,* that had determined that the government cannot compel a person to endorse a message that he does not agree with.[86] The Court also analyzed cases, such as *Keller* and *Abood*, that had found that the government cannot compel funding of private speech that a person disagrees with.[87] Distinguishing its facts from those cases, the Court found that compelled funding of government speech is permissible, whether or not the person compelled to fund the speech agrees with its message.[88]

It can be difficult to distinguish the holding in *Johanns* from *Wooley*, which found that the state cannot prohibit a citizen from covering up the state motto "Live Free or Die" on his vehicle's license plate.[89] Logically, a license plate is not dissimilar from a building permit, which must be displayed on private property. *Johanns* itself distinguishes *Wooley* by stating that the presence of the motto essentially required the citizen to use his vehicle as an advertisement or billboard for the State's ideologic message.[90] Taking that reasoning on its face, municipalities might run into problems when requiring a building permit displayed on private property. One focus in the *Wooley* decision, however, was on the interest that the state provided for requiring the message.[91] In fact, the *Wooley* decision likely would have come out differently if the citizen had covered the words "New Hampshire" or the license plate number itself. The State had provided that its interest in requiring the words to be visible was in identifying that the vehicle had the proper license plates for its type.[92] The Court found that this is not sufficient reasoning because the license plates at issue have other distinguishing features and the motto is an expression of ideology that is not needed for that purpose.[93] As long as a building permit is tailored to the government interest it is intended to support, without ideological commentary, the government can likely compel a property owner to display this government speech.

Further, the Court has previously found that a requirement to allow private speech on private property did not infringe on the property owner's First Amendment rights where it was not likely to be identified as the speech of the owner and the owner was free to dissociate himself from all such views.[94] In *PruneYard*, the Court reviewed a requirement that a privately-owned shopping center in California allow private citizens to speak and pass out petitions on the property.[95] The Court distinguished *Wooley* in stating that the shopping center had chosen to be open to the public.[96] Because it is a publicly-accessible property, it is not as likely that the views expressed by members of the public would be attributed to the property owner as they would when attached to a citizen's personal vehicle.[97] The property owners are also free to put up signage stating that they do not agree with the messaging.[98] Similarly, building permits and other postings required by municipalities tend to be placed in areas open to the public. If a property owner disagreed with the contents of the document, he would be free to express his opinion as well. Based on this analysis, it seems clear that cities would not violate the First Amendment rights of property owners when requiring these documents to be displayed.

Conclusion

Because the governing body of a municipality is generally more accessible to citizens than the state or federal legislature, direct petitions or requests from citizens are more common at city hall. When citizens request that the municipality compel speech, the city attorney's office must be careful to review the limitations that the First and Fourteenth Amendments might put on the requested action. Both the federal Constitution and preemption from the state impact the ability of a municipality to act. These limitations leave municipalities with little ability to compel the speech of others. City attorneys should be aware of these limitations both in the context of requested legislation within their municipalities and with regards to the content of government documents that private property owners are compelled to display. In the case of Corpus Christi's initiative petition, the City Attorney's Office opined that City Council did not have the authority to compel medical professionals to provide information about alternative COVID-19 treatment practices. When presenting the initiative petition to City Council, the City Attorney's Office included an ordinance without the compelled speech requirements.

Notes

1. "*Initiative*. The registered voters of the city shall have the power to propose ordinances to the city council and, if the council fails to adopt the ordinance in substantially the form in which it was presented, to adopt or reject the ordinance proposed at an election as provided herein." Corpus Christi, Tex. City Charter art. I, § 4(a)(1) (2010)
2. Corpus Christi, Tex. City Charter art. I, § 4(d) (2010).
3. U.S. Const. amend. I; U.S. Const. amend. XIV, §1.
4. Minersville School District v. Gobitis, 310 U.S. 586, 591 (1940).
5. *Id.*
6. *Id.* at 592.
7. *Id.* at 600.
8. *Id.*
9. W. Va. State Bd. of Education v. Barnette, 319 U.S. 624, 626 (1943).
10. *Id.* at 629.
11. *Id.*
12. *Id.*
13. *Id.* at 630.
14. *Id.* at 642.
15. *Id.*
16. Wooley v. Maynard, 430 U.S. 705 (1977).

17. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (finding that the government could not require a parade organizer to allow an LGBT group to participate and display a banner).
18. Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986) (finding that a utility company could not be compelled to include certain information in envelopes sent to customers).
19. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (finding that state law cannot compel a newspaper to run an opposing viewpoint).
20. "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." Boy Scouts of America v. Dale, 530 U.S. 640, 650 (2000) (finding that the government cannot compel the Boy Scouts of America to hire a homosexual Scoutmaster as employment by the Boy Scouts is expressive association).
21. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 52 (2006).
22. *Id.*
23. *Id.* at 53.
24. "As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do--afford equal access to military recruiters--not what they may or may not say." *Id.* at 60.
25. *Id.* at 69-70.
26. *Id.*
27. Abood v. Detroit Bd. of Educ., 431 US 209, 232 (1977).
28. *Id.* at 235-36.
29. Keller v. State Bar of Cal., 496 US 1, 13-14 (1990).
30. Janus v. AFSCME, Council 31, 138 S.Ct. 2448, 2467 (2018).
31. *Id.*
32. Jarchow v. State Bar, 140 S. Ct. 1720 (2020).
33. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018)
34. *Id.* at 1723.
35. *Id.*
36. *Id.*
37. "If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference." Id.
38. *Id.* at 1727 (opining that while the rights of homosexuals should be recognized, "the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.")
39. *Id.* at 1731-32.
40. *Id.*
41. Telescope Media Group v. Lucero, 936 F.3d 740 (8th Cir. 2019).
42. *Id.* at 747-48.
43. *Id.* at 749.
44. "Even antidiscrimination laws, as critically important as they are, must yield to the Constitution. And as compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment." *Id.* at 755 (citing *Hurley*, 515 U.S. at 579).
45. *Id.*
46. *Id.* at 757-59.
47. *Id.* at 759.
48. 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021).
49. *Id.* at 1169-70.
50. *Id.* at 1170.
51. *Id.* at 1181.
52. *Id.*
53. *Id.* at 1179.
54. 303 Creative LLC v. Elenis, 143 S. Ct. 77 (2022) (granting certiorari); Transcript of Oral Argument, 303 Creative LLC v. Elenis, held on December 5, 2022 (No. 21-476), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-476_n7io.pdf.
55. *See, e.g.,* Cole v. Richardson, 405 U.S. 676 (1972); Bond v. Floyd, 385 U.S. 116 (1966); Connell v. Higginbotham, 403 U.S. 207 (1971).
56. *Cole*, 405 U.S. at 680 (citing Law Students Research Council v. Wadmond, 401 U.S. 154 (1971); Baird v. State Bar of Arizona, 401 U.S. 1 (1971); *Connell*, 403 U.S. at 209 (1971) (MARSHALL, J., concurring in result)).
57. "Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected." *Bond*, 385 U.S. at 136.
58. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 632-34 (1985).
59. *Id.*
60. *Id.* at 647.
61. *Id.* at 651.
62. Milavetz, Gallop, & Milavetz v. United States, 559 U.S. 229, 252-53 (2010).
63. *Zauderer*, 471 U.S. at 651.
64. Whalen v. Roe, 429 U.S. 589, 602-04 (1977).
65. Planned Parenthood v. Casey, 505 U.S. 833, 882-85 (1992).
66. *Id.* at 884.
67. *Id.*
68. *Id.* at 882-83.
69. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
70. Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).
71. *Id.* at 2368.
72. *Id.*
73. *Id.* at 2372.
74. *Id.* at 2372-73.
75. *Id.* at 2372.
76. *Id.* at 2373.
77. *See* Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907).
78. *Id.*
79. *See* Texas Occupations Code §151.003 (providing that the "primary means of licensing, regulating, and disciplining physicians" lies with

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Managing Risk by Embedding Mental Health Co-responders in Police Departments

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INTRODUCTION

The impact of individuals experiencing mental illness is a growing challenge in our country. Nearly 44 million people suffer from mental illness each year, and many of them lack access to adequate resources to address their difficulties. It is also common for people to struggle with short term emotional crises brought on by specific events, drug or alcohol use, or other factors. Suicide rates continue to increase across the country even among individuals with no known mental illness.

People experiencing mental illness often neglect their basic needs which leads to welfare check calls to law enforcement. Because the signs of mental illness can mirror the signs of drug or alcohol impairment the police are sometimes called to investigate disorderly conduct when individuals are undergoing mental health crises.

Individuals experiencing mental illness are more likely to come into contact with law enforcement, and those law enforcement interactions carry significant risks. Police officers often contact people experiencing mental illness because there is no one else available to respond. The behavior of these individuals can be erratic, unpredictable, and sometimes dangerous. People struggling with mental illness are less likely to comply with verbal commands, and police use force more often in encounters with these individuals than with the general public. Increased use of force levels also carries increased risks of injuries and litigation.

Lawsuits filed against law enforcement agencies can cost taxpayers millions of dollars, and can also negatively impact police department morale and the relationship between the police department and the community. Even when police interactions with individuals experiencing mental illness do not carry an elevated risk of injuries or litigation, the interactions can require significantly more time and resources than other calls for service. Prudent municipal attorneys do not wait to act until problems arise from these encounters, but instead work proactively with their risk managers and law enforcement agencies to develop evidence-based programs to reduce these potential risks. As Lexipol founder Gordon Graham is fond of saying, risks that are predictable are preventable.

As communities across the country continue to examine ways to improve outcomes and reduce the costs of interactions between police officers and individuals experiencing mental illness, many have adopted a risk management approach. Risk management seeks to identify, assess, and prioritize risks and then develop policies and programs that help manage or mitigate those risks. Gathering and analyzing data is an important component in developing effective risk management plans.

Police work carries inevitable risks, which often fall within one of three categories: 1) injury or harm to the public caused by an officer or agency's actions; 2) injury or harm to officers; or 3) injury or harm to public trust or law enforcement agency's public perception. The costs associated with these risks are significant, and national initiatives have begun to collect data that will support best practices to manage and mitigate these risks.

Communities across the country have spent years seeking to manage or mitigate the risks associated with police department interactions with people experiencing mental illness. Crisis intervention training for law enforcement officers has become a recognized best practice to improve outcomes in such cases. Recently many communities have developed policies and programs that include embedding mental health co-responders within their police departments. Because many mental health co-responder programs were recently

implemented, data on their effectiveness is limited. However, the results appear to show that these programs complement the extensive crisis intervention training already provided by many communities to law enforcement officers.

This article will examine the potential benefits of embedding mental health co-responders within police departments. The potential benefits include increasing the safety of those involved in such encounters; helping ensure that people experiencing mental illness are directed to the most appropriate resources; decreasing the number of police encounters with such individuals; reducing the costs associated with these encounters (including litigation costs); and improving the speed with which problems associated with these encounters are solved.

Mental Health Co-Responder Programs

Law enforcement agencies across the country have spent the last 40 years working with mental health professionals to develop innovative strategies to improve outcomes with individuals experiencing mental illness. In the 1980s many law enforcement agencies began to implement crisis intervention training. The purpose of crisis intervention training was to train law enforcement on how to understand the signs and symptoms of mental illness so that people experiencing mental illness could receive treatment instead of incarceration, and to improve law enforcement outcomes with people suffering from mental illness. Crisis intervention training is now widely accepted as a best practice for law enforcement.

Seeking to build on the progress made by crisis intervention training, many communities have developed programs that include police department embedded mental health Co-Responders. Programs utilizing mental health Co-Responders can vary by community depending on the size of the community and police department, and based on other factors.

Eau Claire, Wisconsin, established the mental health Co-Responder program within its Police Department to safely and effectively provide services to individuals with mental illness, and to complement the extensive crisis intervention training provided to police officers. In describing the new program, Eau Claire Police Chief Matt Rokus mentioned the significant rise in police calls involving individuals experiencing mental illness, and said the police department needed to develop preventative approaches to this issue. The initial Co-Response team consisted of a Co-Response coordinator and a Special Operations Sergeant, and the community is considering expansions to the program. The Eau Claire Police Department collaborates with co-response to develop an overall intervention strategy to guide police officers' interactions with those experiencing a mental health crisis or other behavioral health component where co-response would be beneficial. Eau Claire's mental health Co-Responder is a licensed clinician and is responsible for management of the program, clinical oversight, provision of mental health assessment for individuals in need, follow up contacts, and referrals to appropriate services.

Yakima County, Washington embeds four designated crisis responders within the Yakima Police Department. Their Co-Responders work out of the police department buildings, and ride in squad cars wearing tactical vests helping respond to individuals having mental health crises or otherwise in need of behavioral health services.

The San Antonio Police Department has an internal mental health unit with an assigned sergeant, two detectives, ten patrol officers, and three civilian clinicians who are master's-level professional counselors. One counselor in the unit specializes in drug and alcohol treatment. Each police officer on the San Antonio mental health unit receives extensive training in crisis intervention techniques, de-escalation, and connecting people in crisis with necessary mental health resources.

The Duluth, Minnesota Police Department Mental Health Unit includes two licensed independent clinical social workers who work out of the same location as the sworn officers assigned to the mental health unit. Duluth's Co-Responders respond to requests for service alongside officers or on their own, and they collaborate with numerous agencies in Duluth that provide services to individuals with mental illness.

Grand Junction, Colorado developed a police department embedded Co-Responder program in 2018 after receiving a state grant. Their program paired a licensed professional counselor or social worker

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Co-responders *cont'd from page 17*

with a sworn police officer, and they responded together to active crisis calls in the community with a focus on de-escalation, screening and assessment, and the development of next step action plans. The goals of Grand Junction's program were to 1) resolve forty percent of the calls without transporting the individual to a hospital; 2) minimize the use of high-cost services like the emergency room; and 3) increase the availability of other uniformed police officers to respond to incoming criminal calls.

Although there may be differences in how communities construct their mental health Co-Responder programs, their common purpose is to improve outcomes and manage the risks inherent in police department encounters with individuals experiencing mental illness.

Increasing Safety

Developing policies and procedures that include a police department embedded mental health Co-Responder can make police encounters with individuals experiencing mental illness safer. As noted earlier, police encounters with such individuals are more likely to involve force than encounters with the general public. This includes increases in the use of lethal force. According to one study, people with untreated mental illness are sixteen times more likely to be killed during a police encounter than the general public. These disparities are unsurprising because the behavior of individuals struggling with mental illness can be erratic, unpredictable, and sometimes dangerous. Decreases in police use-of-force results in fewer injuries to suspects, to law enforcement officers, and to the general public.

Crisis intervention training for police officers is an important component of increasing the safety of police encounters in these scenarios. After the introduction of crisis intervention training in Memphis, police officer injuries during encounters with individuals experiencing mental illness dropped by eighty percent. Embedding Police Department mental health Co-Responders complements crisis intervention training and further increases the safety of police encounters with individuals experiencing mental illness.

Grand Junction, Colorado's Police Department provides an example of the increased safety provided by embedded mental health Co-Responders. During a two-year reporting period, Grand Junction mental health Co-Responders accompanied police officers on thousands of calls, and they reported the use of force in only five of those calls. After initially utilizing a verbal de-escalation technique, three of those calls concluded in police officers going "hands-on," two involved no injury, and one ended with a minor scrape to the officer's knuckle. The two other incidents involved use of less lethal tools in situations that could have escalated if police officers were not also present. The teamwork of the Co-Responders and police officers safely resolved the situation and the persons in crisis were successfully connected with appropriate services.

Recent use of force lawsuits also demonstrate opportunities to make police encounters with individuals experiencing mental illness safer. In *Kisela v. Hughes* the United States Supreme Court examined a case where law enforcement shot an individual (Hughes) engaged in erratic behavior with a knife. When police arrived, Hughes held a large kitchen knife, had taken steps toward another woman standing nearby, and refused to drop the knife after at least two commands to do so, whereupon an officer shot Hughes. Police then handcuffed Hughes, called paramedics, transported her to a hospital for treatment of non-life-threatening injuries.

All three police officers later said that at the time of the shooting they believed Hughes to be a threat to a bystander. Officers later discovered that Hughes had a history of mental illness that likely contributed to her erratic behavior shortly before the shooting.

Another instructive recent case is *Aguirre v. City of San Antonio*. In Aguirre police were dispatched to respond to an apparently mentally disturbed man walking down the middle of a busy divided highway waving his hands. The first officer on the scene drew her firearm, ordered the man to "come here" and then followed with "I'm going to shoot you, mother f----r." He ignored the commands and kept walking. Officers observed what appeared to be fresh needle marks on the man. Three police officers grabbed grabbed him, handcuffed him, and then dropped him over a concrete barrier. The man resisted, and eventually five different officers struggled to gain control of the man. After more than five minutes of being held down with pressure to his arms and back the officers observed that the man was no longer breathing or responsive, and eventually he died in police custody.

Kisela and *Aguirre* provide examples of situations where a police department embedded mental health Co-Responder could be beneficial. Situations involving individuals experiencing a mental health crisis can be made safer with both law enforcement and mental health professionals quickly responding, particularly when the individual is armed or otherwise poses a threat to public safety. Sending mental health professionals without law enforcement to situations similar to *Kisela* or *Aguirre* would not be safe. Although the mental health training might provide benefits in communicating with the mentally ill individual and possibly assist in de-escalation, the mental health professional lacks law enforcement officers' training, experience, and tools to protect the public from violent individuals or individuals who may need to be restrained for their own safety or the safety of the public.

Communities utilizing police

department embedded Co-Responder programs get the benefits of sending both law enforcement and mental health professionals to situations involving people experiencing mental illness, and these skills complement each other in ensuring the safety of everyone concerned.

Directing Individuals to Appropriate Mental Health Resources

Individuals experiencing mental illness are often better served by behavioral health professionals rather than incarceration. Embedded mental health Co-Responders can help contribute to more timely and accurate needs assessments compared to being arrested, incarcerated, or transported to a facility. Once an on-scene needs assessment is complete, then appropriate resources can be directed. But the benefits of embedded Co-Responders do not stop at the scene of an encounter.

Co-Responders gather helpful information on scene which can be used for case management and effective follow up after the initial contact. Once clearing the initial scene, Co-Responders have the time and expertise to create an ongoing plan for services. In formulating these ongoing plans Co-Responders often interview family members and others familiar with the individual experiencing mental illness, and share this information with law enforcement and other agencies to ensure future contacts with the individual are trauma informed and fit the needs of the specific individual experiencing mental illness. Because Co-Responders are licensed mental health professionals, they understand which resources best fit an individual's specific needs, and can help coordinate ongoing services between organizations to provide a wraparound level of care

A study of county jails in Washington State found that of the inmates receiving Medicaid booked into the Yakima County jail in 2013, forty-eight percent needed mental health treatment and fifty-four percent needed substance abuse treatment. Yakima's Co-Responder program now seeks to ensure that people are not incarcerated if mental health treatment is more appropriate and effective.

Decreasing the Number of Encounters with Law Enforcement

Repeat police contacts for people experiencing mental illness is a significant problem. A recent survey of law enforcement officers asked what are the top three challenges they face on calls involving people who are mentally ill or experiencing a mental health crisis. The most common answer, with eighty percent of respondents, was repeat contacts with same person who does not or cannot seek help.

By helping connect individuals experiencing mental illness with the most appropriate resources, embedded mental health Co-Responders help decrease law enforcement encounters. For example, Grand Junction, Colorado enjoyed a significant reduction in repeat encounters with individuals experiencing mental illness after instituting its Co-Responder program, with seventy-eight percent of those individuals contacted only once. Other communities utilizing police department embedded mental health Co-Responders have experienced a similar decrease in the number of repeat encounters with law enforcement.

Reducing Costs and Litigation

Reducing law enforcement encounters with individuals experiencing mental illness, reducing the likelihood force is used in such encounters, and improving the overall resolution of these encounters will lead to reduced law enforcement and litigation related costs. Unnecessary arrests and avoidable use of force incidents not only harm people experiencing mental illness, but can also cost communities more money and invite more litigation.

Yakima County, Washington estimates it costs approximately ninety-two dollars a night to house someone with mental illness. If the jail houses multiple people each day that would be more appropriately served by mental health treatment then the County would spend tens or hundreds of thousands of dollars on an approach that is not effective. That does not include the amount of money spent on prosecutors, public defenders, judges and court staff, and other employees needed to manage the criminal caseload resulting from the arrests and incarceration.

Additionally, the more time law enforcement spends on individuals experiencing mental illness, the less time thy can devote to other policing efforts, such as proactive policing, crime prevention, community outreach, and other emergency calls for service. Halifax, Nova Scotia, found the time police officers spent on the scene of mental health calls fell significantly the year following the implementation of co-responder team services. Similarly, another study reported the average time officers devoted to calls with a person in a mental health crisis was fifty-two minutes when a co-responder was involved, compared to two hours and forty-six minutes without a Co-Responder.

Reducing the likelihood that force is used in encounters with individuals experiencing mental illness reduces litigation related costs. The cost of litigation involving law enforcement use of force is skyrocketing, and the landscape of federal civil rights lawsuits involves significant risks of loss even when law enforcement use of force is consistent with legal standards. Federal civil rights lawsuits are generally tried in the counties where federal district courts are headquartered. The jury pools from many of these urban areas tend to be less favorable to law enforcement compared to the general public. More federal civil rights lawsuits are being filed in the wake of George Floyd's death,

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NEW LAWYERS

ANDY SEGOVIA,
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Getting Your Boss's Job: Tips on Ascending to the City Attorney Position

Lawyers new to the practice of municipal law are wise to begin focusing and planning their career path now. I wish I had given it more thought early in my career, which itself has taken unexpected twists and turns. Too often we fall into the trap that we can focus on these things later but there is no better time than the present. This article is intended to give new lawyers some practical guidance for their career and professional development.

1. Understand the organization's culture.
Every city, county, and governing body has its own unique culture and approach. Also, the communities they serve have varied histories and face different and unique challenges. It is important to try to understand the culture of your organization and the rich history of the area you are working in. Very often historical events and trends impact the perspective on current issues facing the organization. Work towards maintaining and even augmenting those parts of the organizational culture that help you develop professionally and help the organization succeed. For example, always encourage collaboration and teamwork. For those things that do not help the organization, think about how you can be a change agent to help it move to be a more productive and sustainable organization. As an example, work to break down silos that deter from effective cross department communications.

2. Understand your supervisor's leadership style.
Everyone has a different leadership style. Work to recognize that style and then manage your own work so that it fits the leadership style. Some leaders drive for consensus among the team, while others are more data driven and make decisions after careful review of pertinent information. Some leaders want to be more involved in decision making, while others give their managers more latitude and expect decisions to be made at the appropriate level. No matter what your supervisor's style, try to understand it, and adjust your efforts so that you can be effective. If your supervisor favors a data driven approach, then make sure you provide the pertinent data and analysis to facilitate decision making. Also look to fill gaps in areas where your supervisor is not as strong. For example, I let my team know I am not the best at organization or attention to detail and I am very appreciative when team members focus on those areas as we deliver legal advice to the organization. Every leader has their strengths and weaknesses. Work toward leveraging the strengths and filling in the gaps in the weaknesses.

3. Work well with your clients and colleagues.
I have found that your success is very much tied to the success of your clients and your colleagues. Too often people work toward managing up with an unhealthy focus on impressing the boss at the expense of supporting clients and colleagues. Helping a client accomplish their mission is key to being viewed as a value-added member of the organization. Helping colleagues working on challenging projects will add to your reputation as a team player. Promotional decisions are not made in isolation. Input is received from clients and colleagues and their input plays a significant role in professional evaluations. In short, the more you support and complement others, the more it helps with your development and career advancement.

As you give legal advice do not default to "no." Many risks are clearly avoided by just saying "no" but many opportunities for the organization and the community are lost if we always default to "no". Your clients are trying to accomplish stated missions and objectives that are important. Risk is always at play. Look for ways to mitigate risks to help them accomplish their mission. Instead, suggest "yes, but let's try doing it this way instead." It is important to be viewed as a trusted advisor and not a hinderance. There is almost always a solution you can come up with working together with colleagues and clients. In San Antonio, we teach our staff that the only time we say "no" is if the proposed activity is 1) illegal, 2) unethical,

or 3) enterprise threatening (e.g., allowing drag racing downtown). For anything outside of those three situations, we always try to work with our clients to implement programs and initiatives that entail manageable risks.

4. Leverage your strengths and expertise but be open for learning opportunities.
You may have a unique skill set or knowledge, do not be afraid to raise your hand and share it. Always leverage your strengths and expertise whenever a unique project comes up. The most rewarding projects I have worked on have been those of first impression for the organization. Major projects I have worked on include housing programs in Mexico, theme park sponsorships, branded credit card issuance, and river tour agreements. None of those fit into a particular practice. In situations where you may not have the expertise, view a challenging project as a learning opportunity to gain new skills or experience.

5. Always question "we have always done it that way."
I have found some of the lowest hanging fruit in terms of helping an organization become more effective and efficient can be found by asking why things are done a certain way. There may be excellent reasons why a program or process was started but those factors are not static. You may find that no one has revisited it since it was first created. You can make a real difference by taking a new, fresh look at things like forms, waivers, and similar boilerplate documents. Always ask why we are doing it that way and if the answer is "because we have always done it that way," then that is a good sign it is a non-value-added step. Every process or form should bring real value to the organization.

6. Always use crisp, concise, plain communications.
Your clients and leadership probably do not have time to read a multi-page document with case citations. They have time for an email or one-pager that simply answers their question with yes, no, or maybe. You can use the next three or four paragraphs to explain why your answer is a yes, no, or maybe. If the client or recipient of your email needs more information, then offer to provide it to them or to meet with them.

I have found that lawyers get into the habit of supplying more information than is needed. We do not need to fill the "blue book" anymore (I am probably dating myself). Remember that your client needs advice quickly and that communications need to be clear and concise. If they want case citations or a more in-depth analysis, then you can always follow-up. More often than not the client will appreciate the leaner communications.

7. Productive feedback.
This is a very hard thing to do and there are resources outside of this article that can help you. What I have found to be most effective in my career is to make sure that the feedback is timely and to the point. If someone does a great job, then let them and the team know that right away. If there was something they could improve on, then highlight that to them individually and give them the resources to improve. Performance needs consistent calibration rather than dramatic shifts. Provide feedback to your leadership team. A lot of times our leaders and colleagues are also under the same time pressures. A good leader will welcome your insight.

8. Be patient … to a point.
All of us expect that once we reach a certain skill and experience level, then we will go up the career ladder. That does not always happen. I have had to be patient myself. But leaders change, situations change, and opportunities always come up.

However, if it gets to the point that you really do feel you have hit a standstill or that your career is taking steps back, then come up with a plan. If you are not getting the promotion or development opportunities that you deserve, then think of how you can change that. You can look within your organization but outside your department, or maybe to another city all together. One of the advantages of working for a larger city is that career opportunities present themselves on the client side. We have had attorneys leave the City Attorney's Office for other city departments. Some thrive in their new roles and others later bring back their valuable experience to the legal department. Be patient but recognize that we have limited time in our career to make meaningful contributions to our community and to our profession.

I commend all new lawyers that are giving their talent and expertise to better their communities. Think about where you want to be in the next three to five years and create a plan. Check-in on your plan from time to time to watch for progress, and always have a Plan B. ML



Andy Segovia has practiced law since 1990, serving for 25 years as a senior legal executive with General Motors in Detroit before becoming the City Attorney for his native San Antonio in 2016. He is a member of the City's Executive Leadership Team overseeing the City Attorney's Office and the Diversity, Equity, Inclusion & Accessibility Department. He received a BA in Government Studies from the University of Notre Dame, an MPA from Texas A&M University, and a JD from the University of Texas at Austin.

AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

"Continuity of Government"- the Virginia Supreme Court's Minimalist View

As of the date of this article, we are still waiting for the Supreme Court to issue the vast majority of its decisions, including in several cases we are watching closely that will impact local governments.[1] We expect decisions in the most controversial cases to come down closer to the end of June (when the Term ends), though we never know exactly when the Court will issue opinions. While we await U.S. Supreme Court results, IMLA continues to be busy with our legal advocacy efforts nationwide, including in an important new case at the Virginia Supreme Court involving the intersection of local government emergency authority and virtual meetings.

A County's New Zoning Ordinance: In *Berry v. Board of Supervisors of Fairfax County,* the Supreme Court of Virginia invalidated Fairfax County's new zoning ordinance known as "Z-Mod" because it had been adopted via electronic meeting during the COVID-19 pandemic, which the court held violated the open meeting provisions of the Virginia Freedom of Information Act ("VFOIA") Code § 2.2-3700 et seq.[2] Z-Mod was adopted in March 2021, replacing a more than forty-year-old predecessor enacted in 1978. The new ordinance was codified after "extensive public outreach" which spanned more than five years and incorporated numerous editorial and substantive changes.[3] The modifications were material, including allowing more accessory living units by removing previous age and disability requirements, and changing the home-based business provisions of the previous ordinance, among others.[4]

The Legislative Background: The County was in the process of finalizing Z-Mod when COVID-19 emerged, resulting in governments around the country declaring states of emergency and moving from in-person public assembly to virtual meetings. Under VFOIA, "[n]o meeting shall be conducted through telephonic, video, electronic or other electronic communication means where the members are not physically assembled to discuss or transact public business, except as provided in § 2.2-3708.2[.]"[5] At the time Z-Mod was enacted, Va. Code Ann. § 2.2-3708.2 provided:

> [a]ny public body may meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, provided that (i) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and (ii) the purpose of the meeting is to address the emergency.

In parallel, the Virginia General Assembly had provided, pursuant to Virginia Code §15.2-1413, that:

> Notwithstanding any contrary provision of law, general or special, any locality may, by ordinance, provide a method to assure continuity in its government, in the event of an enemy attack or other disaster. Such ordinance shall be limited in its effect to a period not exceeding 12 months after any such attack or disaster and shall provide for a method for the resumption of normal governmental authority by the end of the 12-month period.[6]

The Continuity Ordinance: Facing the COVID-19 state of emergency, the County adopted a "Continuity Ordinance" pursuant to the General Assembly legislation, "to establish[] methods to assure continuity in Fairfax County government, including Board of Supervisors' procedures for meetings, during the COVID-19 emergency[.]"[7] Section 1(D)(1) of the Continuity Ordinance provided that "[f]or any meeting at which the Board . . . transacts public business with any purpose other than addressing the emergency or assuring continuity in Fairfax County government, the Board . . . will meet in accordance with all usual procedures established by the Virginia Freedom of Information Act."

The County defined "continuity" as including:

> without limitation, those actions, and the coordination of actions, that are necessary to assure the continuation of the County's essential functions and services. By way of example and not limitation, such necessary actions include those related to (1) the County's finances, such as the public hearings and adoption of the

FY 2021 budget, tax rate, and utilities fees; appropriations of funds; and funding requests; (2) contracts that need Board action; (3) applications, appeals, or other requests that are subject to mandatory or directory time frames for action; (4) satisfying due process and other constitutional requirements; (5) public safety; and (6) measures that help sustain the County's economy.[8]

Based on the Continuity Ordinance, the County adopted Z-Mod via electronic meeting in March of 2021.

Differing Interpretations of "Essential": County residents rapidly challenged the action as impermissible under VFOIA, but the Fairfax County Circuit Court upheld the adoption of Z-Mod, concluding that "[z]oning is inherently an essential act of local government[,]… critical, especially in the context of a national emergency…"[9]

The Virginia Supreme Court reversed. It concluded that the legality of the County's actions hinged on whether the adoption of Z-Mod was done to "assur[e] continuity" of the government pursuant to the Continuity Ordinance. The court declined to rule on what it called the broader question of whether the statutory authority granted by the Virginia legislature empowered the County (and other localities) to conduct any of its ordinary business under the emergency procedures without regard to VFOIA. Instead, the court focused its inquiry on whether adoption of Z-Mod was authorized by the Continuity Ordinance, ultimately agreeing with the Residents' arguments that zoning fell within the ambit of "ordinary business" and was not necessary to assure the continuity of government.[10]

The Virginia Supreme Court conceded that the County's definition of "continuity" in the Continuity Ordinance was not exhaustive and was merely intended to be illustrative, but it nevertheless concluded that for something to be considered necessary to the continuity of the government there must be an "implied temporal element."[11] The court reasoned that "[i]f an issue does not require immediate attention, it cannot fairly be classified as 'necessary' to allow the County government to continue with essential functions and services."[12] Given that Z-Mod resulted from a multi-year process, the court concluded there were no imminent deadlines and no reason to believe it was necessary or essential to the continued operations of the County.

The court rejected the County's argument that zoning is "an essential local government function." Notwithstanding prior Virginia Supreme Court decisions recognizing the centrality of the zoning power, the court explained that even if the zoning power[13] is essential, that does not make a particular zoning decision essential.[14] The court thus concluded that the County violated VFIOA by enacting Z-Mod via electronic meeting and was therefore void *ab initio*.

IMLA's View: While open meetings requirements are important to promote transparency in government, here the County complied with VFOIA and was acting in a manner authorized by the General Assembly to ensure safe operations for the County's workers and inhabitants during a deadly pandemic that took the lives of nearly 1,800 County residents. The County's actions were similar to those of local governments around the country that swiftly and commendably turned to virtual meetings to help continue operating essential services for their residents.

Importantly, when the County enacted Z-Mod, there was no indication when the pandemic would subside. COVID-19 had been raging for a year, and while vaccines were newly available to some at the time, there was no known timeline to the crisis. The Virginia Supreme Court's conclusion that zoning was not "essential" to the operation of government not only ignores Virginia case law clearly stating the contrary, but also ignores the fact that at the time, nobody knew when the pandemic would end and when "normal" life could resume.

Berry is an impediment for Virginia's most populous county, putting Z-Mod on ice and reverting the County back to its previous 1978 zoning ordinance. There are myriad questions about what this decision means for the County in terms of existing permits, variances, transactions, and construction that has already begun under Z-Mod. In the meantime, the County is moving forward on multiple tracks and appears to be setting new public hearings to try to readopt the ordinance via in-person meetings while also pursuing its petition for rehearing with the Virginia Supreme Court.

While the court purported to be ruling only on a narrow question, focusing its inquiry on Z-Mod and the County's Continuity Ordinance, other localities in Virginia nevertheless face a good deal of uncertainty due to this decision. It seems likely that the 134 local governments in Virginia passed similar continuity measures during COVID, potentially calling into question a host of other legislative actions throughout the state adopted via electronic meeting during the COVID virtual time-period. Any disgruntled resident unhappy with a particular legislative action can use this decision to seek to invalidate legislation enacted during a virtual meeting. And regardless of the outcome of future lawsuits, local governments in Virginia now face a tremendous amount of uncertainty as a result of *Berry* and will likely encounter increased litigation, which will do nothing except waste valuable time, money, and resources that could be spent on addressing other problems the localities are facing.

The Virginia Supreme Court's decision will no doubt have a destabilizing effect for other local governments in the Commonwealth, which is why IMLA is joining an amicus brief in support of the County's petition for rehearing in this matter. ML

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LISTSERV

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

A Tale of Two Cities

Back in the late sixties and early seventies, I observed that my place of birth–Columbia, SC–and nearby Charlotte, NC, were thought of by many as comparable cities. There was some size difference (in 1970 Charlotte had a population of around 240,000, and Columbia had a population of roughly 110,000) but a drive-through of the two cities, which lie about ninety miles apart, revealed municipalities that seemed a lot closer in size.

Fast forward to 2023, and the story is much different. Charlotte sports a population exceeding 894,000, as compared to Columbia's population just over 139,000. So, in fifty years, Charlotte went from roughly twice as populated to more than six times as populated as Columbia. What could be the reason(s)?

Let's start with the similarities between the two. Both cities occupy cities occupy similar latitudes. Charlotte sits in the piedmont area of North Carolina, nearly straddling the North Carolina/South Carolina State Line. Columbia is also a piedmont city, sitting by design right in the middle of the Palmetto State. Both cities lie at the crossroads of major U.S. Interstates, the climate in both cities is very similar (hot!), and both are home to a major state university. Circa 1970, these factors helped make the two cities appear much more similar than they do now.

What made the difference, you may ask? Well, the first big thing I remember was the announcement around 1970 that a "gigantic" theme park along the lines of Disney World was coming to Charlotte. This drew the excitement of the area children, and although the theme park today technically sits right on the state line, nobody outside the area is ever told that the park is in "upper state South Carolina." One is told today that the park is in Charlotte, NC, and many of the supporting services are provided from the north side of the line.

Charlotte has since outpaced Columbia in developing its airport, as Douglas International Airport is now the sixth busiest in the country and is a southern hub for United Airlines. Cue another big industry and all the benefits it brings to a city. In addition, Charlotte has developed its air freight industry to go along with the massive increase in passenger flights.

Meanwhile, Columbia boasts a very nice airport of its own but nowhere near the traffic of Douglas International. There is little in passenger flight choices beyond United, Delta and American, and Columbia's airport has largely remained dependent on freight traffic to keep afloat. United Parcel Service is a major contributor here, but a "fly by" of the airport wouldn't show a lot of passenger traffic. In fact, many visitors to Columbia fly into Charlotte and take a shuttle south.

Then there is the development of the banking industry in Charlotte. Bank of America and Wells Fargo both have a tremendous presence in the city, and both have grown exponentially in the past few decades. The two banks are the top employers in the Tarheel State's largest city. Truist Bank headquarters also sits in Charlotte. Columbia's largest employers include the State Government, the school system and the U.S. Army. The largest private employers in Columbia the city are two healthcare systems.

Beyond the growth of industry in Charlotte, there is also the city's expanding geography. Charlotte consists of 312 square miles compared to Columbia's 141 square miles. Charlotte's rapid population growth has been spurred by a growth in land area. In fact, according to a 2019 article published by the UNC Charlotte Urban Institute, Charlotte's total land area had increased by almost twelve square miles in the past decade. So, in addition to its population growing by almost twenty percent, its land area has grown by over four percent, according to the Urban Institute.

So, how does a city grow physically in size? Annexation, of course. The willingness and ability to aggressively annex property is one crucial difference between Charlotte and many cities with similar populations, according to the Urban Institute. In addition, many major cities are land locked, either literally (by bodies of

water) or figuratively (by adjacent cities) according to the Urban Institute…. Yet, "there are still thousands of acres Charlotte can still potentially absorb." (Quote again attributable to the Urban Institute).

Although the laws appear to have changed somewhat recently, they have historically been a bit more lenient "north" of our common border. A colleague reports that at one point his parents in Charlotte received a garbage roll cart and a welcome letter by complete surprise. This was followed by a tax bill increase and a tax bill for each vehicle the family owned. That could never have happened in South Carolina!

So, why would annexation play so much of a bigger role in increasing the size of one city as opposed to another similar municipality? The answer could partially lie within the varying state laws which govern the annexation process for all cities within state lines. A listserv review of laws around the country reveals quite an array of annexation statutes. (Names omitted to protect the innocent).

One member reports there are absolutely no involuntary annexations in their state. Annexation of land can only occur "contractually," and be accomplished by petition of the landowner to become a part of the city. The cities have little to no "leverage" to encourage landowners to annex, save the enticement of lower utility rates. This member reports a prevailing sentiment favoring landowner rights to determine the fate of their own property as a reason for slow annexation rates.

Yet another survey contributor reports that until very recently, city staff could almost ride down the street and pick out the parcels it wished to annex. After a short ministerial process, a landowner more or less got a "Welcome to the City" letter. This eventually met with growing landowner resistance and ended up being curtailed by the state legislature.

Another City Attorney reports their city grew exponentially after a resolution to combine City and County Governments. Once the governments combined, all the property became part of the city and the geographic size surged.

There are states with very strict requirements that must be followed to the letter to provide for annexation, and then there are those who pretty much can annex as long as the city and landowner agree to do so. There are also states that require a referendum of voters to approve an annexation.

One respondent cites three methods of annexation: 1) by act of state legislature; 2) by referendum of the voters; and 3) by petition from every landowner of the subject property. A reader in another state reports that a municipality may initiate annexations itself, while others strictly require them to be initiated by landowners.

In one of the more amazing situations, a member reports that annexation in their state cannot move forward at all without approval of the state legislative authorities, even in situations where One Hundred Percent of the Landowners AND the Municipality are in agreement on the matter.

Another reader reports that city boundaries are drawn by the legislature and can be redrawn any time by those same politicians or alternatively by a vote of the people. State politicians deciding municipal boundaries?

Yet another contributor notes that a required part of the annexation process is the filing of an economic plan for the provision of services to the annexed area. And, although nearly all states require property to be contiguous to the current city boundaries to be eligible for annexation, one reader reports state law allows non-contiguous property to be annexed so long as there is the consent of the owner and the property lies within the "urban growth boundary of the municipality." One can imagine the potentially wild city outlines in such a situation!

So, there you have it… Annexation statutes are all over the board ranging from extremely lenient to extremely stringent. In this tale of two cities, Charlotte seems to have grown more quickly due to a combination of economic factors, geographic factors and an aggressive annexation plan. South Carolina has traditionally been a "property owners state," with local governments often facing opposition on the part of property owners to the annexation process. Columbia has, however, maintained a steady population growth to the presence of the state government, the U.S. Army at Fort Jackson and the University of South Carolina.

***

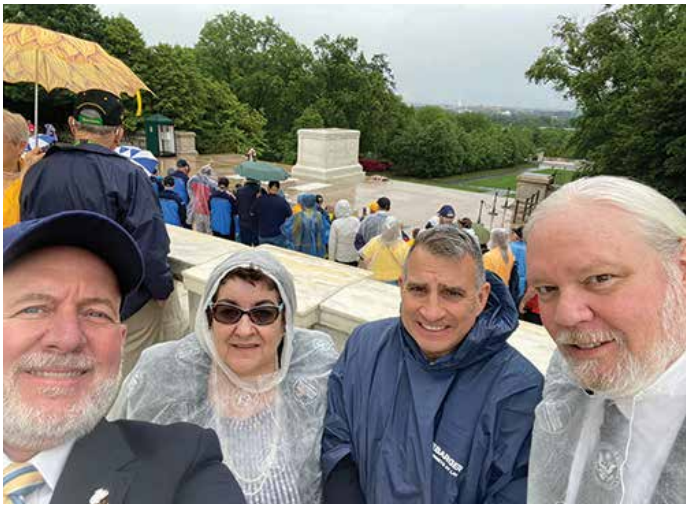
Since we are on the subject of cities' population changes since 1970s, I thought it interesting to compare the largest U.S. Cities in 1970 to the largest in 2022. According to *Biggestuscities.com*, the 25 largest cities in the U.S. in 1970 were: New York at 7,894,862; Chicago 3,366,957; Los Angeles 2,816,061; Philadelphia 1,948, 609; Detroit 1,511,482; Houston 1,232,802; Baltimore 905,759; Dallas 844,401; Washington 756,510; Cleveland 750,903; Indianapolis 744,624; Milwaukee 717,033; San Francisco 715,674; San Diego 696,769; San Antonio 654,153; Boston 641,071; Memphis 623,530; St. Louis 622,236; New Orleans 593,471; Phoenix 581,562; Columbus 539,677; Seattle 530,831; Jacksonville 528,865; Pittsburgh 520,117; and Denver 514,678.

In 2022 the list looked like this: New York 8,467,513; Los Angeles 3,849,297; Chicago 2,696,555;

Continued on page 35

IMLA'S 2023 MID-YEAR SEMINAR IN WASHINGTON D.C.

We devote a few pages to our recently-concluded meeting at the iconic Omni Shoreham Hotel in the Nation's Capital, attended in record-breaking numbers. In addition to hearing from exceptional domain experts, we connected with colleagues, celebrated amicus writers, took in some of the City's sights and sounds, reviewed leading-edge legal products and services, and laid a wreath at the Tomb of the Unknown. Thanks to everyone who made this such a successful event!

















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IMLA'S 2023 AMICUS AWARDS WINNERS

Please join IMLA in recognizing the lawyers who took time out of their busy schedules to author amicus briefs on behalf of our members over the past year. They are central to IMLA's presence and credibility as a leading amicus organization, and we are very appreciative of their time and talents!

180 Land Co. LLC v. City of Las Vegas
Supreme Court of Nevada
Whether a zoning ordinance trumps the General Plan such that a developer has an "absolute right" to build residential units on a property despite it being designated as open space in the General Plan.

Steven Silva
Nossaman, LLP, Sacramento, CA
Partner

303 Creative LLC v. Elenis
Supreme Court Merits
Whether applying Colorado's public-accommodation law to compel a website designer to serve LGBTQ marriage clients violates the First Amendment.

Aileen McGrath
Akin Gump Strauss Hauer & Feld LLP, San Francisco, CA
Partner
Juliana DeVries
Akin Gump Strauss Hauer & Feld LLP, Washington DC (now clerking for N.D. Cal.)
Appellate Attorney

Association of Club Executives of Dallas, Inc. v. City of Dallas
Fifth Circuit
Whether curfew on exotic dance clubs is a restriction on conduct, not expression, and passes muster under intermediate scrutiny.

Joshua Skinner
City of Arlington, TX
Assistant City Attorney

Baker v. City of McKinney
Fifth Circuit
Damage to home during police pursuit of hostage taker is not compensable Fifth Amendment taking.

Tadd Dunn
Messer, Fort & McDonald, PLLC, Frisco, TX
Associate
Justin Johnson
City of Plano, TX
Assistant City Attorney

Brookhaven v. Ardent
Georgia Court of Appeals
Whether a city can be liable to a developer for its refusal to abandon a road at a price dictated by the developer.

Ryan Bowersox
Georgia Municipal Association, Atlanta, GA
Assistant General Counsel

Louisville-Jefferson County Metropolitan Government v. Carr
Supreme Court Petition
Whether all pardons which restore civil rights and nullify punishment or legal consequences of a crime, regardless of the implications on the underlying conviction, sufficiently invalidate a conviction under *Heck*.

Tim Coates
Greines, Martin, Stein & Richland LLP, Los Angeles, CA
Partner Emeritus

Celcog v. Perkins
Supreme Court Petition
Whether an award of attorneys' fees under 42 U.S.C. § 1988 is inappropriate in a state court case where only state claims were raised.

Joy Rabalais
Borne, Wilkes & Rabalais LLC, Shreveport, LA
Partner

City of Grants Pass v. Johnson
Ninth Circuit Petition for Rehearing En Banc
Whether *Martin v. City of Boise* requires confirmation that available beds exceed the number of homeless before reasonable time, place, and manner restrictions can be enforced.

Harry Wilson
Markowitz Herbold, PC, Portland, OR
Shareholder, Head of Government Practice Group
Anit Jindal
Markowitz Herbold, PC, Portland, OR
Shareholder
Hannah Hoffman
Markowitz Herbold, PC, Portland, OR
Associate

Continued on page 30

City of South Miami v. DeSantis
Eleventh Circuit
Whether a Florida statute prohibiting local sanctuary policies violates the Equal Protection Clause.

Raphael Rajendra
County of Santa Clara, CA
Deputy County Counsel
Susan Greenberg
County of Santa Clara, CA
Deputy County Counsel

Connor v. Cleveland County
Supreme Court Petition
Whether "gap time" is compensable under the Fair Labor Standards Act or if it may only be brought as a state contract law violation.

Heidi Wilbur
Fox Rothschild LLP, Denver, CO
Partner
Patrick Kane
Fox Rothschild LLP, Charlotte, NC
Partner
Kip Nelson
Fox Rothschild LLP, Raleigh, NC
Partner

Crawford v. Commonwealth of Pennsylvania
Supreme Court of Pennsylvania
Whether the Pennsylvania Firearms Act violates Philadelphia's Home Rule authority delegated to it by the State.

Jared Make
A Better Balance, New York, NY
Vice President
Robert Toland
Vaughan Baio & Partners, Philadelphia, PA
Partner

El Papel, LLC v. City of Seattle
Ninth Circuit
Whether moratorium on landlord evictions during COVID is a Fifth Amendment taking and satisfies Penn Central standards.

Rachel Fried
Democracy Forward, Washington DC
Senior Counsel

Moore v. Harper
Supreme Court Merits
Whether the "times, places, and manners" clause in Article I, Section 4 of the Constitution gives state legislatures absolute authority to redistrict and to control federal elections, free of any reference to state constitutions or oversight by state courts.

John Korzen
Wake Forest University School of Law, Winston-Salem, NC
Director of the Appellate Advocacy Clinic

Health & Hospital Corp of Marion County v. Talevski
Supreme Court Merits
(1) Whether the Supreme Court should reexamine its holding that spending clause legislation gives rise to privately enforceable rights under 42 U.S.C. § 1983; and (2) whether, assuming spending clause statutes ever give rise to private rights enforceable via Section 1983, the Federal Nursing Home Amendments Act of 1987's transfer and medication rules do so.

Christopher Wright
Harris, Wiltshire & Grannis LLP, Washington DC
Partner
John Grimm
Harris, Wiltshire & Grannis LLP, Washington DC
Partner

City of Huntington v. AmerisourceBergin
Fourth Circuit
Whether opioid distributors' conduct violates West Virginia public nuisance law and requires payment of abatement costs.

Carl Cecere
Cecere PC, Dallas, TX
Owner

Kennedy v. Bremerton School District
Supreme Court Merits
Whether prayer by football coach at midfield after game, surrounded by players, may be prohibited by school district based on Establishment Clause concerns.

Michael Dreeben
O'Melveny & Myers LLP, Washington DC
Partner
Jenya Godina
O'Melveny & Myers LLP, Washington DC
Associate

Kirola v. City & County of San Francisco
Ninth Circuit
Whether a plaintiff must personally encounter ADA violations to bring a claim under Title II of the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) and whether a few scattered non-compliant issues can create liability under the ADAAG for the public entity or whether violations must be widespread and attributable to policies and practices pervading the whole system.

Erin Bernstein
Bradley Bernstein Sands LLP, Oakland, CA
Founder

Knight v. The Metropolitan Government of Nashville and Davidson County
Sixth Circuit
Whether requirement that builders of new homes or substantial additions must build sidewalks or contribute to citywide sidewalk fund is a taking under the Fifth Amendment.

Richard Coglianese
City of Columbus, OH
Assistant City Attorney

Myrick v. City of Hoover
Eleventh Circuit
Whether administrative leave and military leave are comparable for the purposes of benefits under USERRA.

Robbie Alexander Hyde
Alexander Hyde, LLC, Auburn, AL

National Pork Producers Council v. Ross
Supreme Court Merits
(1) Whether allegations that a state law has dramatic economic effects largely outside of the state and requires pervasive changes to an integrated nationwide industry state a violation of the dormant commerce clause, or whether the extraterritoriality principle described in the Supreme Court's decisions is now a dead letter; and (2) whether such allegations, concerning a law that is based solely on preferences regarding out-of-state housing of farm animals, state a claim under *Pike v. Bruce Church, Inc.*

John Korzen
Wake Forest University School of Law, Winston-Salem, NC
Director of the Appellate Advocacy Clinic

New Harvest Christian Fellowship v. City of Salinas
Supreme Court Petition
What must a RLUIPA plaintiff show as a part of its prima facie case in an "equal terms" facial challenge before the burden shifts to the local government.

Derek Cole
Cole Huber LLP, Roseville, CA
Partner and Co-Founder

City of Philadelphia v. Armstrong
Supreme Court of Pennsylvania
Whether the Pennsylvania Firearms Act preempted a local government's ordinance that imposes a fine on an individual who fails to report a lost or stolen firearm within 24 hours after the theft/loss was discovered.

Marissa Roy
Local Solutions Support Center, Los Angeles, CA
Attorney
Dilini Lankachandra
Brightline Defense Project, New York, NY
Legal Director

R.J. Reynolds Tobacco Company v. Bonta
Opposition to Supreme Court Emergency Order
Whether the Tobacco Control Act expressly preempts state and local laws that prohibit the sale of flavored tobacco products

Joelle Lester
Public Health Law Center, St. Paul, MN
Executive Director

Sackett v. Environmental Protection Agency
Supreme Court Merits
Whether the U.S. Court of Appeals for the 9th Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7).

Andre Monette
Best Best & Kreiger, Washington DC
Partner
Roderick Walston
Best Best & Krieger, Walnut Creek, CA
Of Counsel

United States v. Hansen
Supreme Court Merits
Whether prohibition against compensated counseling of undocumented immigrants about obtaining US citizenship violates the First Amendment.

Jamie Huling Delaye
San Francisco City Attorney's Office, San Francisco, CA
Deputy City Attorney
Molly Alarcon
San Francisco City Attorney's Office, San Francisco, CA
Deputy City Attorney

Valenzuela v. City of Anaheim
Supreme Court Petition
Whether a state's prohibition on post-death "hedonic" damages, which purportedly compensate the deceased for the pleasure he would have taken from his life had he lived, is inconsistent with Section 1983.

Steven Renick
Manning Kass, Los Angeles, CA
Partner

Wilkins v. United States
Supreme Court Merits
Whether the Quiet Title Act's statute of limitations is a jurisdictional requirement or a claim-processing rule.

Jeffrey W. Mikoni
Pillsbury Winthrop Shaw Pittman LLP, Washington DC
Special Counsel

INSIDE CANADA

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

Delaying Tactics, Redacted Documents, Single-Vote Recounts and More

Delay in Proceedings: How Long is Too Long?
Toronto (City) v. 961557 Ontario Ltd., 2023 ONCJ 158 https://canlii.ca/t/jwnnl
The Defendant, a local business, was charged by the City of Toronto ("City") under COVID-19 pandemic regulations for failing to comply with an order made during a declared emergency. The Defendant submitted that its constitutional rights were infringed due to the inordinate delay in proceeding with a trial relying on s. 11(b) and s. 24(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

HELD: Motion dismissed.

DISCUSSION: There was a lengthy history between the parties, as the charge was laid by the City against the Defendant on June 27, 2020, and t the trial concluded on December 19, 2022. The Court determined that there had been a total delay of 29 months and 22 days. The purpose of s. 11(b) of the *Charter* is to protect the rights of an accused individual and sets out the right to be tried within a reasonable time. The leading Supreme Court of Canada decision, *R. v. Jordan*, [2016] 1 S.C.R. 631 provides that "[t]imely justice is one of the hallmarks of a free and democratic society." *Jordan* establishes a framework concept of net delay, and whether the delay breached a presumptive ceiling. The presumptive ceiling for matters in the Ontario Court of Justice that proceed under Provincial Offences Act, is 18 months.

The Defendant submitted that the delay is beyond the 18-month ceiling and was therefore unreasonable. The City submitted that the net delay falls under the 18-month *Jordan* ceiling when subtracting Defendant delay including, unsuccessful disclosure motions and unavailability of defence council to set an earlier trial date taken together with the exceptional circumstances of COVID-19 pandemic. The Court was satisfied with the City's argument that the disclosure motion filed by the Defendant was frivolous and a deliberate tactic designed to create delay. It was agreed that the total delay from charge to trial was 29 months and 22 days, furthermore, both parties consented that the time period attributable to the COVID-19 pandemic as an exceptional circumstance was 8 months and 5 days. When subtracting the delay attributed to COVID-19 and the Defendant's action from the net delay, the remaining delay is 16 months and 20 days. With a delay below the 18-month threshold, the onus shifted to the Defendant to demonstrate that the delay was nonetheless unreasonable, and that the Defendant took meaningful steps to expediate the case. The Court found evidence to the contrary, that instead the Defendant took steps to delay the case and did nothing to advance it. Motion dismissed.

Settlement Privilege versus Public Interest in Information Request
Daniels v. Wolfville (Town), 2023 NSSC 126 https://canlii.ca/t/jwppc
The Appellant filed an information request with the Town of Wolfville ("Town") under the *Municipal Government Act*, S.N.S. 1998, c. 18 ("*Act*") seeking a copy of a settlement agreement ("Agreement") concerning a building development within the Town. The Appellant was not a party to the Agreement. The Town provided a partially redacted copy, prompting one of the parties to the Agreement to object and seek a review by the Information and Privacy Commissioner ("IPC"). The IPC recommended disclosure of the entire Agreement without redactions. The Town did not follow this recommendation, and the Appellant appealed.

HELD: Appeal granted.

DISCUSSION: The Town submitted that common law settlement privilege justifies its decision to withhold redacted information. The Appellant submitted that the *Act* abrogates common law settlement privilege and that the competing public interest outweighs the public interest in encouraging settlement. The crux of the matter before the Court was to weigh the purpose of the *Act*, which is to ensure that public bodies are fully accountable to the public, against the public interest in encouraging settlement. The Court outlined that the purpose of settlement privilege is to promote settlement, and it is vital to improve access to justice. There is public interest in favour of settlement because it promotes the interest of litigants, saving time expense and burden on the court system, while the purpose of the *Act* is to ensure that municipalities are fully accountable to the public, by

providing the public a right of access to records with necessary exemptions. The Court was satisfied that the public interest in the full accountability of public bodies, subject only to necessary exemptions, outweighs the public interest in settlement. Therefore, the appeal was granted, and the Town was ordered to provide the Appellant a copy of the Agreement that does not have redacted information.

Did the Arbitrator Apply the Right Test?

City of Toronto v. Canadian Union of Public Employees, 2023 ONSC 2122 https://canlii.ca/t/jwkct

The City of Toronto ("City") terminated an employee after an external investigation found that the employees conduct violated the *Human Rights Code*, R.S.O. 1990, c. H. 19 ("*Code*") and City policies. The Canadian Union of Public Employees ("Union") filed a grievance, and the arbitrator held that the City established grounds for discipline but not termination, finding that the employees' misconduct was not racially motivated. The City filed an application seeking judicial review.

HELD: Application dismissed

DISCUSSION: The City's position was that the arbitrator applied an incorrect test for discrimination when it concluded that the employees' misconduct was not racially motivated. The City maintained that the employees' conduct was discriminatory and a violation of the *Code*; therefore termination was warranted. The Union submitted that the Court should not interfere with the arbitrator's finding. The question before the arbitrator was not whether discrimination had occurred but rather, did the City have just cause to terminate the employee? A finding of discrimination does not always lead to termination. The arbitrator was satisfied with the evidence that City residents were not singled out for adverse treatment by the employee and there was no discrimination of the type alleged by the City. Case law has cautioned courts against reweighing evidence considered by an administrative tribunal, absent exceptional circumstances the reviewing court should not interfere with a factual finding. I The Court was satisfied that the City failed to demonstrate exceptional circumstances. The Court was also satisfied that the arbitrator recognized that the employee's conduct, although reprehensible, was not racist in the manner alleged by the City in support of its position to terminate him. The Court held that the City had not demonstrated a basis for the Court to interfere in the arbitrator's decision. Application dismissed.

Every Vote Counts: Single Ballot to Be Reviewed in Narrow Recount

Pella v. City of Toronto, 2023 ONSC 2021 https://canlii.ca/t/jwhhh

The Applicant lost the Ward 1 City of Toronto Catholic District School Board ("TCDSB") trustee position, by one vote, and sought a recount under s. 58 of the *Municipal Elections Act*, 1996, S.O. 1996, c. 32 Sched. *("Act")*.

HELD: Application granted.

DISCUSSION: On election day, voters were given ballots to vote for mayor, city councillor and a school board trustee. Ballots were put through an electronic tabulator which would scan and register detected votes. The tabulator would beep and not register the vote if the ballot contained an error and read "overvote". City policy required polling staff to alert the voter that there was a defect and offer a fresh ballot, if the voter declined the staff direct the tabulator to register the vote for other races but no vote would be registered for the "overvote". There was one such vote in the Ward 1 *TCDSB* election. The *Act* only permits a recount in the case of a tied vote; however, the Applicant submitted that there was need for a recount under s. 58(1): A person who is entitled to vote in an election and has reasonable grounds for believing the election results to be in doubt may apply to the Superior Court of Justice for an order that the clerk hold a recount.

The Applicant argued that there was possible doubt in the "undervote" where a tabulator failed to register a faint or partially filled ballot, and the one "overvote". The TCDSB and the elected school trustee argued that the Applicant's position was built on speculation. The City did not take a position. To determine if there were reasonable grounds to doubt the result of the election, the Court was satisfied that an "undervote" is common in municipal elections and the City's policy allow the tabulators to count the vote without an alert to the voter. However, when considering the "overvote", the Court was persuaded that in this election with a single-vote margin, the Applicant had reasonable grounds to doubt the outcome given the uncounted "overvote". The City's policy assumed that the voter who cast an "overvote" would have been given an opportunity to a fresh ballot, meaning that it was plausible that the one vote contained some discernable intent to vote for one candidate and the voter failed to cast a replacement ballot because the polling staff failed to alert him to a problem. The *Act* permits a recount in these circumstances to ensure the appearance of fairness. The Court granted the application and ordered that the uncounted "overvote" be counted by hand.

Seniority, Compensation or Both

Canadian Union of Public Employees, Local 79 v. City of Toronto, 2023 ONSC 2031 https://canlii.ca/t/jwgqh

The Canadian Union of Public Employees, Local 79 ("Union") moved for an order that the City of Toronto ("City") be found in contempt of the award of an arbitrator, which was filed and entered as an order of this Court.

Continued on page 39

Co-Responders *cont'd from page 19*

and involve higher settlements and judgments compared to similar lawsuits brought only a few years ago, even in cases involving no wrongdoing by law enforcement. Additionally, successful plaintiffs in federal civil rights lawsuits are entitled to attorney's fees, and these fees can sometimes exceed millions of dollars even in cases where the underlying judgment is small.

The potential risks and costs of police encounters with people experiencing mental illness are quite significant, so the cost of mental health Co-Responders could be a very effective investment. This may be a situation where an ounce of prevention is worth a pound of cure.

Deploying Mental Health Services More Efficiently

Police department embedded mental health Co-Responder programs allow communities to deploy mental health services more efficiently. Police departments across the country report that even when well trained officers make mental illness assessments it can take hours for mental health counselors from other agencies to arrive. Many government agencies employing mental health clinicians are not staffed 24/7, and tracking down an available mental health clinician from another agency includes inevitable delays.

Mental health Co-Responders embedded within police departments, on the other hand, can often respond immediately. Fast response times can be critical in many mental health crises. A faster response can help de-escalate a situation before it gets out of hand, and as discussed earlier, it can help make police encounters with individuals experiencing mental illness safer.

Other Benefits

Beyond the crisis intervention benefit in the field, Co-Responders are also a valuable asset and training resource for police departments. The presence of embedded mental health Co-Responders provides additional training and discussion opportunities for police departments seeking to address the challenges of encounters with people experiencing mental illness in the most effective way. In the City of Eau Claire, the mental health Co-Responder provides annual mandatory crisis intervention training to all police officers in addition to significant amount of other related training officers receive.

Conclusion

Because police department embedded mental health Co-Responder programs are still relatively new, outlets continue to gather data regarding their efficacy. Nevertheless, initial results demonstrate police department embedded mental health Co-Responders can help improve outcomes, and can help manage and mitigate risks inherent in police encounters with individuals experiencing mental illness. Prudent municipal attorneys will recognize the potential benefits and will explore ways to ensure that police encounters with individuals experiencing mental illness carry as little risk as possible.

Notes

1. Lexipol, *Law Enforcement Response to People in Crisis*, *A Nationwide Survey Report*, May 2019 available at https://info.lexipol.com/mental-illness-report; Kristine Gregory, *A Statistical Look at the Effectiveness of a Co-Responder Team in Western Colorado*, Police Chief Magazine 40-47 (January 2023); Ashley Abramson, *Building Mental Health into Emergency Responses*, American Psychological Association, (July 1, 2021) available at https://www.apa.org/monitor/2021/07/emergency-responses; National Alliance on Mental Illness. Mental health by the numbers available at https://www.nami.org/mhstats; Ayobami Laniyonu, Phillip Atiba Goff, *Measuring Disparities in Police Use of Force and Injury Among Persons with Serious Mental Illness*, National Library of Medicine (October 2021) available at https://pubmed.ncbi.nlm.nih.gov/34641794/ .
2. *Id.*
3. *Id.*
4. *Id.*
5. A non-comprehensive list of Gordon Graham's writings on risk management for Public Safety can be found at https://www.police1.com/columnists/gordon-graham/. The authors would also like to acknowledge City of Eau Claire Risk Manager Colleen Schian who cites Graham's "predictable is preventable" phrase so often we felt we needed to include it in this article.
6. Colleen K. Copple and James E. Copple, *Risk Management In Law Enforcement: Discussions on Identifying and Mitigating Risk for Officers, Departments, and the Public*. United States Department of Justice Washington D.C. Office of Community Oriented Policing Services (2018).
7. *Id.*
8. Sarah Ahmed-Alsaggaf, *A Brief History of Mental Health Crisis Intervention Efforts*, National Alliance on Mental Illness (March 25, 2021) available at https://www.namidanecounty.org/blog/2021/3/25/history-of-crisis-intervention-by-police-officers.
9. *Id.*
10. Danielle Kaeding, *More Wisconsin Police Departments Are Adding Social Workers To Respond To Crisis Calls*, Wisconsin Public Radio (June 17, 2021) available at https://www.wpr.org/more-wisconsin-police-departments-are-adding-social-workers-respond-crisis-calls
11. Rebecca Mennecke, *Responding to the Call: New Co-Response Coordinator Focuses on Mental Health Needs in Chippewa Valley*, Volume One (October 12, 2021) available at https://volumeone.org/articles/2021/10/12/284248-a-human-response.
12. Emily Goodell, *Yakima Police Partner With Crisis Responders To Help Mentally Ill and Save Tax Dollars in the Process*, Yakima Herald (November 20, 2018) available at https://www.yakimaherald.com/news/local/yakima-

police-partner-with-crisis-responders-to-help-mentally-ill-and-save-tax-dollars-in/article_dd45e3fa-ed53-11e8-b084-930ac282df11.html.
13. Abramson, *supra* note 1.
14. Lexipol, *supra* note 1.
15. Gregory, *supra* note 1.
16. Doris A. Fuller, H. Richard Lamb, M.D., Michael Biasotti, John Snook, *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters*, Treatment Advocacy Center (December 2015) available at: https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf.
17. Statewide Crisis Intervention Team Program Annual Report 2020-2021 available at https://www.tn.gov/content/dam/tn/mentalhealth/documents/220416-2021-2022-AR_CIT.pdf.
18. Gregory, *supra* note 1.
19. Kisela v. Hughes, 200 L. Ed. 2d 449, 138 S. Ct. 1148 (2018).
20. Aguirre v. City of San Antonio, 995 F.3d 395 (5th Cir. 2021).
21. Michael Ranalli, *Police Use of Force: Managing Risk and Mitigating Harm*, Lexipol (April 18, 2022) available at https://www.lexipol.com/resources/blog/police-use-of-force-managing-risk-and-mitigating-harm/.
22. *Assessing the Impact of Co-Responder Team Programs: A Review of Research*, IACP/University of Cincinnati Center for Police Research and Policy (2020) available at https://www.theiacp.org/sites/default/files/IDD/Review%20of%20Co-Responder%20Team%20Evaluations.pdf.
23. Goodell, *supra* note 12.
24. Lexipol, *supra* note 1.
25. Gregory, *supra* note 1.
26. Goodell, *supra* note 12.
27. *Assessing the Impact of Co-Responder Team Programs: A Review of Research*, IACP/University of Cincinnati Center for Police Research and Policy (2020) available at https://www.theiacp.org/sites/default/files/IDD/Review%20of%20Co-Responder%20Team%20Evaluations.pdf.
28. Goodell, *supra* note 12

Listserv *cont'd from page 25*

Houston 2,288,250; Phoenix 1,624,569; Philadelphia 1,576,251; San Antonio 1,451, 853; San Diego 1,381,611; Dallas 1,288,457; San Jose 983,489; Austin 964,177; Jacksonville 954,614; Fort Worth 935,508; Columbus 906,528; Indianapolis 882,039; Charlotte 879,709; San Francisco 815,201; Seattle 733,919; Denver 711,463; Oklahoma City 687,725; Nashville 678,851; El Paso 678,415; Washington 670,050; Boston 654,776; and Las Vegas 646,790.

A few observations: Cities on the 1970 list that did not appear on the 2022 list include Detroit, Baltimore, Cleveland, Milwaukee, Memphis, St. Louis, New Orleans, and Pittsburgh. Detroit suffered the longest fall dropping off the 2022 list after being number five in 1970. Baltimore dropped off from number seven. Other significant drops include Cleveland, which dropped off from tenth on the list, and Milwaukee, which dropped off from number twelve.

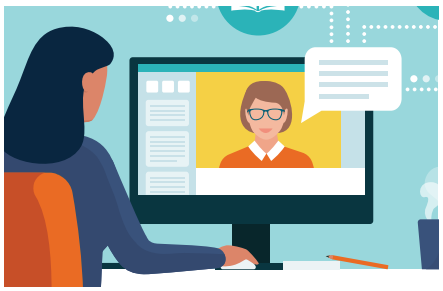
Cities that were not on the list in 1970 but do appear in 2022 include San Jose, Austin, Fort Worth, Charlotte, Oklahoma City, Nashville, El Paso, and Las Vegas. The highest jump belongs to San Jose which went from not on the list to number ten. It was closely followed by Austin which jumped from not being on the list to number eleven, Fort Worth which showed up at thirteen, and Charlotte at sixteen.

The top three cities on the list stayed the same, except Los Angeles and Chicago switched places, while six of the top ten cities in 1970 remained in the 2022 top ten. In all, seventeen cities appeared on both lists.

One could look at the same factors used in comparing Columbia and Charlotte for virtually all explanations on the list. San Jose's move from off the list to the top ten is likely due in large part to its location in Silicon Valley and the rapidly evolving technology industry. It is home to Apple, Google and Facebook. Conversely, Detroit dropping off the list from its number five position is likely in great part because of its dependence on the auto industry and the changes that sector has seen over the past fifty years.

In some cases, it is easy to pinpoint the likely cause of rises and falls in population. But in others it appears to be a mixture of all things discussed herein. One thing is for sure, however: annexation will continue to be a significant factor as cities grow, and will pose challenges for local government attorneys.

The prosecution rests, your honor… ML



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Compelled Speech *cont'd from page 15*

the Texas Medical Board); and Texas Occupations Code §554.002 (providing that the Texas State Board of Pharmacy regulates the practice of pharmacy).
80. *See* Dall. Merch.'s & Concessionaires Ass'n. v. City of Dallas, 852 S.W.2d 489 (Tex. 1995).
81. *Hunter*, 207 U.S. at 178.
82. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009).
83. "[I]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000)
84. Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 559-60 (2005).
85. *Id*. at 553.
86. *Id*. at 557.
87. *Id*. at 557-58.
88. *Id*. at 559.
89. *Wooley*, 430 U.S. at 715.
90. *Johanns*, 544 U.S. at 557.
91. *Wooley*, 430 U.S. at 716-17.
92. *Id*. at 716.
93. *Id*.
94. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85-88 (1980).
95. *Id*. at 77.
96. *Id*. at 87.
97. *Id*.
98. *Id*.

Amicus *cont'd from page 23*

Notes

1. These include *Groff v. DeJoy* (a Title VII religious accommodation case); *303 Creative v. Elenis* (which involves the intersection of free speech and anti-discrimination laws); *Harper v. Moore* (the Independent State Legislature Theory case); *Tyler v. Hennepin County* (an important Takings case); *Sackett v. Environmental Protection Agency* (a WOTUS case); and National *Pork Producers Council v. Ross* (which involves the dormant commerce clause and the extraterritoriality principle).
2. Berry v. Bd. of Supervisors of Fairfax Cnty., No. 211143, 2023 WL 2604163, at *9 (Va. Mar. 23, 2023).
3. *Id*. at *1.
4. *See* Fairfax County Zoning Ordinance Modernization Project: Notable Changes from the 1978 Ordinance (April 6, 2021), available at: https://www.fairfaxcounty.gov/planning-development/sites/planning-development/files/assets/documents/zmod/executive-summary-notable-changes.pdf.
5. Va. Code Ann. § 2.2-3707(B).
6. In 2021, the General Assembly amended Va. Code Ann. § 15.2-1413 to allow a continuity ordinance to remain in effect for twelve months rather than six months.
7. The court refers to the County's ordinance as the "Continuity Ordinance" as it was an uncodified ordinance that was adopted on April 14, 2020.
8. *Id*. at *10, citing the Continuity Ordinance 1C
9. *Id*. at 3.
10. Berry, 2023 WL 2604163, at *9.
11. *Id*. at *10.
12. *Id*.
13. *See* Board of Supervisors v. Board of Zoning Appeals, 268 Va. 441, 446 (2004) (quoting Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915)) ("a local government's exercise of its zoning authority is 'one of the most essential powers of government[.]'")
14. Berry, 2023 WL 2604163, at *11.

Removing Individuals *cont'd from page 13*

to cross a particular parcel of land, enter a chosen dwelling, or gain admittance to a specific government building"); *see also* Harper v. Houston, 2017 U.S. Dist. LEXIS 214988, at *9 (W.D. Tenn. Nov. 15, 2017) ("municipalities are constitutionally permitted to limit access to facilities without impinging on the right to free movement"); *see also* Hannemann v. S. Door County Sch. Dist., 673 F.3d 746, 757 (7th Cir. 2012) (right to intrastate travel protects the right to move from place to place, not the right to access certain public places such as community centers and government office buildings); *see also* Banuelos v. Martinez, 2015 U.S. Dist. LEXIS 76039, at *7-8 (E.D. Cal. June 10, 2015) (no liberty interest to enter into any state office without restriction); *see also* McCraw v. City of Okla. City, 973 F.3d 1057, 1080-81 (10th Cir. 2020) (fundamental right to freedom of movement applies only interstate travel, not intrastate travel).
35. *See* Hirt v. Unified Sch. Dist. No. 287, 2019 U.S. Dist. LEXIS 70477, at *32 (D. Kan. Apr. 24, 2019) (policy not void for vagueness because it clearly spelled out the conduct that may lead to someone being denied access to a school).
36. Thomas v. Chi. Park Dist., 534 U.S. 316, 317 (2002).
36. *See* Yeakle v. City of Portland, 322 F. Supp. 2d 1119, 1122 (D. Or. 2004) ("A narrowly-tailored ordinance would not have a one-size-fits-all 30-day exclusion irrespective of the nature of the violation.").
37. *See* Cyr v. Addison Rutland Supervisory Union, 60 F. Supp. 3d 536, 552 (D. Vt. 2014) (notices against trespass deficient because they were not issued pursuant to any protocol and did not set out a process for contesting the notices); *see also* Sanchez v. City of Austin, 2012 U.S. Dist. LEXIS 190686, at *21-25 (W.D. Tex. Sep. 27, 2012) (city violated the protestor's procedural due process rights because of the broad guidelines provided for use by officials in implementing the policy, the lack of notice, and the post-deprivation-only nature and burden placed on the ban recipient for appeal process).

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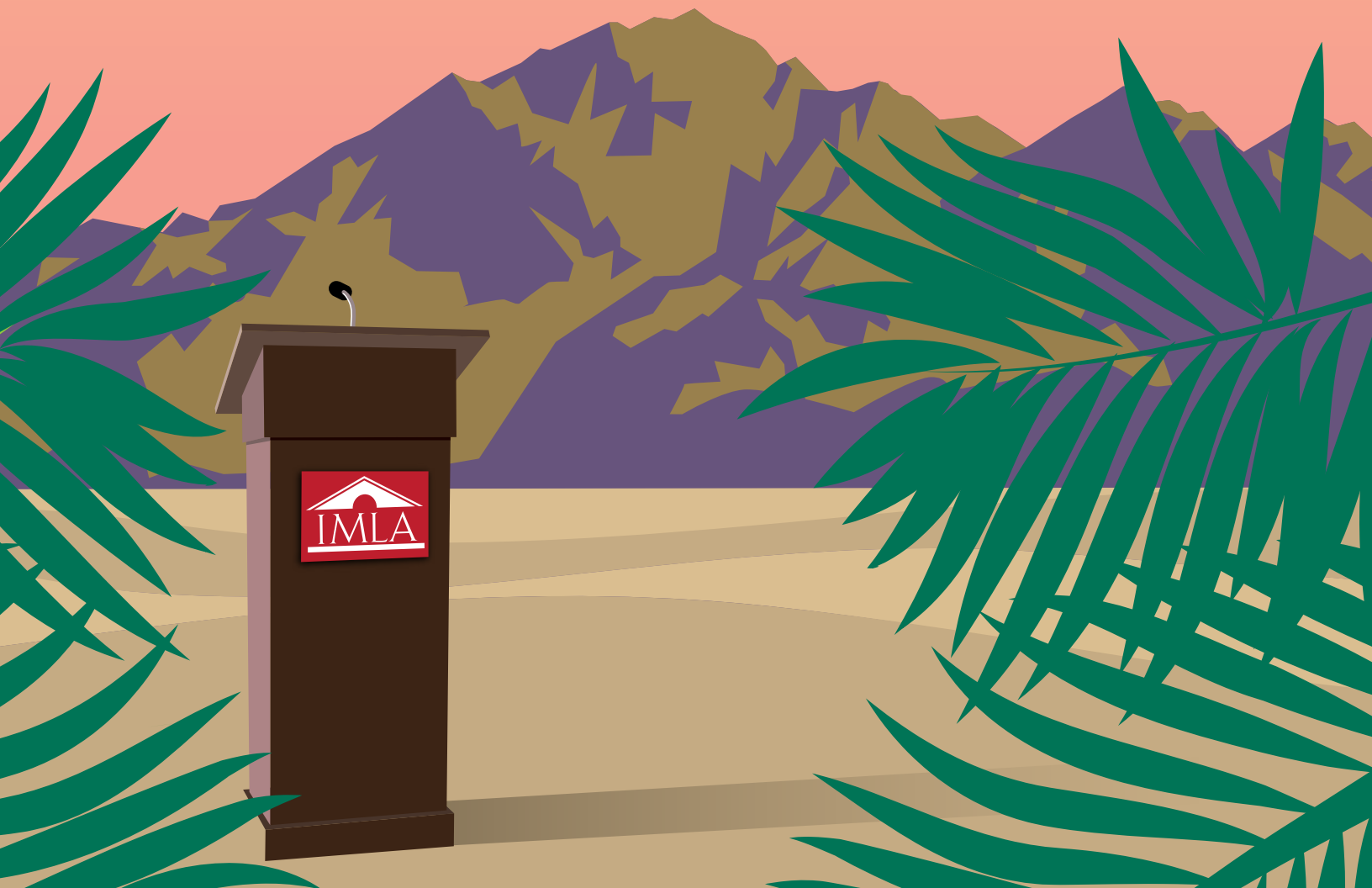

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Inside Canada *cont'd from page 33*

HELD: Motion dismissed.

DISCUSSION: Following the termination of an employee at the City, the Union filed a grievance that was referred to arbitration. The arbitrator set aside the termination for a suspension and included an award to reinstate the employee without loss of seniority and wages. The City sought judicial review of the arbitrator's decision. Initially the City requested the employee's agreement that if his reinstatement were to be overturned on the judicial review application, the employee would be required to repay wages, benefits and pension contributions. This prompted the Union's motion but ultimately the City did not require the employee to agree as a condition of reinstatement. The question before the Court was whether the City should be found in contempt of the award and order by maintaining the position that it reserves the right to seek an adjudicative decision requiring the employee to repay wages after his reinstatement in the event the judicial review is successful, and termination is upheld. The Union submitted that the City, by reserving this right, is trying to impose an additional condition on the employees' reinstatement not contained in the award. The City submitted that it complied with the award, and reimbursement of wages is a separate and distinct matter. The Court held that the award and order required the City to reinstate the employee, without loss of seniority and with compensation. The Court was not satisfied that the Union demonstrated that by reserving a future right if the judicial review application is successful, the City has deliberately and wilfully disobeyed the award and order. Motion dismissed. ML

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