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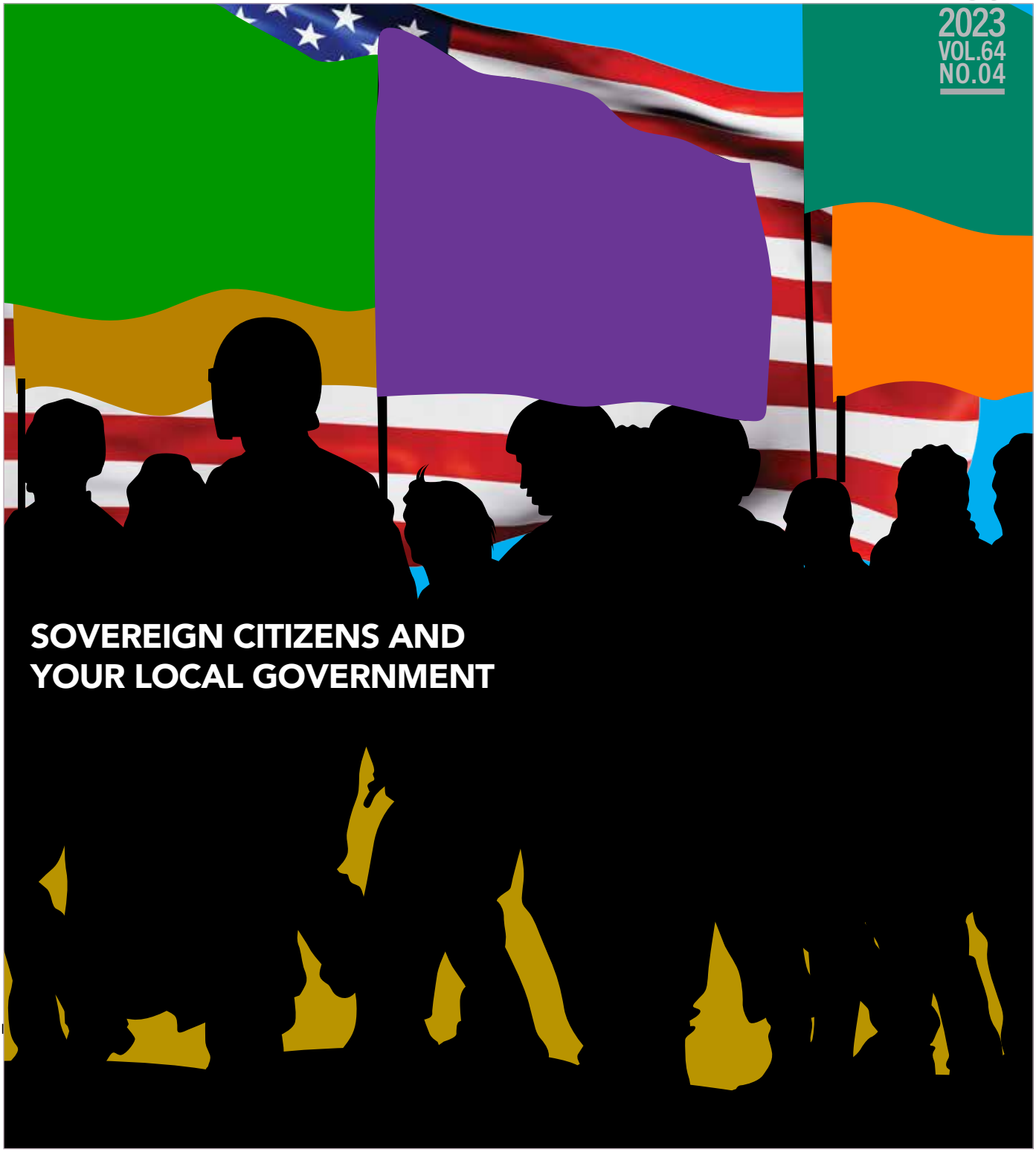

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SOVEREIGN CITIZENS AND YOUR LOCAL GOVERNMENT

By: Judith El Masri, Executive Vice President, The Randle Law Office, Houston, Texas

As Americans debate the merits of liberal or conservative policies, the proper functioning of legislative, executive, and judicial branches, and the appropriate balancing of state versus federal authority, another faction disavows the very legitimacy of any government. Ignoring authority and challenging laws at every turn, the sovereign citizen presents unique challenges for local government attorneys.

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EDITOR'S NOTE



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

On the Virtue of Government

It may seem inappropriate, mere days before we celebrate the Fourth of July, to deliver a publication whose cover depicts those in our midst who reject America, or at least the rules and institutions by which we are governed. But that editorial choice is actually an entrée to a more positive message: that despite its flaws, our "constitution"— as that word describes both a document and a national character – still guides us through continuing challenges.

One reason for that perspective arises from an arena in which IMLA frequently adds its voice—the United States Supreme Court. While raising criticisms about ethical lapses, the shadow docket, politicization, and more, Americans nevertheless consent to be bound by its pronouncements in matters of huge consequence. We need only look to the decisions rendered in the last weeks to see the pivotal role played by the Court in our daily lives, whether the issue is consideration of race in college admissions policies, the personal expressive rights of business owners, the authority of state courts to apply state constitutions in evaluating state legislatures' elections measures, the continuing vitality of federal voting rights law, and much more. These opinions, and countless others issued by courts around the nation, are accepted as binding until reversed or displaced by amendment or legislative processes. Regardless of the outcome, the vast majority of us remain loyal to tripartite government and harness democratic principles to effect the change we seek, using the ballot box—local, state, and federal—as our vehicle. In that sense, we are the true sovereign citizens.

Against that backdrop, we offer this July-August 2023 *Municipal Lawyer*. Our cover feature, as referenced above, is an article by Judith El Masri discussing the various persons and groups who decline to accept their status within American citizenry. While most are harmless but troublesome, consuming time and energies of local governments in dilatory and mischievous behavior, others are more dangerous, engaged in fraud and even threatening violence. But sovereign citizens are free to espouse their perspectives under the protection of the very Constitution they may disavow, illustrating its legitimacy—and providing a segue to our other articles, all of which emphatically support the validity of government. A second feature by Meredith Ladd analyses the ethical complexities arising for local government lawyers when your councilmember is sued in a personal capacity, a situation which can pose competing duties. In a third, Jeffry Dorocak discusses Establishment Clause considerations when localities place monuments on public property, another activity which inherently invites First Amendment scrutiny.

Our departments provide shorter commentaries. In *Practice Tips*, Cyril Vidergar advises on the fine points of securing copyright and trademark protection for your locality's branding efforts; in *Telecommunications*, Gerry Lederer and Greg Caffas update us on the latest FCC robocall rules which can provide pitfalls for local governments; in *Amicus*, Amanda Karras looks towards the upcoming Supreme Court Term and cases of major importance for our membership as that calendar is populated; and Monica Ciriello delivers her reliable update on Canadian decisions of relevance to our members above the 49th Parallel in *Inside Canada*.

As IMLA members in Canada and the U.S. head into our respective celebrations of national unity, whether on July 1 or July 4, we rest assured that government, and local government in particular, plays a pivotal role the lives of our constituents. IMLA appreciates the opportunity to be a part of that dynamic, through our amicus activities and our various educational offerings which bring to the fore so many talented and dedicated public servants. Have a happy and safe Independence Day.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



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

IMLA and Continuing Our Legal Education

If you are reading this letter, you are already tapped into some of the great resources offered through IMLA membership which enhance our professional acumen. The *Municipal Lawyer* is just one tool highlighting new developments and emerging trends found in our very diverse spectrum of legal practice. IMLA also offers excellent continuing legal education in a variety of different forums, and facilitates fantastic networking opportunities at our in-person seminars. The ABA Model Rules reinforce the commitments that we all swore to uphold with our attorney oaths. We are all called to be competent and diligent and cultivate knowledge of the law. Most of us also have Continuing Legal Education mandates, which ought to enhance our municipal practice.

It is especially critical for public servant lawyers to continue to seek meaningful and targeted continuing legal education. There are so many different specialties we need to master in the municipal law practice, and it seems that the laws are changing more rapidly now than previously. Some of these legal changes result from the public's erosion of trust of government during the past few years. This is exacerbated by high profile reports in the news media, publicizing criminal charges against corrupt public officials- elected and appointed. In order to combat public skepticism, we need to immerse ourselves in continuing legal education, with an emphasis on ethics. When placed in challenging situations, this allows us to demonstrate that we are called to be of service, as opposed to seeking privilege or power. Our commitment is to advance the public good, help our communities, and improve society, and we can best accomplish this through awareness, empathy, and foresight, which can optimally be achieved when we are prepared and also have a supportive community. IMLA provides us with this community-for those who have been practicing for a number of years and have a few cautionary tales, and also for those who are just venturing into the municipal law practice. IMLA has intentionally added focus on newer attorneys, which has poised us in a good position for the future.

There is a New Members Committee and also a Listserv dedicated to those persons under forty years of age, or with less than seven years of practice. IMLA has also established a mentorship program which continues to thrive, providing great benefits for both mentees and mentors. There is a Canadian Scholarship for lawyers under age 40 that provides financial assistance for in-person attendance at an IMLA event. The Charles W. Thompson Jr. Local Government Law Scholarships provide encouragement to law students who select careers in local government law. These applicants are provided with an opportunity to demonstrate their scholarship through the submission of written articles on cutting edge topics, which are then disseminated to the entire IMLA membership. And I'm thrilled about the inaugural Dewitt F. "Mac" McCarley Scholarship designated for dedicated municipal attorneys with less than three years of practice. This scholarship provides an opportunity for our newest professional members to experience firsthand all of the benefits of attending an IMLA Annual Conference. Although the turn-round time for the McCarley applications is short for this inaugural year, the excellent program and the fabulous location in La Quinta, California is expected to inspire many talented applicants.

Hopefully we will also see you at the Conference in La Quinta. There's still time to register and plan to attend! For those with more limited budgets, please consider a subscription to the Kitchen Sink Program, which is fantastic webinar-based programming provided by experts in the field; its low cost makes this a tremendous value. There are also several working groups with a more focused subject area or demographic, such as elected county attorneys or the newly created DEI Committee led by Deanna Shahnami, IMLA's Assistant General Counsel and Director of Diversity, Equity and Inclusion. These working groups allow for an exchange of ideas and war stories. There's also the Listserv, where our members quickly give and receive advice from other members on novel issues. IMLA also has embarked on a new Local Government Legal Center, formed with the National League of Cities, the National Association of Counties, and the Government Finance Officers Association to expand our advocacy on behalf of government before the U.S. Supreme Court, the federal circuits, and state supreme courts. In that role, IMLA is educating local government officials (in addition to municipal attorneys) on the impact of significant U.S. Supreme cases.

I continue to be amazed by how much IMLA's small but dynamic professional staff, in connection with our many volunteers who fill important committee and advisory roles, can offer to our membership. ML

Monumental Uncertainty: The Supreme Court, Sectarian Symbols, Statues, and Cities

By; JEFFRY DOROCAK,
Assistant City Attorney, Las Vegas, Nevada

From honoring significant community members to memorializing local soldiers and public safety officers, from celebrating seasonal festivities to commemorating historic events, statues, displays, and monuments offer a myriad of messages to residents and visitors of towns and cities throughout the United States. With the diversity and multiculturalism of twenty-first century America, municipalities and their local governments are rightfully sensitive to the messages sent from, and the symbols included within, such statues—whether historic or newly proposed. Indeed, one area of such sensitivity, caution, and uncertainty for local governments is the use of ostensibly religious or sectarian symbols on taxpayer funded or publicly located statues.

Local governments rightly view the use of religious symbolism on public statues with a degree of caution based on the American philosophy of "separation of church and state," which is rooted in the Establishment Clause of the First Amendment. The Establishment Clause states simply, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and it was incorporated against the states (and their local subdivisions) with the Supreme Court's *Everson v. Board of Education* decision in 1947.[1] Local governments' caution—and, perhaps, aversion—to religious symbols on public statues is exacerbated by the uncertainty and ongoing legal debate about when a statue violates the Establishment Clause. This uncertainty has grown in recent years with the United States Supreme Court's decision in *American Legion v. American Humanist Association*.[2]

This article intends to explore issues and strategies for local governments to contemplate when funding, constructing, or placing new statues with seemingly religious imagery. To do so, this article will, first, review *American Legion*; second, identify the unanswered questions from that case and possible legal tests which can be gleaned from it for evaluating new statues; third, determine which of those legal tests best comports with the Supreme Court's most recent Establishment Clause jurisprudence in *Kennedy v. Bremerton School District*;[3] and, fourth, offer practical strategies for local governments when considering new statues or monuments with religious or sectarian symbols.

Case Summary: *American Legion v. American Humanist Association*

Four years ago, in *American Legion*, the Supreme Court ruled 7-2 that a longstanding cross in Maryland which honors forty-nine servicemen from the Bladensburg, Maryland area killed in World War I, did not violate the Establishment Clause. The Court concluded that the Christian-cross shaped war memorial on public land and maintained with public funds did not violate the Establishment Clause because the statue had acquired other secular meanings over time.[4]

Standing since 1925, the cross was first devised in 1918 by a planning committee of county residents to honor the area soldiers who died in World War I.[5] The planning committee decided on a Latin Cross for the statue—in particular—because it was a well-known symbol of the war, "referencing the seemingly endless rows of small white crosses used to temporarily mark the graves of fallen soldiers overseas."[6] When the planning committee ran out of money to complete the statue, the American Legion took over in 1922 and finished the project in 1925.[7]

In 2014, the American Humanist Association ("AHA") filed suit and claimed the statue with its Latin Cross design violated the Establishment Clause because it was on public land and supported by public funds. The American Legion intervened to defend the statue.[8] During the litigation, the AHA suggested that the statue be moved to another less central location on private land, or be redesigned into a "non-religious slab or obelisk."[9]

The Federal District Court sided with the American Legion because

the monument served a secular purpose of honoring World War I. The District Court concluded that this secular purpose satisfied the first prong of the three-pronged "Lemon" test announced in *Lemon v. Kurtzman*; the remaining two prongs were satisfied because "a reasonable observer aware of the Cross's history, setting, and secular elements would not view the Monument as having the effect of impermissibly endorsing religion," and the "maintenance of the memorial did not create the kind of continued and repeated government involvement with religion that would constitute an excessive entanglement." [10]

On appeal, the Fourth Circuit Court of Appeals reversed the District Court. Specifically, the Circuit Court found that the statue failed the second prong of the Lemon test—the effects prong—because a reasonable observer would find the ownership and the maintenance of the statue with public funds to be an endorsement of Christianity.[11]

When the case reached the Supreme Court, three issues were presented to the Court: (1) was the statue, with its display of religious symbolism, constitutionally permitted on public land; (2) could the statue be maintained with public funds; and (3) was the Lemon test the proper legal standard for reviewing the well-established statute?[12]

Upon review, the Supreme Court ruled that the statue did not violate the Establishment Clause. On its way to upholding the constitutionality of the statue, though, the Court issued seven varying opinions. For instance, a majority argued that there was a "presumption of constitutionality" for historical monuments featuring religious symbolism because such statues take on a secular meaning over time and become part of the cultural heritage.[13] Meanwhile, four justices proposed a replacement test for the Lemon test, and Justices Ginsburg and Sotomayor dissented on the basis that the majority opinion eroded government's religious neutrality.[14]

Unanswered Questions

The Supreme Court's fractured opinion in *American Legion* left two critical questions for local governments—and government at all levels—to consider when dealing with similar statues in their communities. First, what religious or sectarian symbols are constitutionally permissible with new statues that are publicly financed or placed on public property? And, second, what legal test should be used to analyze the constitutionality of new statues? Simply put, the answer to the second inquiry will undoubtedly inform the answer to the first.

American Legion made clear that its "presumption of constitutionality" applied to longstanding statues, monuments, and practices, rather than new statues.[15] The Court, however, failed to provide any new guidance for Establishment Clause cases going forward. Thus, lower courts and local government attorneys lack a clear test for determining whether a newly proposed statue with religious or sectarian symbols violates the Establishment Clause. Nevertheless, from the justices' varying opinions in *American Legion* and other academic proposals, there are several possible tests for evaluating the constitutionality of new statues with religious symbols that may become controlling Supreme Court precedent in the future.

Justice Neil Gorsuch argued in his concurring *American Legion* opinion that the Court should apply the test from *Town of Greece v. Galloway* when examining statues for possible Establishment Clause violations.[16] Justice Gorsuch noted that this test could be used regardless of a statue's age, which avoids the problem of determining when a statue is "old enough" to withstand an Establishment Clause claim.[17] The Gorsuch-endorsed *Town of Greece* test specifically examines if a challenged statue or practice is supported by the country's tradition and history, thereby making it consistent with the Establishment Clause. For example, the relevant tradition in *Town of Greece* was legislative prayer dating back to the drafting of the Bill of Rights. This historic tradition and practice of legislative prayer, according to the Court, supported the constitutionality of the town board's opening benediction, as well as the town's nondiscrimination policy regarding who could offer the prayer.

In his concurring opinion in *American Legion*, Justice Brett Kavanaugh proposed a separate, new test for reviewing Establishment Clause claims. As an alternative to the Lemon test, Justice Kavanaugh proposed that if a government practice is not coercive and "(i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from generally applicable law," the Establishment Clause has not been violated.[18] In other words, Justice Kavanaugh's test offers three individual paths by which a governmentally supported statue or practice may survive an Establishment Clause challenge.

Justice Kavanaugh offered his new test only after dismissing the use of the Lemon test in future Establishment Clause cases.[19] It is not clear, however, that *American Legion* abandoned the Lemon for use when examining new statues with religious symbolism. As noted, *supra*, *American Legion* dealt particularly with older statues and

Continued on page 8



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even noted "that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones."[20] Thus, it is possible that the Lemon test may still be used to review the constitutionality of new statues. To satisfy the Lemon test, the government conduct at issue: (1) must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion.[21]

Besides the legal tests that can be gleaned from the opinions in *American Legion* or the conceivable survival of the Lemon test, another possibility is that the constitutional review of new statues with religious symbolism will rely upon a new, yet-to-be-announced legal test. For instance, one legal author has theorized that the four considerations described in *American Legion* to reject the use of the Lemon test for long-standing statues, "may provide criteria to determine whether a new symbol passes constitutional muster."[22] These four considerations are a statue's original purpose, whether the statue has gained a secular purpose, the message associated with the statue, and whether the rejecting the statue will not appear neutral.[23]

Elsewhere another legal commentator has suggested a "mirror-image" test for Establishment Clause claims, linked to the relatively stable test associated with the Free Exercise Clause.[24] Under the "mirror-image" test, courts "could look to what the Free Exercise clause prevents the government from prohibiting or burdening to craft an equal and opposite doctrine regarding what the Establishment Clause prevents the government from mandating or compelling."[25] For example, as equal and opposite of the Free Exercise Clause, the mirror-image test for Establishment Clause claims would not allow the government to "grant subsidies or privileges based expressly on recipients' religious affiliations" or "act purely on a veiled intent to compel religious observances."[26] In total, any one of several legal tests could be adopted for use in examining Establishment Clause issues with new statues.

Understanding *American Legion* after *Bremerton*

While the topic of publicly supported statues with religious or sectarian symbolism has not been addressed by the Supreme Court since *American Legion*, the Court's recent decision in *Bremerton* provides critical insight into which test most likely will be used to examine new statues that are challenged under the Establishment Clause. In *Bremerton*, the Court held that an Establishment Clause violation does not automatically follow whenever a public school or other government entity fails to censor the private religious speech of an employee—specifically, prayer on the field by a football coach.[27]

Significantly for the analysis of statues—particularly new statues facing Establishment Clause challenges—the Court also noted that that it "long ago abandoned Lemon and its endorsement test offshoot" for Establishment Clause cases.[28] The Court further reiterated that the Establishment Clause does not "compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious."[29] Finally, Justice Gorsuch, writing for the majority, clearly embraced the test found in *Town of Greece*, which—as noted *supra*—he had previously recommended in *American Legion*, and explained:

> In place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings. The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers. An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some exception within the Court's Establishment Clause jurisprudence.[30]

In sum, while *American Legion* did not answer the question of how new statues with religious elements would be examined for an Establishment Clause violation, *Bremerton* suggests that, despite numerous possibilities, the future of Establishment Clause jurisprudence lies with the historical test developed in *Town of Greece*.

Practical Strategies for Local Governments

Based on the uncertainty regarding new statues after *American Legion* and the possible clarity offered recently by *Bremerton*, local governments that are considering funding, constructing, or placing new statues with religious or sectarian symbols should consider the following points. First, to avoid any risk, simply avoid using any religious or sectarian symbols on statues that will be publicly funded or placed on public property--a seemingly simple strategy, but one that likely may not always be available if an elected representative insists on a particular design.

Second, a local government could attempt a maneuver whereby it funds a possibly problematic statue and places it on municipal land, but then sells the land and statue to a private operator. After funding and construction, this strategy should eliminate a local government's exposure to an Establishment Clause violation, but it may prove ineffective if an aggrieved party with proper standing seeks an injunction during the funding stage.

Third, a local government, when considering a new statue or even reviewing newer statues with conceivably religious aspects, can either remove the sectarian symbol from the design or remove it from the recently placed statue. This approach may not prove particularly appealing to

members of the community or its elected representatives, but it is an option. What's more, based on *American Legion*, this approach should be taken with caution because of the Court's warning to avoid actions that may not appear neutral. Thus, many people may be alarmed by the erasure of religious symbolism and may not find the local government's action particularly even-handed.

Fourth, based on *American Legion* and *Bremerton*, a local government can proceed with a new, religiously suggestive statue so long as the design is not coercive, does not discriminate, and is rooted in the nation's history and tradition. Following such a test and related case-law guidance, local governments can seemingly support statues with religious symbolism that are keeping with the country's traditions and history. For example, the long-standing tradition of using crosses to commemorate local police officers or soldiers who have given their lives in the line-of-duty is permissible.[31] Moreover, the Court's emphasis on non-coercion and non-discrimination suggests that local governments should avoid new statues only if they compel, coerce, or intimidate a reasonable person into religious observance; and local governments should avoid "systematic preference or discrimination" in favor of or against one religion.[32] Avoiding systematic preference or discrimination does not mean, however, that a new statue cannot be associated with a particular religion or faith, or that religious balancing is required.[33] Indeed, both *American Legion* and *Town of Greece* suggest that symbols from a certain religion may be used as long as a local government maintains a policy of non-discrimination and makes an honest endeavor to achieve inclusivity within the community.

Conclusion

Because *American Legion* explicitly separated long-standing statues from new statues, a legal test for analyzing newly proposed statues with religious or sectarian symbols was not immediately obvious. Nevertheless, the varying opinions from *American Legion* and subsequent developments with Establishment Clause jurisprudence provide some additional guidance. Thus, whether a local government wishes to avoid sectarian statues completely or include some religious aspects in new designs, strategies exist to avoid constitutional risk. ML

Notes

1. 330 U.S. 855 (1947).
2. 139 S. Ct. 2067 (2019).
3. 2022 WL 2295034 (U.S. June 27, 2022)
4. 139 S. Ct. 2067 (2019).
5. *Id.*
6. Columbia University Global Freedom of Expression, American Legion v. American Humanist Assn., https://globalfreedomofexpression.columbia.edu/cases/american-legion-v-american-humanist-assn/ (last visited July 1, 2022); see also James C. Kozlowski, Longstanding Historic Cross Constitutional Challenge, National Recreation and Park Association Magazine (Sept. 1, 2019), https://www.nrpa.org/parks-recreation-magazine/2019/september/longstanding-historic-cross-constitutional-challenge/ (last visited July 1, 2022).
7. 139 S. Ct. 2067, 2074 (2019).
8. *Id.* at 2078.
9. *Id.*
10. 403 U.S. 602 (1971); James C. Kozlowski, *Longstanding Historic Cross Constitutional Challenge,* National Recreation and Park Association Magazine (Sept. 1, 2019), https://www.nrpa.org/parks-recreation-magazine/2019/september/longstanding-historic-cross-constitutional-challenge/ (last visited July 1, 2022) (internal quotations omitted).
11. Columbia University Global Freedom of Expression, American Legion v. American Humanist Assn., https://globalfreedomofexpression.columbia.edu/cases/american-legion-v-american-humanist-assn/ (last visited July 1, 2022).
12. 139 S. Ct. 2067 (2019).
13. *Id.* at 2082.
14. *Id.*
15. *Id.* at 2103.
16. 572 U.S. 565 (2014).
17. 139 S. Ct. at 2102.
18. *Id.* at 2093.
19. *Id.*
20. *Id.* at 2085.
21. Lemon v. Kurtzman, 403 U.S. 602 (1971).
22. Lisa Shaw Roy, *The Replacement Campaign: Monuments and Symbols*, 56 Tulsa L. Rev. 255, 273 (2021).
23. Am. Legion, 139 S. Ct. at 2085.
24. First Amendment: Leading Case, 133 Harv. L. Rev. 262 (2019).
25. *Id.*
26. *Id.*
27. Kennedy v. Bremerton Sch. Dist., 2022 WL 2295034, at *13 (U.S. June 27, 2022).
28. *Id.*
29. *Id.* (internal citations omitted).
30. *Id.* (internal citations and quotations omitted).
31. Henry C. Whitaker, *Religious Seasonal Decorations in Federal Government Buildings*, GSA Memorandum (January 15, 2021).
32. *Id.*
33. *Id.*



Sovereign Citizens and Your Local Government

By: JUDITH EL MASRI,
Executive Vice President, The Randle Law Office, Houston, Texas



Editor's Note:

It is no secret that our nation is increasingly fractured by widely differing perspectives regarding a broad range of issues: federal and state preemption, immigration, crime, gun control, women's rights, climate change, and many more. But while Americans may argue vociferously about such issues, implicit for the vast majority is the view that government plays a legitimate role in resolving them. This article is about a different attitude towards government--the proposition that one need not accept governmental authority: enter the sovereign citizen.

1. What is a Sovereign Citizen?

Sovereign citizens are anti-government extremists who believe that even though they physically reside in this country, they are separate or "sovereign" from the United States. As a result, they believe they don't have to answer to any government authority, including courts, taxing entities, motor vehicle departments, or law enforcement.

The FBI defines sovereign citizens as "individuals who openly reject their US citizenship status, believe that most forms of established government, authority, and institutions are illegitimate, and seek, wholly or in part, through unlawful acts of force or violence, to further their claim to be immune from government authority.[1]

The current sovereign citizen movement can be traced back to groups that were predominantly tax protestors. The Anti-Defamation League reports that in the 1970's the Posse Comitatus protestors appeared in increasing numbers spreading their belief that the existing U.S. government is illegitimate, and they set out to restore minimalist government ("posse comitatus" power under common law is the power of the Sheriff to summon citizens to aid in law enforcement and currently may be authorized in the U.S. under state law or as a residual power under common law)[2]. 'Posse Comitatus' means 'power of the people within the country. Posse members do not acknowledge State and Federal rights to enact laws.[3] They believe that U.S. counties and their sheriffs formed the highest U.S. authority and were responsible for protecting citizens from the wrongdoings of the federal government. Followers believe that 'common law' (based on interpretations of the Bible), as opposed to federal law, provides the only valid laws for Americans. This movement is distinct and unlike earlier movements in the 20th century; specifically, earlier groups attempted to align with the government or governmental authority, both state and federal-(e.g. Ku Klux Klan of the 1920's to the anticommunist groups of the 1950's and 1960's).

The movement itself originated in the Civil War era when certain individuals held the belief that there had been a conspiracy that the U.S. government had been infiltrated. Sovereign citizens believed at the time (and currently) that the government was infiltrated, and the laws were replaced with tyrannical laws somehow replacing the true government in the 1860's, and that the new (infiltrated government) was designed to enslave people. Thus "Sovereign citizens" declared sovereignty, and they contend the existing government had/has neither authority nor jurisdiction over them.[4] The Posse Comitatus resurgence in the 1970's and 1980's preceded a warning from the Southern Poverty Law Center (SPLC) to Attorney General Janet Reno in 1994. SPLC warned of the rise of armed groups fueled by hate.

Six months after this warning, the deadliest attack ever by a domestic terrorist was carried out in April 1995 by a man disturbed by the government raid in Waco, Texas, and obsessed with the rhetoric and conspiracy theories of the militias. The bombing in Oklahoma City of the Alfred P. Murrah Federal Building "literally brought home the impact of terrorism for Americans."[5]

Each of these groups subscribe to the beliefs held by sovereign citizens: the

Aware Group, Washitaw Nation, the Republic of United States of America, Freeman, Freemen on the Land, Sons of Liberty, and the Aryan Nation.[6] In the last few decades the Patriot Movement has grown and fueled the sovereign citizen membership, and they have gained mainstream attention particularly since January 6, 2021. The members of this movement view the federal government as too powerful and overreaching into the lives of Americans, specifically regarding Constitutional liberties, taxation and guns.

In the past three decades there has been an increase in African American sovereign citizens, and many can be traced to the Moorish Science Temple of America (MSTA), a religious sect that has existed since 1913. There have been instances of sovereign citizens claiming to be members of MSTA[7] in an attempt to disguise criminal activity.[8]

According to the SPLC: "Moorish sovereigns espouse an interpretation of sovereign doctrine that African Americans constitute an elite class within American society with special rights and privileges that convey on them a sovereign immunity placing them beyond federal and state authority." SPLC quotes MSTA "black Moors were America's original inhabitants and are therefore entitled to self-governing, nation-within a nation status."[10] In 2021 there was a standoff between police and 11 members of the group "Rise of the Moors" in which arrests occurred, after a nine-hour standoff. Their website declares Moors "are not sovereign citizens" but Moors are the "original sovereigns" of America and therefore immune to the law.[11]

Upon the election of President Obama, the militia groups surged. In 2009 the SPLC published a paper titled "The Second Wave Return of the Militias," arguing that what distinguished the resurgence of political dissenters and anti-government groups was the election of President Obama.[12] During former President Trump's presidency, a new wave of militants emerged, further impugning governmental authority. That anti-government sentiment spiked due to Covid-19 measures and restrictions.

The rather amorphous group known as sovereign citizens thus includes those identifying themselves as freeman, freeman of the land, sons of liberty, Aryan nation, constitutionalists, citizens of the universe, and galactic citizens. While the membership of the various groups may be different, they each share the firm stance that they are not subject to laws.

2. **The Sovereign Citizen Threat**
Question: Should the sovereign citizen movement cause concern at the municipal level?
Quick Answer: Yes, and the Movement is growing due to impetus gained by the pandemic, the current political climate, and fueled by internet access and social media.

Sovereign Citizens have been watched by the federal government for several decades but in 2010 the FBI disclosed that in addition to monitoring the threat of eco-terrorists, and lone conservative (far right) terrorists, the FBI began referring to sovereign citizens as a third category of domestic terrorists. Increasing violence and the uptick in "paper terrorism" has brought attention to sovereign citizen activity across the country. The extraordinary amount of time (administrative, municipal, judicial, law enforcement), and expense incurred by cities, counties, states due to the sovereign citizen "tactics" continues to grow. Despite the government monitoring, and watch-dog monitoring, it is difficult to determine the exact number of individuals that subscribe to the movement or specifically describe themselves as sovereign citizens; SPLC estimates that there are a half million sovereign citizens.[13] The prevalence of smart phones and widespread access to the internet has surely fueled the increase in both attention to the movement and the spread of ideology. SPLC lists the sovereign citizen groups they have identified as of 2021; the tally includes thirty groups.[14] In my state they have identified the group "Republic of Texas." In Canada there is a group called "Freeman-on-the-Land,"[15] a "Natural Persons" movement, and there are sympathizers aligned with "First Nations" in British Columbia; they fly the flag "Sovereign Squamish Government"---interestingly they have no website, as it has been suspended.

There are numerous "self-help" websites and publications guiding would-be sovereign citizens about how to navigate the judicial, municipal, federal and law enforcement systems, including several which are listed later in this article. There is no quantified methodology to determine the numbers with any accuracy, but the ideology is certainly on the rise, and with increasing access to the internet, followers aid other followers with plenty of information on "how to" file fake liens, fake judgments, bring fraudulent legal actions, and more.

While "how to" forms, online

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videos, and self-help websites exist to aid sovereign citizens, the methodology to combat the paper terrorism or sovereign citizen tactics is difficult to find, despite an abundance of research, writing, and legislative changes across the country. There are notably an increasing number of watchdog groups and members of academia making their findings and research available to the public regarding sovereign citizens, their activities, and their beliefs. The groups include the aforementioned SPLC, the Anti-Defamation League (ADL), the Program on Extremism at George Washington University, and the National Consortium for the Study of Terrorism and Responses to Terrorism (START) at the University of Maryland. There are international entities doing research as well, such as the Institute for Strategic Dialogue[16] (ISD), a think tank which has studied and written about sovereign citizens.[17]

3. Interactions with Sovereign Citizens

Growing evidence indicates we are increasingly likely to encounter sovereign citizens, but are encounters with sovereign citizens cause for legitimate concern for the judiciary, courts, and municipal entities?

According to a 2020 START research brief, 30% of all far-right extremists, in their Profiles of Individual Radicalization in the United States (PIRUS) database identify as sovereign citizens. The START brief is easy to find online.[18] The growth in the movement reflects the prevalence of sovereign citizens in society and the increased odds of encountering sovereign citizens in court, in government offices, and in law enforcement encounters.

The growing presence of sovereign citizens is not just an American phenomenon. The ADL has reported sovereign citizens have been tracked in Australia, Canada, United Kingdom, Scotland, Republic of Ireland, Northern Ireland, New Zealand, New South Whales, and South Africa. Countries around the world are taking notice and examining the sovereign citizen movement and have discovered it is an international phenomenon.[19] According to the ISD, in the United Kingdom sovereign citizens have entered hospitals and vaccination clinics after the Covid-19 pandemic to harass medical staff and politicians. Similarly, in Canada with the rise of anti-government sentiment, sovereign citizens are disrupting court proceedings. Many are members of the group known as the Freeman: they first appeared in 2000, and like many other groups, they have their own Facebook page for their membership.[20]

The U.S. government has labeled sovereign citizens as domestic terrorists, and an increasing number of federal laws reflect that determination. In 2001 federal law was revised and domestic terrorism was defined in Section 802 of legislation titled "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" (USA Patriot Act).[21] A person engages in domestic terrorism if they commit an act "dangerous to human life" that violatesthe criminal laws of a state or the United States, if the act appears to be intended to: (i) intimidate or coerce a civilian population; (ii) influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.

Many of the acts taken by extremists, and particularly those that identify as sovereign citizens, clearly fall under this definition. The sole purpose of paper terrorism is intimidation of the courts, court staff, and the judicial system generally. Sovereign citizens attempt to use the forum, whether it be the court room, or in an encounter with law enforcement or any municipal authority, and thereby any proceeding is intentionally drawn out for as long as possible. Filing fake liens, judgments, deeds, and lawsuits are all targeted methods of intimidation in defiance of proper procedure.

The Texas Department of Public Safety (DPS), the State agency responsible for statewide law enforcement and driver license administration, describes sovereign citizens similarly and generalizes that much of their activity involves fraudulent acts, but DPS recognizes that many sovereign citizens are also capable of, and will, resort to violence as a justified response to their perceived abuses by the government.[22]

Another group, noticeably on the rise in the U.S. since 2016, that shares many of the ideals of sovereign citizens is the Constitutional Sheriff Movement.[23] The Constitutional Sheriffs and Peace Officers Association (CSPOA) claims to be supported by 400 Sheriffs. CSPOA is an extreme, far-right group that calls itself "the last line of defense standing between the overreaching government and your Constitutionally guaranteed rights."[24] The Constitutional Sheriffs assert that they have the power to determine the constitutionality of the laws they are entrusted with enforcing, and can refuse to enforce any law that they believe is unconstitutional.[25] The pandemic and the restrictions imposed on individuals, municipalities and businesses by virtue of a community health disaster provided impetus for the growth of this movement. Certainly, January 6, 2021 and the events of that day support this. CSPOA has a website (cspoa.org) for members containing the byline "*Join & Become Part of the CSPOA Posse.*"

City attorneys, city prosecutors, law enforcement, municipal court staff, elected municipal officials, and municipal staff will likely encounter a sovereign citizen, and it is increasingly possible that some municipal employees may follow the ideology. In municipal court and most other courts, sovereign citizens likely will appear *pro se*. Because a sovereign citizen refutes the authority of the government including municipal government and therefore recognizes no authority in judges, law enforcement officers, attorneys, local municipal government, nor the legal

procedural system, an encounter can be a challenge. At the municipal level an encounter with a sovereign citizen may not appear on its face dangerous, but it can be if unreasonable behavior ensues or the individual retaliates. The pattern of behavior which includes refusing to confirm identity with a driver's license (or some other official identifying document), refusal to pay fees, fines, or recognize any municipal or law enforcement authority may appear benign. But it is an aspect of the same ideology known to be shared by extremists, and it is documented that extremists have resorted to violence in furtherance of those beliefs.

Sovereign citizens believe they alone decide what laws to obey or ignore, leaning heavily towards actively ignoring laws. The immediate consequence of an encounter in court or other governmental interaction is an inordinate expenditure of time, while the secondary consequence is the inability to complete or progress with the necessary procedural or administrative steps to resolve the issue that brought the sovereign citizen to the attention of the judiciary, municipality, law enforcement or administrative agency. More importantly, many of the tactics are designed to intimidate and frighten their victims. Intimidation is a direct and intended result of filing fake documents such as liens, deeds or court filings. It is a risk for those that work for the government and enforce the laws of the government at every level-state, county, city or municipality, to be targeted.

4. **Sovereign Citizen Activities, Schemes, and Strategies**

Sovereign citizens use a variety of means to frustrate government:

• Filing of false suits or claims, bogus liens, deeds, conveyances, or other similar documents in order to encumber the property of their enemies in retaliation for some perceived wrongdoing; The Real Estate Fraud Prosecution Unit of the San Bernardino (California) District Attorney's office, for example, has estimated that their current case load consists of 85% sovereign citizen cases. Common practice includes filing liens against the homes and land of public officials who participated in or were complicit in their legal proceedings. Intentional filings that are based on tactics to delay, complicate, question, rebel, and obstruct.

• Fraudulent UCC filing of financing statements and the majority of all false UCC financing statements also share another important characteristic: They indicate that the debtor is a transmitting utility.[26] This term is used to refer to "any person who

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is primarily engaged in the railroad, street, railway or trolley bus business, the electric or electronic communications transmission of electricity, steam, gas, or water, or the provision of sewer service." Fraudulent filers, particularly sovereigns, use this designation in an attempt to ensure that their financing statements remain indefinitely on file. Under UCC Section 9, transmitting utility filings do not lapse.

• Filing of legitimate IRS forms to harass officials; fake 1099's that indicate the individual targeted has collected large amounts of money in interest income or payments.[27]

• Real Estate and mortgage fraud; move into repossessed homes or empty buildings, file fake quick deed transfers or documents conveying a real property interest, and claim the property as their own. Improper or fraudulent liens against the real property owned by the authorities, state, county, city, judicial. Fake deeds are used to apply for subsidized Section 8 Housing assistance through HUD and often will move into vacant housing and change the locks. Judges and public officials have liens filed against their homes when a sovereign citizen has encountered that judge in court (see appendix).[28]

• Credit repair schemes where sovereign citizens from Texas and California fraudulently open credit repair businesses and then use the identities of credit repair clients to open bank accounts, credit cards, and loans and create real estate portfolios in the clients' names. The illegal credit repair companies have used several names including *KMD Credit, KMD Capital* and *Jeff Funding* Upon arrest, the sovereign citizens sent letters to the court refusing to recognize the court's authority.[29]

• School boards across the U.S. have recently been targeted with incessant unnecessary filings and parent groups showing up and disrupting meetings to force political or anti-political or religious beliefs. The group "Let Them Breathe" created in part due to mask mandates during the pandemic elected false board members and continually disrupted meetings in Poway, California.[30]

• Fabricated, false arbitration rulings by some of the following organizations: Sitcomm Arbitration Association and HMP Arbitration Association (also known as the Healing My People Arbitration Association, HMP Dispute Resolution, and Healing My People Ministries, among other names) run by Robert Dale Presley, a California sovereign citizen. In 2021 Tarrant County, Texas judges ruled on a foreclosure and were targeted; Presley was jailed for four months after ignoring the judge's order to appear in court involving one of his fake arbitrations.[31]

• Sovereign Citizens Courts that issue illegal warrants for judges and law enforcement officers and issue fraudulent manufactured judgments. Common law courts, or courts of the Continental United States derive their common law from the American Revolution, which freed the colonists from the British monarchy and made each colonist sovereign over his own property.[32] Under this definition of common law, no court ruling, or government statute or regulation can deprive a citizen of his common law rights, particularly with regard to property. The theory followed by sovereign citizens is that common law refers to a separate system of laws, designed to protect individual property rights.[33]

• Peace Officer who refuses to recognize the State of Texas or the United States; in order to be sworn in, has to swear to protect the Texas Constitution and enforce laws of the State of Texas. (My encounter with a sovereign citizen).
• Sovereign citizen stopped by police for traffic violation; let go due to the fact too much time and the annoyance of having to arrest the driver who refuses to identify himself or provide documents that identify driver or reflect insurance or registration regarding Texas Transportation Code violations. (I have encountered this scenario more than once). The time consumed during a traffic stop by local law enforcement across the U.S. quite likely leads to either releasing the driver or an arrest due to the failure to properly identify.

• Refusal to pay taxes (local, state and federal), municipal fees, deposits, to complete necessary municipal permit applications. The IRS has created a department solely to deal with problem filings likely contrived by militia groups and sovereign citizens by design; including misuse of non-profit status.[34] IRS is also sharing information and processes regarding tax filings with the FBI and other federal agencies.[35]

5. Solutions

Traditional methods of dealing with sovereign citizens, such as sanctions, criminal charges, contempt, and general penalties are the solutions that serve as effective deterrents for individuals that recognize the legitimacy of the legal system. Sovereign citizens do not possess this recognition and therefore traditional solutions are not successful. An exponentially increasing number of court opinions are written that include rulings or definitions referencing sovereign citizen theories. Court rulings and dicta provide the precedence necessary to guide new rulings or determinations involving sovereign citizens, but also provide valuable guidance for judicial and municipal policy creation. For example, U.S. Magistrate Judge David L. Horan in *Wright v. United States*, no. 3:20-cv-03299 (N.D, Tex. Nov.

9, 2020) cites the following from *Westfall v. Davi*s, no. 7:18-cv-23, 2018 WL 2422058, at *2 (N.D. Tex. May 4, 2018):

> So-called sovereign citizens argue that, though they are born and reside in the United States, they are their own sovereigns and are not United States citizens. They claim as grounds for this belief the Uniform Commercial Code, maritime and admiralty law, the idea of strawman trusts, and Bible verses. Sovereign citizens often attempt to use these beliefs to 'avoid paying taxes, extinguish debts, and derail criminal proceedings.' However, these citizens cannot claim to be sovereigns independent of governmental authority while they simultaneously ask the judicial system to grant them recourse.

Many states are passing harsher laws and civil and criminal penalties to address a major tool used by sovereign citizens, paper terrorism. These include pre-filing remedies and post-filing judicial relief. But what about remedies and solutions to achieve cooperation from the sovereign citizen for the period of time he or she is in front of you and any department or individual in your municipality? Keep in mind there is no typical "sovereign citizen," nor do they identify explicitly as a sovereign, but what does become evident is the expression of a core theme of beliefs that individuals share and it principally centers on the view they are not subject to the law or subject to a higher set of laws.

Since writing about sovereign citizens in a 2022 blog, our office receives, on average, one phone call a day from individuals seeking guidance on how to become a sovereign citizen, a citizen of the universe or simply seeking information regarding the sovereign citizen views and tactics.

Legal and psychological experts emphasize the importance of fair processes and fair treatment when sovereign citizens encounter the "system." Ideally no additional effort is necessary to illustrate the inherent fairness of any process, but when explaining how the "system" is fair as sovereign citizens encounter the municipal, judicial or any administrative system, the belief that the court or municipality or system is illegitimate must be overcome. Municipal Court and law enforcement training materials emphasize staying calm, avoiding escalation and some go as far to include anger management guidelines.

The recommended approach for encounters with sovereign citizens must not include the loss of patience, or ridicule of their beliefs; despite their purposeful intent to be difficult and argumentative and to generally "push back." "Fair processes and treatment may provide the necessary incentive to not reoffend and may even signal the legitimacy of the judiciary—at least to the extent that sovereigns believe that courts will not summarily strip citizens' rights as a matter of course."

Even when sovereign citizens achieve no success when arguing their position and essentially lose in court, or fail to gain a favorable ruling or result, if treated without bias the sovereign citizen may feel the outcome was fair. Essentially fair treatment on its face will act as a deterrent. Indeed, if a judge is reasonably fair with a sovereign citizen and ultimately decides that she should be barred from filing with the court in the future, this outcome, though unfavorable for the sovereign, may be accepted as fair.

Sovereign citizens believe in anti-government conspiracy theories and these conspiracies are historically rooted in racism. Sovereign citizens intentionally frustrate law enforcement agencies, judges, judicial staff, and elected officials as well as municipal employees. In addition, sovereign citizens have proven to be capable of terrible violence and no person that purports to be a sovereign citizen should be underestimated regarding such capability or simply the possibility of violence. A key element of paper terrorism is most commonly the ability of sovereign citizens to intentionally hold up court proceedings and public meetings with incomprehensible jargon, theories, and argument and when attempts to manipulate the system fail they resort to harassing public officials with the same tactics; including filing suit, fake liens, or fake deeds. As early as 1995 the Central Texas Counterterrorism Group began writing articles on domestic terrorists and paper terrorism following events in Waco, Texas and Oklahoma City and a key purpose of the group is to partner with high-technology communities as Texas is particularly vulnerable to domestic terrorist groups.

U.S. courts are employing pre-emptive and preventative measures such as pre-filing injunctions, also known as "gatekeeper orders," to prevent litigants from filing new lawsuits or other filings without leave of court. Federal courts have the inherent authority to issue these injunctions to prevent abuse of the judicial system and to protect other parties from frivolous or malicious lawsuits. The All Writs Act (28 U.S.C. § 1651(a)) authorizes federal district courts to withhold judicial access from parties who repeatedly file frivolous suits.

APPENDIX - Practical Tools to Aid in Sovereign Citizen Encounters and Understanding Sovereign Citizens

Understanding the mindset and theories behind the sovereign citizen movement will help in any encounter with sovereign citizens. In other words, if you can't beat them, at least try to understand them. This is certainly not a complete list, but it provides sources of general information to gain an understanding of the ideology. Suggested reading to gain an understanding of the militia and sovereign citizen mindset and to prepare for methods and tactics used by both:

1. The Citizens Rule Handbook which includes "The Unanimous Declaration" https://famguardian.org/Publications/CitRulebook/rulebook.htm#anchor14
2. "*Title 4 Flag Says You're Schwag!*

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

DOUGLAS HOFFER, *Deputy City Attorney, Eau Claire, Wisconsin and*
JASMINE DUTTON, *Administrative Associate, Eau Claire, Wisconsin Police Department*

INTRODUCTION

Co-responders *cont'd from page 17*

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TELECOMM

By: GERARD LEDERER
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Washington, DC

Local Governments and Robocalls: Updated Rules Restricting Artificial and Prerecorded Calls

Background on the Telephone Consumer Protection Act

Congress enacted the Telephone Consumer Protection Act (TCPA) in 1991 to address the growing number of uninvited marketing calls. The TCPA restricts the making of calls using automatic telephone dialing systems and artificial or prerecorded voice calls, as well as telemarketing calls to numbers on the "National Do Not Call Registry." There are generally two exceptions to TCPA enforcement: (i) calls made for emergency purposes and (ii) calls made with the called party's prior express consent to receive such calls.

Over the succeeding 30 years, the Federal Communications Commission (FCC) has established regulations that interpret and enforce the TCPA. These implementing rules can be found at 47 C.F.R. § 64.1200. Navigating these rules and the FCC's various Orders and Declaratory Rulings interpreting the TCPA can prove complicated for any caller looking to avoid liability for violations associated with artificial or prerecorded voice calls. Importantly, the TCPA does not apply only to private-entity telemarketers. Local governments—and their counsel—may be unpleasantly surprised to learn that while federal government callers are excluded from TCPA restrictions, the FCC has specifically clarified that local governments and local government-affiliated entities such as schools and utilities are subject to TCPA liability.

Local government and private callers must be mindful that TCPA liability can be massive — the TCPA allows for private rights of action with base statutory damages of $500 per violation, or $1,500 per violation if knowing and willful. Damage claims in the millions are not uncommon.[1] Further, the TCPA does not prevent potential plaintiffs from also seeking damages under analogous state laws, which often have even larger statutory damage provisions.[2]

In December 2020, the FCC issued a Report and Order[3] to update its TCPA rules in response to the passage of recent Congressional direction (the TRACED Act[4]) aimed at streamlining enforcement of "robocall" violations. The updated rules were published in the Federal Register in January of 2023, setting an effective date of July 20, 2023. Like TCPA rules in the past, these rules apply to local governments, school boards and municipal utilities. And TCPA compliance is only becoming more difficult. In addition to the updated rules, below we will also discuss the recent Notice of Proposed Rulemaking approved on June 8, 2023 stating that the FCC seeks to further modify the TCPA's rules by strengthening consumers' ability to revoke consent to receive robocalls and texts.

Updated TCPA Rules

The FCC Report and Order implementing the TRACED Act (TRACED Order) adds restrictions to existing TCPA consent exemptions for artificial or prerecorded voice calls made to residential lines, even those made by local governments.

- *Limit on Exempted Calls:* Previously, if a call fell into an exempted category, namely non-commercial calls, commercial calls that do not include an advertisement or constitute telemarketing, tax-exempt nonprofit organization calls, and HIPAA-related calls (collectively, Exempted Calls) there was no limit on the number of artificial or prerecorded voice calls that could be made to a residential line without the recipient's prior express consent. As of July 20, 2023, even these exempted calls will be limited to no more than three calls in a 30-day period (with the exception of HIPAA-related calls, which are limited to one call per day and a maximum of three per week).

- *Opt-out Requirements:* The TRACED Order imposes new disclosure and opt-out requirements on the categories of Exempted Calls listed above. The amended rules require that on all Exempted Calls to residential lines utilizing an artificial or prerecorded voice (1) the caller identifies him or herself

(in the manner described in the *Do-Not-Call Policy* section below), and within two seconds of identifying themselves, (2) provides an interactive voice and/or key press-activated opt-out mechanism for the called person to make a do-not-call request. The caller must immediately terminate the call following a do-not-call request.

- *Do-Not-Call Policy:* The TRACED Order extends the TCPA's company-specific do-not-call rules to any person or entity making Exempted Calls utilizing artificial or prerecorded voice, regardless of whether the calls are telephone solicitations.

  Specifically, any person or entity making such calls must (1) maintain a written do-not-call policy that is available on demand, (2) train personnel on the existence and use of the do-not-call list, (3) record and honor do-not-call requests within 30 days, and (4) provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted.

Caveat: While the updated rules apply to calls to residential lines, federal courts have ruled that a cell phone can satisfy the residential telephone subscriber element of the TCPA's rules.[5]

New Notice of Proposed Rulemaking on Revocation of Consent

The FCC released a Notice of Proposed Rulemaking on May 19, 2023[6] that was subsequently approved on June 8, 2023. The Notice proposes additional changes to the TCPA's rules aimed at strengthening the ability of consumers to decide which robocalls and texts they receive, adding new compliance hurdles for callers. Specifically, the Notice proposes the following new requirements:

- Callers and texters must honor company-specific do-not-call and revocation-of-consent requests subject to the TCPA within 24 hours of receipt.
- Wireless providers must honor customers' requests to cease robocalls and robotexts subject to the TCPA immediately.
- Consumers are empowered to revoke consent under the TCPA through any reasonable means.
- Robotexters are permitted to send a one-time text message confirming a consumer's revocation of consent, so long as the confirmation text only confirms the called party's request and does not include any marketing or promotional information, and the text is the only additional message sent to the called party after receipt of the opt-out request.

While it is unclear what exact changes the FCC will adopt to the existing TCPA rules, it would be prudent for callers and their counsel to be prepared to revisit their calling procedures to ensure compliance in the not-to-distant future.

Local Government Guidance

In December of 2020, the FCC affirmed that "local government entities, including counties, cities, and towns, are 'persons' within the meaning of [the TCPA's automated and prerecorded voice provision] and are, therefore, subject to the TCPA."[7] Local governments must be vigilant in ensuring TCPA compliance before sending any automated messages or calls. There are, however, exceptions to the rules available to local governments that may not be available to non-government callers.

Governments' calls are more likely to be considered to be for emergency purposes and therefore not subject to TCPA liability. As the FCC held in its 2016 Blackboard/Edison Declaratory Ruling, the TCPA's emergency purpose exception is to be interpreted broadly. Messages that relate to public health and safety (e.g., school closure notices, utility outages and maintenance notices, and COVID-19 alerts) are generally immune from TCPA rules. On the other hand, non-emergency messages (e.g., public meeting notices and court docket notices) could still be considered potentially subject to TCPA enforcement.

The *Blackboard/Edison* ruling also provided guidance on permissible calling practices for certain local government entities. The *Edison* ruling specified that certain public

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AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

2023 Supreme Court Term Preview: No Rest for Local Government Attorneys

Every Thursday morning in June, the Court issues decisions in cases that will impact local governments and society writ large.[1] And while we wait for those major decisions, the Court has also been busily filling its docket with significant cases for next Term as well. The Court has granted certiorari for next Term in several cases that will have major implications for local governments including a case asking the Court to overrule *Chevron v. Natural Resources Defense Council* as well as a pair of cases involving social media and the First Amendment.

Loper Bright Enterprises v. Raimondo

Chevron, a more than 40-year precedent, provides that courts should defer to a federal agency's interpretation of an ambiguous statute as long as that interpretation is reasonable. More specifically, the Court in *Chevron* provided a two-step framework for analyzing agency regulations. First, courts must consider whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter..."[2] If the statute is ambiguous, step two in the *Chevron* analysis provides that "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[3] Step two is known as *Chevron* deference.

When Congress enacts statutes, there are often ambiguities and there may be several reasons for this. Congress delegates authority to administrative agencies, which typically have more expertise in the regulated area than Congress, to fill in the gaps. As the Court recognized in *Chevron:*

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[4]

In the *Loper* case slated for next Term, the Court will decide an issue of monumental importance that ultimately centers on a somewhat obscure Congressional Act. This case involves the Magnuson--Stevens Fishery Conservation and Management Act of 1976 (the "Act"), which authorizes the Secretary of Commerce, and the National Marine Fisheries Service ("the Service") to implement a "comprehensive fishery management program" in furtherance of its goal "to conserve and manage the fishery resources ... of the United States."[5] Key to the statutory scheme is the promulgation and enforcement of "fishery management plans."[6] Pursuant to the Act, the Service promulgated a rule that required the fishing industry to fund at-sea monitoring programs.[7]

A group of commercial herring fishing companies contend that the statute does not specify that industry may be required to bear such costs.[8] The Service estimated industry costs to the herring fishery "at $710 per day," which in the aggregate could reduce annual returns by "approximately 20 percent."[9]

The D.C. Circuit applied *Chevon*'s two-step framework to analyze whether the agency had the authority under the Act to promulgate the new rule and require the industry to bear these costs. The court concluded the text of the statute was clear that the Service could direct vessels to carry at-sea monitors, but the text was ambiguous as to whether the Service could require the industry to bear the costs of at-sea monitoring mandated by a fishery management plan.[10] Because the text was ambiguous as to whether the agency had the authority to require industry to bear this cost, the court moved on to step two of the analysis. The court explained this is a deferential standard and so long as the agency's interpretation of the Act is reasonable, the agency will prevail.[11] In this case, the court found that various clauses of the Act read together including "necessary and appropriate" clauses supported the conclusion that the Service's interpretation of the Act was reasonable.[12]

The decision was 2-1, and the dissent argued that *Chevron's* step two should only come into play if the statute is ambiguous *and* Congress either "explicitly or implicitly delegated authority to cure that ambiguity."[13] The dissent argues that silence on a particular issue indicates an agency's lack of authority.[14]

Local governments are subject to agency regulations and for that reason,

this is an important case. But whether overruling *Chevron* is good or bad for local governments is not so simple. Under the petitioner's rule, if a statute does not contain unambiguously express authorization for a particular course of action, the agency would not have the authority to regulate. (The petition, like the dissent in *Loper*, argues that silence is not ambiguity). There are federalism principles that may favor overruling *Chevron* and, in many cases, local governments may benefit from less agency authority. For example, in the telecommunications context where the Federal Communications Commission ("FCC") has regularly sought to preempt local authority, applying *Chevron* deference to FCC regulations cuts against local government interests. There are other similar contexts where the expansion of federal regulatory authority can mean less authority for state and local governments.

However, in other contexts, some local governments have argued in favor of federal regulations. For example, some local governments have argued that the Environmental Protection Agency ("EPA") should have broad authority to regulate greenhouse gas ("GHG") emissions given that GHGs do not adhere to municipal or state boundaries and the burdens of climate change are likely to overwhelm localities seeking to reduce GHGs without federal support. Another area where local governments may support federal regulatory authority is in federal grants. The federal government awards hundreds of billions of dollars in grants each year to state and local governments on a wide array of public projects or in response to emergencies. For example, under the American Rescue Plan Act, Congress appropriated $350 billion to states, tribal governments, and local governments to help defray costs incurred responding to the pandemic emergency. The Treasury Department issued guidance that allowed local governments to recoup significant funds under a flexible standard to avert economic calamity.[15] Applying *Chevron* deference in these instances would likely benefit local governments. In still other situations, local governments may be split on whether a particular regulation would benefit them and that split may also vary depending on federal and local politics.

Another wrinkle to this case is how overruling *Chevron* may (or may not) impact judicial deference to state and local regulations. In some states, state courts defer to municipal interpretations of their own ordinances.[16] And there are examples of federal courts doing the same. For example, in *Beaulieu v. City of Alabaster,* the Eleventh Circuit explained that in construing the constitutionality of a city ordinance, the court "consider[s] the City's 'own authoritative construction of the ordinance, including its implementation and interpretation' and defer to that construction 'so long as its interpretation is based on a permissible construction.'"[17] And while the court in *Beaulieu* did not mention *Chevron,* the same logic seems to underpin both decisions. Overruling *Chevron* may not immediately impact deference to local government's interpretations of their own ordinances, but it would likely cast doubt on the practice where it exists.

The practical effect of overruling *Chevron* is that there would be a much smaller and weakened regulatory state. Whether that is ultimately a good thing for local governments is not clear.[18] But it will be significant. And while we do not know the outcome of the decision yet, it seems quite possible that the Court will overrule *Chevron,* given past writings by sitting Justices.[19] The *Loper* case will be argued in the fall of 2023 and a decision will be issued sometime before the end of June 2024.

Social Media Cases

In addition to the *Loper* case, the Supreme Court has also granted certiorari in two cases involving the question of when a public official engages in state action for the purposes of Section 1983 and therefore violates the First Amendment when they block or ban someone from the official's social media accounts. Somewhat oddly, the Supreme Court did not consolidate these cases and as of this writing, they will be argued separately. The two cases stemmed from circuits that offered different tests for these situations, but that would not ordinarily result in cases that present essentially the same issue to be argued separately. Perhaps there are factual differences in the cases that will lead to a more nuanced test. For example, one involves elected officials who were utilizing their social media accounts originally as campaign accounts which later morphed into their school district accounts while the other involves an unelected city manager. Might there be a different test for officials who are a part of a governing body and cannot act unilaterally versus those that have authority to do so? We will find out the test for what constitutes state action in these circumstances before the end of June 2024.

Lindke v. Freed

Mr. Freed had a Facebook page, which started out as private, but once he had more than 5,000 friends, he converted it to a "page" which allows for unlimited followers. His page was public (anyone could follow it) and for the page category, he chose "public figure." In 2014 (after he created the public Facebook page), he was appointed the city manager of Port Huron, Michigan and he added that information to his Facebook page. He listed his contact information as Port Huron's, including linking to the city website, city email, etc.

He used the page to post about personal and professional things, including things like his daughter's birthday pictures, but also the town's COVID-19 policies and articles on public-health measures as the pandemic continued.

Mr. Lindke was a citizen of Port Huron and unhappy with the City's COVID policies. Lindke would post negative comments on Mr. Freed's Facebook page and Freed would delete those comments. Freed eventually blocked Lindke from the page.

Lindke sued, claiming that blocking him from the Facebook page was "state ac-

Continued on page 32

PRACTICE TIPS

By: CYRIL VIDERGAR,
Assistant City Attorney,
City of Fort Collins, Colorado

Local Government Branding: Protecting Your Municipality's Goodwill

Creating a unique brand for a municipality involves investment. This is as true for original scholarly works produced by employees on the job as it is for creative logos and marks which a city may design in-house or derive by hiring an artist. These original works of art and identity can have value far beyond community pride. They are not merely part of the public domain and represent intellectual property a municipality can choose to federally register and protect, even if state laws do not extend a similar protectable property interest for public entities.

Two forms of federally recognized intellectual property rights automatically attach to these original works: copyright and trademark (or "service mark" in most municipal contexts). Each applies to a different subject matter and offers a different scope of protection.

Copyright protects the unique expression of an artist and controls how the work is reproduced, i.e. the right to "copy" it (this right also extends to performance of musical and theatrical works); Trade and service marks instead are consumer focused, providing assurance to a purchaser that a product bearing a mark is as anticipated in quality and from a certain source, i.e. what a mark represents.

Under federal law, copyright attaches as soon as a work is created, provided it is original and "fixed in a tangible medium of expression, " e.g., physical items like sheet music, paintings, and written words, or intangible items like software machine code. Basic federal rights do not require registration with the U.S. Copyright Office. So long as you use the copyright notice (© and the year of publication and owner's name), the work is "protected" under the Copyright Act of 1976 (U.S. Code Title 17) and only the copyright owner may authorize reproduction or performance.

Federal registration nevertheless makes it easier for a municipality to prove ownership, as well as providing the "teeth" to enforce ownership rights, including the right to file an infringement case in federal court, and claim damages and attorney's fees in a lawsuit.

If a city retains an outside artist or contractor, e.g., marketing firm, to create a logo, design a website, or create another work, the contractor owns the copyright, unless the service contract indicates the art was a "work for hire" or the contractor agrees in writing to transfer the copyright. If a city does not hold these copyrights, it needs the third party's permission to change the creation, including getting permission and/or paying royalties to use art on updated brochures, posters, and new merchandise.

Trademarks and service marks also confer immediate intellectual property rights as soon as a city begins using them to indicate the source of products or services. Trademarks never exist on their own, however; they are always tied to specific goods or services. Initial use nevertheless starts building the market or "trade" recognition needed to eventually achieve federal trademark protection.

Using the "TM" or "SM" symbol with products or services, respectively, lets citizens and other communities know your city is claiming a mark to identify its civic brand and activities. The "registered" symbol ® however, can only be used after federal registration.

• Goods are products you sell or

transport across state lines and bear your mark.
- Services are activities you provide for others, using your mark in advertising or carrying out those activities.

Like basic copyright protection, even though federal registration is not required to use a trademark, it provides key benefits, including the following:

- Legal presumption of ownership;
- Right to stop others from using it; and
- Right to sue in federal court to protect it.

Registering a mark requires a detailed application, evidence of use or intent to use in commerce, and thorough examination of the application by a U.S. Patent and Trademark Office (USPTO) examining attorney. The USPTO may refuse registration if a proposed mark is merely descriptive or confusingly like a previously applied-for or registered mark.

When a mark only describes goods or services, it is not identifying the source or brand of the item; it is merely describing something about the item, e.g., a quality, characteristic or main ingredient. Similarly, the USPTO will refuse to register a mark that is the generic name for the goods or services. This often occurs with municipal marks that consist mainly of the city's name, which is considered merely a "geographic descriptor."

As such, under The Trademark Act (Lanham Act, 15 U.S.C. § 1125, adopted in 1946) not all elements of a mark – whether graphical or word form – can be protected individually. While this may lessen what is referred to as "the bundle of sticks" or property interests a city may exercise, it also prevents a mark owner from prohibiting anyone's use of the city's name or a common term of language, which would inhibit communication.

To increase the likelihood the USPTO will accept a city's mark for registration, it needs to avoid confusing similarity in appearance, sound, or meaning to other marks. Marks can be confusingly similar without being identical, e.g., if visually similar or have a similar meaning, e.g., translations of foreign words. Confusingly similar marks don't necessarily need to be used with identical goods or services; the goods or services just have to be related. Fortunately, there are "use classes" for government services (035, 041, and 045) that make it easier to properly distinguish and categorize a municipality's marks for federal registration.

Choosing a mark that uniquely and with fanciful terms or graphics points to your city as the source of your goods and services, distinguishing them from neighboring community's goods or services, will increase the likelihood your city's mark will be eligible for registration and federal protection either as art or a "composite" of art and words.

All that said, municipal copyrights and trademarks can be federally registered and are worth protecting. Many municipalities even hold multiple registered works and marks. The principal purpose and value of these registrations is to control the commercial use and apparent "source" of information and materials bearing the city's name or logo. Residents and consumers are then assured that materials or vehicles bearing the city's logo are "official" and represent the quality and integrity for which the city stands.

- More information about the copyright registration process with the U.S Copyright Office can be found at: https://www.copyright.gov/
- More information about trade and service mark eligibility and registration can be found at: https://www.uspto.gov/trademarks/ **ML**



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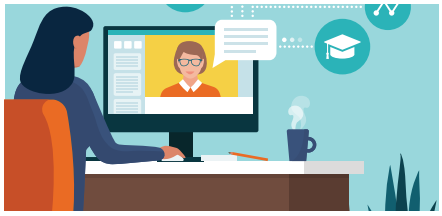

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Telecomm *cont'd from page 21*

entities, such as schools and utility companies, are able to obtain prior express consent to send informational automated calls and texts when students' parents/guardians and customers simply provide their contact information. This standard is significantly less arduous than the TCPA's typical requirements for obtaining a recipient's prior express consent to receive automated or pre-recorded calls.

FCC Chair Jessica Rosenworcel explained:

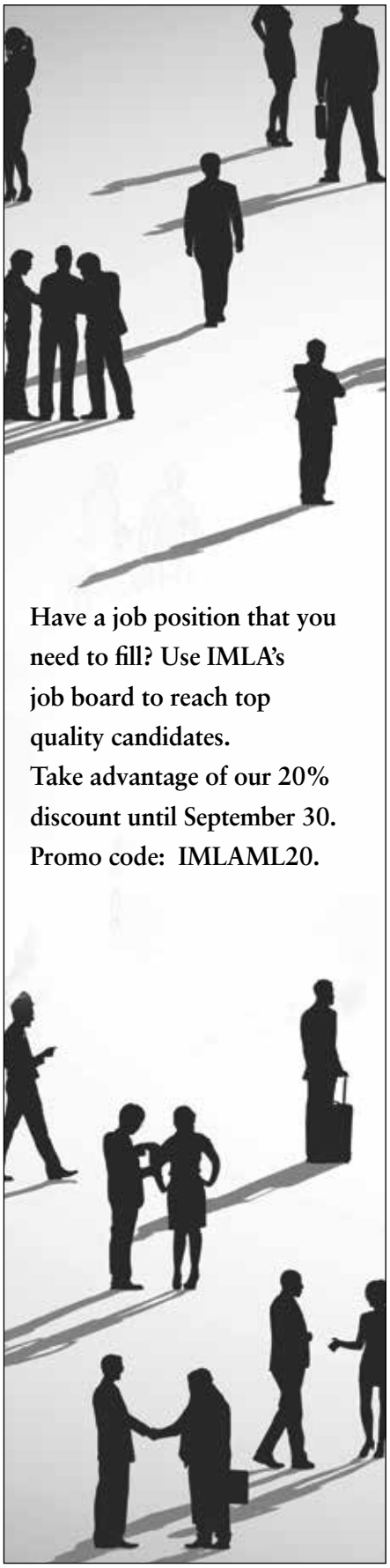
> If you have provided energy and utility companies with your number, they can reach out to you when the power goes out, when service is being restored, and when dangerous work is being done on electrical facilities near your home. In other words, they have the ability to reach out to you when safety is at stake. Second, we make clear that schools, which act in loco parentis, can reach out to a student's family or guardian in emergency situations.

Conclusion

TCPA compliance can be difficult to navigate and presents liability landmines, even for local governments. With the rollout of the FCC's new TCPA rules and potential additional changes regarding customers' ability to revoke consent to receive calls, local governments, private entities, and their counsel should ensure their calling policies and equipment are compliant with current rules and are flexible enough to comply with any proposed modifications before employing the use of automated or prerecorded messages. ML

Notes

1. *See*, *e.g.*, Krakauer v. Dish Network, LLC, 925 F.3d 643 (4th Cir. 2019) (affirming $61 million TCPA verdict); Golan v. FreeEats.*com, Inc.*, 930 F.3d 950 (8th Cir. 2019) (affirming $32 million TCPA verdict).
2. *See*, *e.g.*, Va. Code § 59.1-515 (providing for damages of $500 for the first violation, $1,000 for the second violation, and $5,000 for each subsequent violation under the Virginia Telephone Privacy and Protection Act); S.C. Code § 37-21-80 (providing for damages of $1,000 per violation, increased to $5,000 per violation if knowing and willful under the South Carolina Telephone Privacy and Protection Act).
3. *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 35 FCC Rcd. 15188 (2020).
4. The Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, 133 Stat. 3274, § 8 (2019) (TRACED Act).
5. *See*, *e.g.*, Stevens-Bratton v. TruGreen, Inc., 437 F.Supp.3d 648, 655 (W.D. Tenn. 2020).
6. *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, DOC-39514A1 (May 19, 2023).
7. *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 35 FCC Rcd. 15052 (2020).
8. *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 FCC Rcd. 9054 (2016).



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INSIDE CANADA

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

Unconvincing Evidence, "Local Boards," Personal Information, and More

Absent Palpable and Overriding Error, Court of Appeal Does Not Interfere with Findings
Viceversa Developments Inc v The City of Winnipeg, 2023 MBCA 52 https://canlii.ca/t/jxnwd
The Appellant acquired property from the Canadian National Railway in the City of Winnipeg ("City"), it included a roadway, sidewalk, and bicycle/pedestrian path ("Roadway"). The Appellant planned to re-develop the property by constructing a condominium building and filed an application to the City to amend the existing Zoning By-law, to allow for the Property to be zoned Commercial District, C2. After a few years, the complexity and magnitude of the re-development was apparent. The Appellant failed to secure approvals from all three levels of government, causing delays in the development application. Despite the delays, the City granted the Appellant several extensions, but denied the third extension request. As a result, an amended Zoning By-law never came into force, and the City did not prepare a Zoning Agreement. The Appellant alleged that the City was negligent in failing to complete certain steps necessary to bring into force amendments to a Zoning By-law, causing damages.

HELD: Appeal dismissed.

DISCUSSION: The trial judge agreed with the Appellant that the City's failure to prepare a Zoning By-law amendment and Zoning Agreement was negligent. However, despite the City's negligence it did not cause the Appellant any legally compensable damages. The trial judge found based on the evidence that even if the City had produced a Zoning Agreement, the Appellant would not have signed off on it. The Appellant argued that it would have signed off on the conditions to secure the C2 zoning, however the trial judge was not persuaded by the evidence presented nor the testimony of the Appellant's principal, Mr. Katz. The trial judge found Mr. Katz was not a credible witness, as his testimony was at odds with the lengthy history between the two parties. On appeal, the Court found that absent a palpable and overriding error it ought not to interfere with factual findings made by the trial judge simply because it may or may not agree, *Housen v. Nikolaisen,* 2002 SCC 33. The Court was satisfied that the trial judge's credibility assessment was reasonably supported by the evidence. No palpable or overring error. Appeal dismissed.

City Did Not Retaliate When It Suspended a Volunteer
Xu v. City of Toronto, 2023 HRTO 882 https://canlii.ca/t/jxmv8
The Applicant, a table tennis program volunteer at the City of Toronto ("City"), alleges that the City suspended him from his volunteer role in retaliation for filing a Human Rights Tribunal of Ontario ("TAribunal") application. In response, the Applicant filed another Tribunal application against the City.

HELD: Application dismissed.

DISCUSSION: The Applicant relied on section 8 of the *Human Rights Code*, R.S.O. 1990, c. H. 19 ("*Code")* which prohibits reprisal. In *Noble v. York University,* 2010 HRTO 878. the Tribunal set out the three-prong test for reprisal:
a) an action taken against, or threat made to, the applicant;
b) the alleged action or threat is related to the applicant having claimed, or attempted to enforce a right under the *Code,* and
c) an intention on the part of the respondent to retaliate for the claim or attempt to enforce the right. The requisite intention to retaliate can be inferred from the overall evidence.

It was uncontested by both parties that the Applicant brought a previous Tribunal application against the City, and that following the Tribunal's dismissal of the application the City suspended the Applicant. The Tribunal held that this

met the first prong. However, the Tribunal was not satisfied that the Applicant established on a balance of probabilities that the second and third prongs were met, specifically that the City's actions related to the Applicant's Tribunal application. The Tribunal was persuaded by the City's evidence that the suspension was given in response to the Applicant's conduct towards City staff. The suspension letter provided explicit details, including events, dates and rationale for the suspension all unrelated to the *Code*. The suspension letter referenced prior verbal and written warnings given to the Applicant, and furthermore evidence revealed that following the suspension the Applicant's inappropriate behaviour against City staff continued. The Tribunal was satisfied that there was strong evidence justifying the City's suspension letter and it was not in retaliation of the Tribunal application. Application dismissed.

Unconstitutionality Does Not Circumvent Exclusive Jurisdiction
Prodaniuk v Calgary (City), 2023 ABCA 165 https://canlii.ca/t/jxb2g
The Appellant, a member of the City of Calgary Police Service ("CPS"), appealed the decision of the chambers judge that struck her claim for lack of jurisdiction. The Appellant alleged that while employed at the CPS she was subject to unfair treatment, sexual harassment, and discrimination in the workplace. The chambers judge found that the Appellant's claim was related to workplace conditions and held that it fell under the exclusive jurisdiction of the collective agreement between the Appellant and her employer, the City of Calgary ("City"). She appealed.

HELD: Appeal dismissed; cross appeal is allowed.

DISCUSSION: The Appellant's position was that in a workplace, victims of harassment are predominantly women, and it is not unusual for women, inclusive of the Appellant, to delay reporting harassment to their employer. The Appellant raised the 60-day limitation period in the collective agreement preventing grievances as the crux of the appeal. The Appellant argues that the limitation period is an unconstitutional denial of her access to justice that violates s. 96 of the *Constitution Act, 1867* and s. 15 of the *Canadian Charter of Rights and Freedoms*. The remedy sought by the Appellant was a declaration of invalidity, a remedy that only a Superior Court may grant, *Nova Scotia (Workers' Compensation Board) v. Laseur,* 2003 SCC 54. The Court of Appeal was not persuaded; the Appellant cannot circumvent the exclusive jurisdiction model simply by alleging unconstitutionality, as it is not the test to require a court to assume jurisdiction over a matter. The Court agreed with the City, that at its core the claim before the Court was a workplace issue, and the *Constitutional* or *Charter* claims are at best an ancillary element. Having concluded that the claim was a workplace issue, the Court reviewed whether the collective agreement provided the remedy required to resolve the dispute. The Court found that the collective agreement procedures were effective, and thereby the chambers judge did not err. Appeal dismissed. The Court granted a cross appeal by the Calgary Police Association, finding that the chamber judge erred in finding that the Appellant might be open to financial compensation or damages under the *Societies Act*, RSA 2000, c S-14 and the *Business Corporations Act*, RSA 2000, c. B-9. The Court held that the statutory labour relations regime forecloses the Court's residual discretion, and the chamber judge erred by going beyond that finding.

What is a "Local Board"?
County of Lambton Community Development Corporation v Municipal Property Assessment Corporation et al., 2023 ONSC 3434 https://canlii.ca/t/jxjhv
The Appellant is a not-for-profit community development corporation also known as the County of Lambton Community Development Corporation ("CLCDC"). The CLCDC's sole purpose is to operate the Western Sarnia-Lambton Research Park located in the City of Sarnia. The CLCDC unsuccessfully sought a declaration that it was a "local board" as defined by the *Municipal Affairs Act,* R.S.O. 1990, c. M46 to be exempt from taxation pursuant to the *Assessment Act*, R.S.O. 1990, c. A. 31. The CLCDC appealed.

HELD: Appeal dismissed.

DISCUSSION: In Ontario all real property is liable to assessment and taxation under the *Assessment Act* unless it is among other things, a local board as defined pursuant to the *Municipal Affairs Act*. A local board is defined as:

"local board" means a school board, municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power or authority under any general or special Act with respect to any of the affairs or purposes, including school purposes, of a municipality or of two or more municipalities or parts thereof.

In support of dismissing the application, the application judge relied on the Ontario Court of Appeal decision, *Ontario Ombudsman v.*

Continued on page 33

Amicus *cont'd from page 25*

tion" for the purposes of a Section 1983 claim and that Freed had violated his First Amendment rights in doing so.

The Sixth Circuit concluded that Freed was not acting "under the color of state law" for the purposes of bringing a Section 1983 action.[20] The Sixth Circuit applies what it calls the "state-official test," which asks if the official "is performing an actual or apparent duty of his office or if he could not have behaved as he did without the authority of his office."[21] In concluding that Freed was not acting as a state official in using his Facebook post, the court emphasized that you must look at the page as a whole, not at individual posts in isolation.[22] The court reasoned that the Facebook page did not derive from his duties as city manager nor did it depend on his authority as city manager.[23] In further support of its finding that Freed was not acting under the color of state law, the court noted that Freed used no state or city funds or resources to run the page, no government employees helped him maintain it, and it was clear the page belonged to him and not the office of city manager (i.e., it will stay with him when he leaves his job).[24]

The court rejected Lindke's argument that the page helped Freed fulfill an official duty of communicating with constituents, pointing out that Freed is free to go to the hardware store in town and talk about his job and is not engaging in official state action when he does that.[25] The court also distinguished the case from the action brought against former President Trump several years ago where the former President was sued for blocking critics on Twitter.[26] The Sixth Circuit explained that the way then-President Trump had used the account created "substantial and pervasive governmental involvement with and control over" the Twitter account and that Freed was not using his account in the same manner.[27]

The Supreme Court granted certiorari to resolve the following question: whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.

O'Connor-Ratcliff v. Garnier

In this case, two school district officials created public Facebook and Twitter pages to promote their campaigns for office. They maintained separate private accounts for family/friends. After they won their elections, they used their public social media pages generally to promote school board business, solicit input on board decisions, invite the public to school board meetings, etc. The "about" section on the pages lists their positions as school trustees, and links to official trustee emails. Only the trustees themselves could post on their public Facebook pages, but members of the public could comment on a post or react to it (like, dislike, etc.).

The Garniers were members of the community with children in the school district. They would frequently write repetitive and critical comments on the school board officials' pages. For example, within ten minutes of the officials' posting a message on their pages, the Garniers would post over 200 identical replies. The school board officials deleted and hid the posts and then eventually blocked them from their social media accounts.

The Garniers sued under Section 1983, claiming the school board officials had violated their First Amendment rights by blocking them from their social media pages.

The Ninth Circuit concluded that the school board officials were acting under the color of state law for the purposes of Section 1983; therefore, blocking the Garniers from the officials' accounts because of the message the Garniers were promoting violated the First Amendment.[28] The Ninth Circuit analogized the situation to off-duty governmental employees, explaining that the question is whether the public official's conduct, even if "seemingly private," is sufficiently related to the performance of his or her official duties to create "a close nexus between the State and the challenged action," or whether the public official is instead "pursu[ing] private goals via private actions."[29] The Ninth Circuit concluded that the social media pages were "overwhelmingly" geared toward providing official information and soliciting feedback on the same.[30] The court also rejected the argument that these were personal campaign pages even though that is how they started out.[31]

The issue in this case is similar to the *Lindke* case, but it is presented in a slightly different way. The question in this case is whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social-media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.

While the *Lindke* and *Garnier* cases will be argued separately, they both present an opportunity for clarity around an important issue for local government attorneys. Every local government has governmental officials who are using social media, whether it's the city/county manager, elected officials, or others. These cases should provide guidance as to when an account is considered personal in nature and when it would be considered a tool of governance such that constitutional principles, including the First Amendment apply. A rule that would sweep in largely private social media accounts and subject them to the First Amendment could create significant liability for local governments and also lead to administrative headaches.

IMLA plans to file an amicus brief in these cases in support of neither party and will advocate for a clear rule that will provide sufficient guidance to local officials in this area so that we can avoid liability moving forward. ML

Notes

1. To read about notable Supreme Court decisions, visit the IMLA Blog at https://imla.org/blog/.
2. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
3. *Id*. at 843.
4. *Id*. at 866.
5. Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 363 (D.C. Cir. 2022), *cert. granted in part sub nom*. Loper Bright Enterprises v. Raimondo, No. 22-451, 2023 WL 3158352 (U.S. May 1, 2023); 16 U.S.C. § 1801(b)(1).
6. Loper 45 F. 4th at 364.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*. at 366-69.
11. *Id*. at 369.
12. *Id*.
13. Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th at 374 (D.C. Cir. 2022) (Walker, J., dissenting).
14. *Id*.
15. *See* Department of the Treasury, 31 CRF Part 35, Coronavirus State and Local Fiscal Recovery Funds.
16. *See* Luke Phillips, Chevron in the States? Not So Much, 89 MISS. L.J. 313, 315 (2020) (noting "[f]ourteen states and the District of Columbia apply Chevron-type deference" to state administrative agencies' interpretation of state statutes); see also Joseph Diedrich, Judicial Deference to Municipal Interpretation, 49 Fordham Urb. L.J. 807 (2022) (discussing state court deference to municipal interpretation of municipal ordinances).
17. Beaulieu v. City of Alabaster, 454 F.3d 1219, 1232 (11th Cir. 2006).
18. IMLA will not be participating as an amicus in this case but will be monitoring the case closely and will provide updates to our members regarding the outcome.
19. *See* City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 316 (2013) (Roberts, C.J. dissenting) (objecting to application of Chevron deference joined by Justice Alito and citing to Marbury v. Madison for the proposition that "[i]t is emphatically the province and duty of the judicial department to say what the law is.")
20. Lindke v. Freed, 37 F.4th 1199, 1204 (6th Cir. 2022), *cert. granted*, No. 22-611, 2023 WL 3046121 (U.S. Apr. 24, 2023).
21. *Id*. at 1202-03.
22. *Id*. at 1203.
23. *Id*. at 1205-06.
24. *Id*.
25. *Id*. at 1205.
26. *Id*. at 1205-06 discussing Knight First Amend. Inst. v. Trump, 928 F.3d 226 (2d Cir. 2019).
27. Lindke, 37 F.4th at 1206.
28. Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1170 (9th Cir. 2022), *cert. granted*, No. 22-324, 2023 WL 3046119 (U.S. Apr. 24, 2023)
29. *Id*. at 1170-71.
30. *Id*. at 1171.
31. *Id*. at 1172.

Inside Canada *cont'd from page 31*

Hamilton (City), 2018 ONCA 502: "where a class of things is modified by general wording that expands the class, the general wording is usually restricted to things of the same type as listed items (*ejusdem generis*). The application judged applied *ejusdem generis* to the facts at issue and held that all the named entities in the definition of local board provide services which are integral to the day-to-day operation of a city. However, the CLCDC does not provide this same type of service; therefore it was not exempt from taxation.

On appeal the Divisional Court agreed with the application judged, finding that the CLCDC is dissimilar to the entities listed in the "local board" definition, notably that it was created to administer and operate the Research Park and does not provide any core municipal services. The Divisional Court held that the application judge was correct in its finding. Appeal dismissed.

When is a City Compelled to Disclose Personal Information under *MFIPPA*?

Toronto (City) (Re), 2023 CanLII 49382 (ON IPC) https://canlii.ca/t/jxkmk

Following a by-law enforcement investigation by the City of Toronto ("City") at the Appellant's business, the Appellant filed a freedom of information request under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M. 56 ("*MFIPPA*"). The Appellant sought records, photos, correspondence and the identity of the complainant. The City granted partial access to the request, withholding personal information about the complainant under section 14(1) of the *MFIPPA*. The Appellant appealed the City's decision to the Information and Privacy Commissioner of Ontario ("IPC").

HELD: Appeal dismissed.

DISCUSSION: The IPC reviewed whether the City was correct in withholding the complainant's personal information under section 14(1) of *MFIPPA*. Section 14(1) is not without exceptions,: if there are certain factors present then the City is compelled to disclose personal information. Notably, section 14(1)(f) requires the City to disclose personal information only if doing so would not be an "unjustified invasion of personal privacy". The IPC noted that a disclosure of personal information is an unjustified invasion of personal privacy if it was collected as part of an investigation into a violation of the law. In finding this, the IPC was satisfied that the complainants' information was collected following a complaint and a subsequent by-law investigation against the Appellant. The IPC held that the disclosure of the complainant's information would rise to the level of an unjustified invasion of the complainant's personal privacy, and is therefore exempt under section 14(1). ML

Sovereign Citizens *cont'd from page 15*

The Sovereign Citizen's Handbook: Version 3.2" (November 11, 2013), by H.I.R.M. J.M. Sovereign: Godsent™, published by CreateSpace Independent Publishing Platform; available on Amazon.com.

3. Discharge-Debt.com. Sections on how to use sovereign citizen methods to counter financial responsibilities; "*You can Get out of Debt & it May Even be Free;*" "*MANS Law vs. Gods Law*" (www.newenergybooks.com); "*Once Upon a Time There Was No Money*" website that offers training packets and a Sovereign Citizen Preparatory Course. Sovereign-Citizen.net.

4. Continental United States of America Marshalls, https://afreecountry.com/?q=cusa-marshals. "*The sheriff is the highest law enforcement officer elected by the people in each county. No other law enforcement officer is permitted to operate within the county without the authority of the sheriff. This applies to city, state and federal law enforcement agents.*"

5. National Liberty Alliance, a national sovereign citizen movement and their website includes a "how to" on how to "win in court" https://www.nationallibertyalliance.org/how-we-people-will-win.[34]

6. "Rise of the Moors" a group based in Rhode Island recently involved in a Massachusetts standoff with law enforcement and arrests when a heavily armed group of men travelled to Maine for "training." www.riseoftheMoors.org.

7. Amazon.com: Nearly every item a sovereign citizen desires or needs may be purchased on Amazon, including, fake license plates,[43] sovereign citizen kit ("as seen on T.V."),[44] sovereign citizen pocket constitution,[45] and countless publications.

Other Resources:

U.S. Department Homeland Security Digital Library (HSDL) provides public access to numerous documents and bulletins related to homeland security policy and strategy. (www.hsdl.org)

These documents include:

- U.S. Department of Housing and Urban Development Office of Inspector General: "Attention HUD REO Contractors, Property Inspectors, Section 8 Administrators, and Realtors: Watch out: Sovereign Citizen Scams."
- Naval Postgraduate School, 2016; "Uncommon Law: Understanding and Quantifying the Sovereign Citizen Movement."
- Naval Postgraduate School, 2018 "Weapons of Mass Distraction: Strategies for Countering the Paper Terrorism of Sovereign Citizens."
- Naval Postgraduate School, 2015, "Posse Comitatus/Sovereign Citizens: A brief bibliography.

Notes

1. *Domestic Terrorism and the Sovereign Citizen Movement*, FBI, April 13, 2010.
2. A separate 1956 federal law exists known as the federal *Posse Comitatus Act*, 18 U.S.C. § 1385 (2021), which prohibits any part of the U.S. military from being used as a posse or called to the aid of local law enforcement unless specifically authorized by law.
3. U.S. Department of Justice Abstract; *National Sheriff Volume 35, Issue 5*, (Oct.-Nov. 1983), at 10-16, 18-20.
4. *Extremism, Terrorism, and Bigotry*, ADL, June 26, 2017.
5. U.S. Department of Justice, *Responding to Terrorism Victims* (October 2000).
6. *A Quick Guide to Sovereign Citizens*, Unc Sch. Gov't 1 (Sept. 2012).
7. U.S. District Court, Northern District of Texas, Dallas Division, *Case No. 3:20-mc-53-E-BN*, Moorish Science Temple of America Asiatic Nation of America v. United States, et al., August 11, 2020.
8. *Couple in Washington DC repeatedly attempt to take ownership of empty mansions claiming their ancestors owned the land*, NBC News Washington (2017).
9. Southern Poverty Law Center, *Moorish Sovereign Citizens*.
10. Southern Poverty Law Center, *Sovereigns in Black* (Aug. 2011).
11. *Rise of the Moors*, July 10, 2021, ABC News, https://abcnews.go.com/US/rise-moors-group-affiliated-11-men-arrested-massachusetts/story?id=78731313.
12. Southern Poverty Law Center, *The Second Wave* (Aug. 1, 2009).
13. Southern Poverty Law Center, *Sovereign Citizens Movement*.
14. *Id.*
15. *FreeMan Society of Canada*, "Freedom is just a word unless you have control of yours!?!?!"
16. The ISD focuses on examining and forging solutions in 3 key areas; disinformation; extremism and polarization & hate.
17. In addition to research from these groups, in writing this article I was able to find information regarding sovereign citizens from law journal articles written at the following schools: Georgetown Law School, University of North Carolina Law School, University of South Carolina Law School, Penn State, University of Maryland, and University of Montana, and I was fortunate to communicate with, and read numerous articles written by Associate Professor of Social Work and Criminology, Christine M. Sarteschi, PhD, LCSW at Chatham University.
18. National Institute of Justice sponsored study, *Profiles of Individual Radicalization in the United States (PIRUS): An Empirical Assessment of Domestic Radicalization*, authored by START at University of Maryland (May 2020), available at: https://www.start.umd.edu/pubs/START_PIRUS_ResearchBrief_May2020.pdf.
19. BBC News, August 5, 2020, *What is a sovereign Citizen?*.
20. Stephen A.Kent, *Freemen, Sovereign Citizens, and the Challenge to Public Order in British Heritage Countries,* Int'l J. Cultic Studies, vol. 6 (2015).21. 18 U.S.C. § 1 (2021).

Continued on page 36

Page from Affidavit of Sovereign Citizen

AFFIDAVIT OF STATUS
of [redacted]

TEXAS STATE)
)ss
HARRIS, COUNTY)

Comes now, [redacted]
your Affiant, being competent to testify and being over 18 years of age, after first being duly sworn accordingly to law to tell the truth to the facts related herein states that she has firsthand knowledge of the facts stated herein and believes these facts to be true to the best of my knowledge.

1. I [redacted] Affiant is a living breathing Natural Private people created by God who reserve all her Natural rights a living Soul born on the land and not the sea who's domicile is TEXAS STATE

2. I [redacted] is a Natural Private Soul created by God therefore is not and cannot be any ARTIFICIAL PERSON and, therefore, cannot be assumed or presumed to be a STATUTORY CITIZEN who domicile is in the DISTRICT OF COLUMBIA Washington D.C. and therefore, cannot be LITIGATED, PROSECUTE or EXECUTED and FALSELY IMPRISONED under the COLOR OF LAW codes, statute, policies or given a STATUTORY CITIZEN IDENTIFICATION STATUS.

3. I [redacted] are born of the People of the land and reserve all my NATURAL PRIVATE RIGHTS and DO NOT CONSENT for my NATURAL PRIVATE RIGHTS TO BE CONVERTED TO STATUTORY RIGHTS.

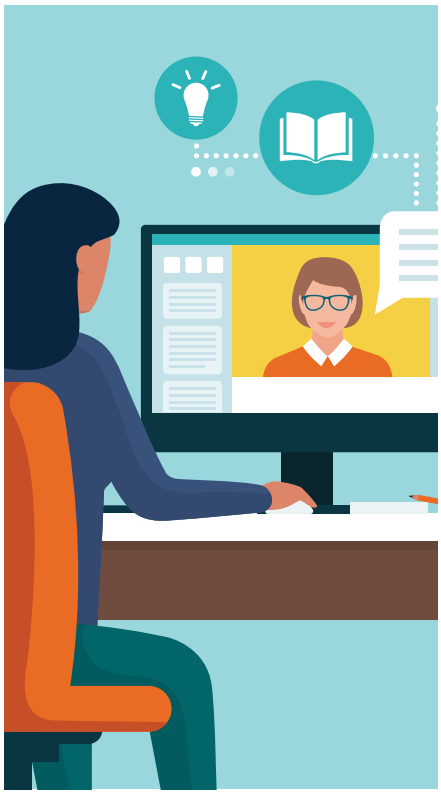
4. I [redacted] am not an ARTIFICIAL FICTION created by the Government therefore I DO NOT CONSENT for my NATURAL PRIVATE NAME to be CONVERTED into the all cap name [redacted] this a ARTIFICIAL FICTIONAL NAME that is not my NATURAL PRIVATE NAME [redacted]

5. I [redacted] is a creation of God and who's domicile is the Natural Land created by God in which I was born on the soil of the Constitutional TEXAS STATE.

6. I [redacted] under my Natural Private Universal Rights given by my God the creator under a SWORN OATH OF OFFICE All courts and Judges in every state shall be bound thereby any Thing in the Constitution or Laws of any State

Sovereign Citizens *cont'd from page 34*

22. *Texas Domestic Terrorism Threat Assessment* (Jan. 2020), Texas DPS.
23. *A radical and growing organization of 'constitutional sheriffs' is promoting defiance of federal laws it doesn't like,* Southern Poverty Law Center, June 13, 2016, *Line in the Sand*.
24. *Id*.
25. Georgetown Law, Institute for Advocacy and Protection, *Constitutional Sheriffs and Elections* (2022).
26. A Report for State Business Filing Agencies, *National Association of Secretaries of State*, April 2014.
27. *FBI News* 2017; https://www.fbi.gov/news/stories/sovereign-citizens-sentenced.
28. https://www.hud.gov/sites/documents/SOVEREIGNCITIZEN-SCAMSV2.PDF
29. https://www.justice.gov/usao-sdtx/pr/california-ringleader-charged-multi-layered-fraud-scheme, Nina Saavedra, "3 arrested in massive multistate mortgage fraud, credit repair and government loan fraud scheme" (July 22, 2022).
30. A look at the groups supporting school board protesters nationwide, NPR 10/2021; https://www.npr.org/2021/10/26/1049078199/a-look-at-the-groups-supporting-school-board-protesters-nationwide.
31. "Federal District Courts are uniformly skeptical about the validity of the *Sitcomm Arbitration Association* and its decisions," Per Curiam Opinion Appeal to U.S. Supreme Court from U.S. Court of Federal Claims, *Mark Wayne Nation et al v. U.S.*, 2022-1256.
32. People of the State of Colorado v. Bruce Doucette, et al, District Court, City of Colorado Denver, Bruce A. Doucette, the self-appointed "Superior Court Judge of the Continental United States of America."
33. Mark Pitcavage, "Common law and uncommon courts: overview of the common law court movement: hidden history as justification," *The Militia Watchdog*, July 25, 1997.
34. ADL, "Extremist and Hate Groups May be Abusing Non-Profit Status," June 28, 2021.
35. *IRS and Terrorist-Related Information Sharing*, October 2002.
36. Andy Quittner, "Contending with Obstruction Advocacy: Dealing with Difficult Sovereign Citizens," *Texas Municipal Education Center*, 2012.
37. Tom R. Tyler, *Why People Obey the Law* 5 (1990).
38. 93 N.C.L. Rev. 1106 (2015), at 1137.
39. *FBI Law Enforcement Bulletin* Volume 64, issue 3 (March 1995), NCJ Number 154478.
40. 93 N.C.L.Rev. 1106(2015), at 1132.
41. https://www.splcenter.org/fighting-hate/extremist-files/group/national-liberty-alliance[42]https://www.splcenter.org/fighting-hate/extremist-files/group/national-liberty-alliance
43. Traveler license plate: https://www.amazon.com/Right-Travel-Traveler-Photo-License/dp/B0847CZHWL/ref%3Dasc_df_B0847CZHWL/?tag=hyprod-20&linkCode=df0&hvadid=563570741241&hvpos&hvnetw=g&hvrand=12950832343339956819&hvpone&hvptwo&hvqmt&hvdev=c&hvdvcmdl&hvlocint&hvlocphy=9027629&hvtargid=pla-1647899912372&psc=1&gclid=Cj0KCQiAx6ugBhCcARIsAGNmMbhoSvrIiRPdEWPS0pmcwBM743Apt2N8f-2FT5Dalp0_n8pg9YrvhloaAswjEALw_wcB
44. Sovereign Citizen Cut Out Book; https://www.amazon.com/Sovereign-Citizens-Cut-Out-Book-2-0/dp/1481205285/ref%3Dsr_1_1?crid=1EIM4PYIFODBO&keywords=sovereign%2Bcitizen%2Bkit&qid=1678459501&s=automotive&sprefix=sovereign%2Bci%2Cautomotive%2C104&sr=1-1-catcorr
45. Pocket constitution: https://www.amazon.com/SOVEREIGN-CITIZENS-POCKET-CONSTITUTION/dp/055768112X/ref%3Dsr_1_12?crid=1EIM4PYIFODBO&keywords=sovereign%2Bcitizen%2Bkit&qid=1678459642&s=automotive&sprefix=sovereign%2Bci%2Cautomotive%2C104&sr=1-12-catcorr



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From the Desk of Amanda Karras

IMLA Nominating Committee for 2023 Elections

Pursuant to the IMLA By-Laws, IMLA is announcing the 2023 Nominating Committee. The Committee encourages people interested in being nominated for Vacant Positions on the IMLA Board of Directors and for IMLA Regional Vice Presidents to make their interest known to the Committee. Vacant Positions this year include one position on the IMLA Board of Directors and the Fifth Circuit Regional Vice President. Please fill out this form if you are interested in applying for a vacant position, click here.

In addition to filling vacancies, the Committee is charged with nominating the Board's officers: including, Treasurer and President-elect. Some members of the board will be term limited and cannot seek reelection. As a result there will be a vacancy or vacancies open. It is IMLA's goal to have a Board that represents the organization's diversity of region, gender, race, age and ethnicity and the Board welcomes all who wish to serve. Unlike other non-profit boards, IMLA does not require board members to contribute money to the organization, but does seek persons who are interested in advancing its mission, increasing its membership and attendance at its programs.

This year, the nominating process will be similar to last year's. The Nominating Committee will be conducting Zoom interviews PRIOR to the Annual Conference and will introduce its slate of nominees at its meeting at the Conference. It is important to hear of your interest as soon as possible to allow for the Zoom interviews to be set up. Our hope is to reduce the amount of time members must spend away from our educational programming and to thoroughly consider each applicant. In applying, the Committee hopes that you can offer the Committee an explanation about how you can advance the mission of IMLA and increase its membership and attendance as well as innovative ideas for advancing the interests of our membership.

Application are due by July 15, 2023

CHAIR:
Tom Carr | County Counsel | Washington County, Oregon | (503) 846-8747 | tom_carr@co.washington.or.us

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The current copy of IMLA's amended By-Laws, which describe the qualifications for service on IMLA's Board of Directors or other IMLA office, can be found at https://imla.org/imla-by-laws/.

Best Wishes,
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