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Public Good Meets Private Property: the Hydra-Headed Takings Clause

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EDITOR'S NOTE



BY: **ERICH EISELT**
IMLA Deputy General Counsel

Not in My Backyard

Thirty years ago, British law enforcement was called upon to suppress a new threat to the national sense of public order. The menace had crossed the Atlantic from Chicago, a product of names likely little-known today: Frankie Knuckles, the "Godfather of House Music" and empresario at the Warehouse—ground zero of the scourge; Larry Heard, also known as "Mr. Fingers" and creator of "Can You Feel It;" Marshall Jefferson, whose track "Move Your Body" is an anthem of the genre; and many more.

The problem, as you may divine, was music—specifically "House Music" (more recently labelled EDM)—that drove young Brits to hitherto unknown levels of hypnotic, rhythmic, often drug-fueled dance parties, lasting from dusk to dawn: the "rave." Instead of being celebrated by several hundred ravers jamming indoor venues in Chicago and Detroit, the English version played out in parks and open spaces, with upwards of 20,000 participants.

Parliament took steps to rebuff this emerging infestation. The 1994 Criminal Justice and Public Order Act defined an illegal "rave" as 20 or more people "gathering on land in the open air" with music "that includes sounds wholly or predominantly characterised by the emission of a succession of repetitive beats," at a level where it is loud enough to cause "serious distress to the inhabitants of the locality." Have fun, officers, implementing that bit of clarity.

Segue to IMLA in March 2024. This very day, as the March-April *Municipal Lawyer* hits your virtual doorstep, IMLA will convene another of our many work groups—Code Enforcement. Under the able leadership of Patricia Link, our members in that group will discuss some of the bottom-line issues confronting communities around the country. While not on today's agenda, it seems that the issue of unwanted sound is out there for discussion at a later date—for one thing, there is a contemporary version of "repetitive beats," likely causing "serious distress" to some of our fellow residents.

The plague alluded to above is not being visited upon us from foreign shores, but from Bainbridge Island, Washington. And the complicit are well-known; as they say "We've met the enemy, and the enemy is us." Your editor speaks as a co-conspirator, having traversed, one year ago, the conceptual Berlin Wall between tennis (a long time personal favorite) and this new species of "sport." Yes, meet the perforated plastic yellow sphere that that had amassed nearly 37 million American acolytes as of 2023: pickleball. Positives: easy to whack, attracts all types of players regardless of skill level, encourages mutual respect and camaraderie, and limits games to ten or fifteen minutes. Negatives: causes torn Achilles' tendons and other injuries, some rules are inscrutable (why are all lines "in," except for the "kitchen" line, which is "out" on a serve?). And most relevant for our purposes, the avocation's namesake emits a crisply annoying "pop" on every contact with paddle or court, easily hearable for 100 yards.

These two species of communal activity--raves and pickleball--converge, insofar as visiting unacceptable noise and impacts on nearby residents is concerned. As evidence, IMLA will devote a session to community control of pickleball at its upcoming Mid-Year Seminar; hopefully, any ordinances proposed by local government will provide law enforcement with standards and criteria far more exacting than the aforementioned British rave antecedent.

Turning to this issue of *Municipal Lawyer*, we are pleased to provide you with a home-grown product. All the articles except one are written by IMLA employees or our long-time contributors to *ML*—part of the "infrastructure" that IMLA President Rose Humway-Warmuth references in her President's Letter. We hope you find them informative and worthwhile.

Best regards,
Erich Eiselt

PRESIDENT'S LETTER



BY: **ROSE HUMWAY-WARMUTH,**
City Solicitor, Wheeling, West Virginia and IMLA President

In Praise of Infrastructure

Lately I have been thinking a lot about infrastructure in and around my City of Wheeling, West Virginia. Like many of you, our community has ongoing infrastructure projects including massive roadway improvements, water and sewer initiatives, bridge reconstructions, large scale demolitions of dilapidated buildings, several public/private development and redevelopment projects, and more. Infrastructure comprises the basic physical and organizational facilities needed for the operation of a society or enterprise. It incorporates the fundamental organizational elements that serve a community -- or maintain the viability and momentum of an organization.

Infrastructure can also be described as an authority-based bedrock necessary to support an entity. From infra-- meaning "below," one must infer that infrastructure refers to the "underlying structure" of a locality, or in the analogy to IMLA, the assets that the organization needs in order to function. IMLA is supported by its Board of Directors, Regional Vice Presidents and Chairs, Past Presidents, numerous dedicated members, and staff. All are necessary to continue to fulfill the IMLA mission and to seek to improve the membership experience.

As I see it, the key human infrastructure of IMLA, which is the day-to-day foundation of our organization, are the IMLA personnel. Amanda Karras, Executive Director/General Counsel oversees virtually all areas of IMLA. Former Executive Director/ General Counsel Chuck Thompson provides a wonderful resource as Of Counsel to the organization. The IMLA staff consisting of Jennifer, Erich, Carolina, Deanna, Ravinder, Trina, Caroline and Avery form a small yet fortified foundation for IMLA. That stable infrastructure ensures proper coordination of human resources, operational processes, and tools necessary to promote IMLA's progress, which is necessary for not just surviving, but thriving.

The IMLA infrastructure offers members many services such as Listservs, Working Groups, Local Government Fellows and Mentorship Programs, Annual Conferences, Mid-Year Seminars, IMLA/ Canadian Programs, Webinars (both live and recorded), a vast Resource Library, Model Ordinances and documents that can be used to provide guidance in the municipal attorney's daily practice, and more. Infrastructure consists of long-lived assets that assist in preserving the quality of the enterprise. Being the oldest professional organization to advance the needs of the municipal law practitioner, IMLA has such infrastructure assets to offer our membership.

In life, infrastructure is commonly used on a daily basis: local roads, bridges, telecommunication facilities, and so on. That usage usually results in a demand not only to maintain existing infrastructure but to provide more. To analogize, IMLA provides resources that as municipal practitioners we utilize daily; the IMLA staff continually strive to improve the offerings that strengthen the organization, not only maintaining the programs and benefits but broadening them.

A well-developed infrastructure provides a high quality of life. Similarly, the well-developed IMLA infrastructure continues to provide a high quality – if not the highest quality – of member education, staff support, networking, and various earning avenues and opportunities. In the year just passed, IMLA's accomplishments are many: it hosted three in-person conferences and two virtual events; it provided 40 webinars, of which ten were free for members; it offered nearly 100 CLE hours; it honored the first Thompson Scholarship winners and introduced the McCarley Scholarship. IMLA members now have more than 9,400 individual attorneys to network with as well as 39 listservs (three new lists were added in 2023); using those lists, at least 86 working group/committee calls were held in 2023. Finally, IMLA's legal advocacy group filed more than 30 amicus briefs at the nation's highest appellate courts on behalf of local governments last year.

It is wise to take note that lack of attention to infrastructure results in dilapidation, damage and decline of overall quality. Inadequate infrastructure constrains growth and development, and services can be inadequate to meet the demands of the community, often resulting in expectations of low quality, with constituents feeling unserved rather than well-served. For IMLA, the diligence and attention by all of those named above will continue the growth of the organization, meet the ever-changing needs of our members, and protect IMLA from falling into a position of inadequate infrastructure. To be sure, that foundation has clearly enabled our organization for nearly nine decades of providing valuable tools for thousands of members as they serve the legal needs of our local governments.

So, with all of the valuable infrastructure IMLA has to offer, take a look at those areas that are there for the taking as a benefit of membership, and explore their use in your daily practice. I hope to see many of you at the Mid-Year Seminar in mid-April. Good Tidings!

Rahimi: The Challenges of Second Amendment History and Tradition

By: RAVINDER ARNEJA,
IMLA Associate Counsel, Rockville, Maryland

Introduction

"You don't have any doubt that your client is a dangerous person, do you?" Chief Justice Roberts asked pointedly, his tone implying that the answer about Respondent Zackey Rahimi was self-evident. Matthew Wright, however, refused to concede the point on behalf of his client without clarification. "I would want to know what dangerous person means," he countered.

The Chief Justice, seemingly incredulous, replied, "Someone who is shooting at people," sparking soft chuckles from the gallery.

A sheepish Wright conceded, "That's fair."[1]

While the courtroom exchange offered glimpses into the legal complexities at play, the true import of *United States v. Rahimi* will be revealed in the months ahead. As the Supreme Court deliberates, we delve deeper into the ever-shifting landscape of Second Amendment law and assess how the Court's *Bruen* decision continues to reshape gun rights in America. This article analyzes the arguments and explores the potential impact on pending cases.

Rahimi's Road to SCOTUS

Zackey Rahimi's appearance on the Supreme Court docket first began to materialize in February 2020, when his escalating violence led a Texas state court to issue a domestic violence restraining order against him.[2] The order followed Rahimi's assaulting his girlfriend and firing a handgun at a passerby who witnessed the incident. The court deemed these and numerous other actions by Rahimi to be "family violence" with a high likelihood of recurrence, and consequently prohibited him from possessing firearms during the term of the order.[3]

Between December 2020 and January 2021, Rahimi engaged in a disturbing string of shootings in and around Arlington, Texas. The underlying facts were detailed by the district court in a pre-sentencing report and stipulated by Rahimi.[4] His pattern of accelerating criminality included firing multiple shots into an individual's residence after a narcotics sale, shooting at another driver in a road rage incident, and even firing at a constable's vehicle. Rahimi was indicted for possessing a firearm while under a domestic violence restraining order, a violation of 18 U.S.C. §922(g)(8). He pleaded guilty to the federal charges and received a prison sentence exceeding six years.[5]

By way of explanation, Section 922(g)(8) aims to protect individuals from potential harm by prohibiting firearm possession for those subject to domestic violence-based restraining orders.[6] Its application is limited to individuals who have received due process, ensuring they have a hearing with notice and an opportunity to participate before being subject to firearm prohibition. Furthermore, the restraining order itself must contain specific findings of a credible physical threat or a prohibition against force likely to cause harm.[7]

Rahimi appealed to the Fifth Circuit on the grounds that the law violated his Second Amendment rights.[8] On June 8, 2023, the Circuit upheld the statute. [9]

The *Bruen* Sea-Change

Fifteen days later, the Supreme Court decided *New York Pistol and Rifle Club v. Bruen*.[10] In *Bruen*, the Court ruled that New York's licensing regime for carrying a firearm in public violated the Second Amendment.[11] The 6-3 decision overturned a lower court ruling and dramatically reshaped the landscape of gun control legislation nationwide. The majority opinion, authored by Justice Thomas, established

a new "text-history-tradition" test for evaluating Second Amendment challenges.[12] This framework replaced the previous two-step approach that combined historical analysis with means-end scrutiny.

The Court determined that the Second Amendment's text "presumptively guarantees" the right to public carry for self-defense, placing the burden on the government to demonstrate that any restriction on public carry is consistent with the nation's historical tradition of firearm regulation.[13] Justice Thomas's analysis concluded that New York's "proper-cause" requirement, which obligated applicants to demonstrate a special need for self-defense beyond general public safety concerns, lacked sufficient historical justification.[14] The Court found no evidence for a tradition of broadly prohibiting the carrying of commonly used firearms to defend oneself.

A concurring opinion, penned by Justice Kavanaugh and signed by Chief Justice Roberts, clarified that the decision does not affect other aspects of gun control, such as restrictions on who may possess firearms, the types of weapons allowed, or purchasing requirements.[15] Additionally, states may still impose objective licensing requirements for public carry, provided they do not grant excessive discretion to officials or require a showing of special need.[16]

Justice Breyer's dissenting opinion, joined by Justices Kagan and Sotomayor, argued that the majority's rigid historical approach is impractical and undermines consensus on Second Amendment rights.[17] The dissent also criticized the decision for being based on a limited record and failing to consider the practical implications of its ruling.[18]

A Reversal in the Fifth Circuit

Within two weeks after *Bruen*, the Fifth Circuit withdrew its *Rahimi* opinion, asking for supplemental briefings in light of the new analytic paradigm.[19] The government attempted to justify §922(g)(8) using three categories of historical analogues: laws disarming "dangerous" individuals, "going armed" regulations, and colonial-era surety laws.[20] However, the court found none of these sufficiently supported the New York restriction. These historical references were deemed too old, unspecific, focused solely on terrorism, or ineffective in actually disarming individuals.[21] In March 2023, the Circuit reversed itself, finding the statute unconstitutional and vacating Rahimi's conviction:

> Doubtless, 18 U.S.C. § 922(g)(8) embodies salutary policy goals meant to protect vulnerable people in our society. Weighing those policy goals' merits through the sort of means-end scrutiny our prior precedent indulged, we previously concluded that the societal benefits of § 922(g)(8) outweighed its burden on Rahimi's Second Amendment rights. But *Bruen* forecloses any such analysis in favor of a historical analogical inquiry into the scope of the allowable burden on the Second Amendment right. Through that lens, we conclude that § 922(g)(8)'s ban on possession of firearms is an "outlier[] that our ancestors would never have accepted." *Id*. Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated.[22]

The panel found that deprivation of a fundamental constitutional right cannot be based on the relatively lower procedural protections afforded defendants in civil proceedings: "[t]he distinction between a criminal and civil proceeding is important because criminal proceedings have afforded the accused substantial protections throughout our Nation's history," and that §922(g)(8) disarms individuals "subject merely to civil process."[23] According to the Fifth Circuit, while *Heller* suggested that "felons" may be deprived of gun possession, Rahimi's restraining order was merely a civil disposition; if the Second Amendment meant that Rahimi could be deprived of firearm possession merely because he was not "law-abiding," could "speeders" or "[p]olitical nonconformists" also be deprived of their Second Amendment rights?[24]

While acknowledging that previous rulings have circumscribed Second Amendment rights as belonging solely to "ordinary, law-abiding citizens," the court expanded the Second Amendment's protective reach by excluding only specific groups: "felons," "the mentally ill," and those historically stripped of their Second Amendment prerogatives.[25]

Under this calculus, the Fifth Circuit concluded that Rahimi wasn't a convicted felon or otherwise excluded from the Amendment's scope, notwithstanding his prior violent behavior.[26] Therefore, he fell within the ranks of "law-abiding citizens" entitled to Second Amendment protections.[27]

Rahimi Meets *Bruen* at the Supreme Court

Challenging the Fifth Circuit's *Rahimi* determination that § 922(g)(8) was facially unconstitutional, the government successfully petitioned

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Ravinder Arneja is IMLA's Associate Counsel, where he oversees the firm's distance learning programming as well as participating in IMLA's amicus activities and contributing legal analyses to *Municipal Lawyer* and eNews. Prior to joining IMLA, Ravinder received his bachelor's degree in political science from the University of Maryland Baltimore County and earned his Juris Doctor from the University of Michigan Law School. Before graduating in 2022, he worked as a summer intern in the Frederick County State's Attorney's Office and participated in an externship for the US Department of Treasury. Ravinder is admitted to practice in Maryland.

Rahimi *cont'd from page 7*

the Supreme Court for review.[28] The petition highlighted the prevalence of domestic violence in our society and the lethal potential of firearms in such situations, arguing that effective gun control measures are necessary to protect public safety.[29]

Oral argument in *United States v. Rahimi* took place on November 7, 2023.[30] The crux of the government's position was that the Second Amendment protects the rights of "law abiding, responsible citizens."[31] Chief Justice Roberts promptly questioned this proposition, painting a broad canvas of civic responsibility encompassing mundane actions like recycling routines or behavior at a basketball game.[32] He illustrated the challenge of basing a fundamental constitutional right on a subjective term such as "responsible," emphasizing the difficulty in establishing a model for responsibility, where actions deemed irresponsible by some might appear inconsequential to others.[33]

Pivoting away from this grammatical roadblock, Solicitor General Elizabeth Prelogar steered the conversation around "irresponsibility" towards a more definitive and actionable term: danger.[34] This refocusing proved beneficial to the government. Chief Justice Roberts inquired whether "irresponsible" served as a placeholder for "dangerous" when applied to firearm ownership, and Prelogar agreed, confirming that "Our understanding of what history and tradition reflect and how this Court has used the term is that it's identifying those whose possession of firearms presents an unusual danger beyond the ordinary citizen."[35]

This assertion prompted Justice Kavanaugh to probe the potential distinction between "not responsible" and "dangerous."[36] Prelogar acknowledged a nuanced difference, explaining that "not responsible" encompasses individuals who may not intend harm but still pose a threat due to factors like mental illness or age.[37] She clarified that responsibility, in this context, signifies a heightened risk associated with firearm access, regardless of intent.[38] Prelogar further elaborated on the connection between responsibility and danger by drawing an analogy to established precedents regarding sensitive places and dangerous weapons.[39] In these instances, the Court identifies specific contexts and objects that elevate the risk associated with firearms, justifying restrictions based on the potential for harm. The exchange illuminated the government's position on the relationship between responsibility and firearm ownership. By emphasizing the potential danger posed by certain individuals, the government attempted to justify restrictions on access to firearms, even for those who might not pose an immediate or intentional threat. However, the question of how to distinguish between "not responsible" and "dangerous" seems open to further analysis.

Navigating the *Bruen* Uncertainty in Lower Courts

Justice Kagan addressed the uncertainties surrounding the application of the *Bruen* framework in lower courts, prompting an illuminating exchange with General Prelogar.[40] Recognizing the "fair bit of division and fair bit of confusion," Justice Kagan sought guidance beyond the immediate case to assist lower courts in navigating *Bruen's* complexities.[41]

In response, General Prelogar identified three key errors in lower courts' methodologies.[42] First, she highlighted their overly restrictive focus on regulations. Citing *Heller*, she emphasized the importance of considering diverse historical evidence, including "English practice, state constitutional precursors, treatises, commentary, and state judicial decisions" to understand the Second Amendment's scope.[43] This perspective challenges the narrow "regulation-only" interpretation adopted by *Rahimi* and other courts.

Secondly, Prelogar criticized lower courts' tendency to excessively scrutinize historical evidence; their meticulous search for minor discrepancies between past regulations and contemporary provisions disregards the conventional approach to constitutional interpretation.[44] As Prelogar aptly stated, "constitutional interpretation usually proceeds" by using "history and regulation to identify principles," necessitating a level of generality when finding historical analogues.[45]

Finally, Prelogar addressed the erroneous reliance on the absence of regulations in interpreting the Second Amendment.[46] She cautioned against assuming significant weight from the lack of regulations, illustrating this point with the example of disarming domestic abusers.[47] Without substantial counter-evidence, she said, such absence should not be a decisive factor in constitutional interpretation.

The oral arguments exposed potential disparities in interpreting "responsibility" and its connection to firearm possession. This underlying tension raises concerns about subjective interpretations and unequal application of the law. The Court's ultimate decision in *Rahimi* will be challenged to address these concerns and establish a clear and objective framework for assessing responsibility within the context of the Second Amendment.

The Boundaries of *Bruen's* History and Tradition Test

Justice Ketanji Brown Jackson questioned General Prelogar about the potential inconsistencies arising if historical evidence concerning dangerousness, specifically regarding domestic violence, clashed with modern-day interpretations: "I'm just trying to understand how the *Bruen* test works in a situation in which there is at least some evidence that domestic violence was not considered to be…

subject to the kinds of regulation that it is today," she stated.[48]

While acknowledging the importance of historical context and relevant analogues, Prelogar argued that the primary focus should be on establishing the underlying principle of the proposed legislation, such as disarming dangerous individuals.[49] Once established, detailed historical analysis becomes less crucial, and the focus shifts to evaluating the specific regulation based on factors like its scope, evidence of dangerousness, and consensus among other legislatures.[50] Justice Jackson pressed further, highlighting the dilemma faced by legislators grappling with novel situations where established principles might not yet exist.[51] Prelogar conceded that in such cases, a more extensive historical analysis may be necessary to identify and establish relevant principles for future legislation.[52]

This exchange hints at the Court's potential approach to *Rahimi*, suggesting a possible clash between the law's interpretation and the need for sensible gun regulations. While a narrow ruling in favor of the restriction in *Rahimi* might be expected to align with precedent, this nuanced debate could expose the limitations of the underlying ruling rather than solidify its legitimacy. Justice Jackson's inquiries highlight the ongoing challenges of navigating Second Amendment precedents while acknowledging the necessity for reasonable regulations.

An Uphill Battle for Rahimi

James Matthew Wright, representing Rahimi, faced the daunting task of defending his client under the *Bruen* framework. While he diligently argued that there's no history or tradition of gun bans that "applies to rights-holding American citizen," many of the Justices seemed unconvinced.[53] Justice Jackson emerged as a leading voice of skepticism regarding the viability of the *Bruen* framework: "I'm a little troubled by having a history and traditions test that also requires some sort of culling of the history so that only certain people's history counts."[54]

Wright defended the *Bruen* framework while acknowledging the historical exclusion of certain groups. He argued that the focus should remain on the Founding era and the rights-holding citizens of the time.[55] He emphasized that historical laws targeting marginalized individuals "were not people who were part of the community" and therefore should not be considered in the Court's analysis.[56] Wright also stressed the importance of considering the historical understanding of "dangerousness" when evaluating gun control measures.[57] He argued that Founding era societies recognized the existence of dangerous individuals but consistently rejected broad disarmament measures like the one proposed by the government in this case.

"Violence, interpersonal violence, dueling, any robbery," Wright stated. "So, in other words, society understood violence, understood dangerous people. But they rejected at every point the type of dangerousness disarmament principle that the government is advocating."[58]

Other Justices focused on the consequences of adopting Rahimi's interpretation. Justice Kagan questioned the implications of Wright's argument for individuals deemed mentally unfit to possess firearms. Wright conceded that historically, restrictions on the sale of weapons to the mentally ill have existed, but he argued that such restrictions might be unconstitutional under the *Bruen* framework.[59] Justice Kagan's pointed question, "Do you think that the Congress can disarm people who are mentally ill, who have been committed to mental institutions?" directly challenged that proposition.[60] Wright, hesitant to fully embrace the potential consequences of his argument, responded by suggesting that there might be "an enumerated powers problem" and that the historical record regarding restrictions on the mentally ill is "post-Civil War."[61] Justice Kagan, unconvinced, expressed her belief that Wright was "running away from his argument" due to its "untenable" implications.[62] She argued that Wright's logic could potentially apply to a "wide variety of disarming actions, bans, what have you" that are currently considered commonplace and necessary to protect public safety.[63]

Several Justices voiced confusion and frustration with Wright's argument that protective order hearings do not generally afford the due process required to deprive a Constitutional right. Justice Barrett grappled with Wright's procedural argument. "I'm so confused, because I thought your argument was that there was no history or tradition, as Justice Kagan just said, of this kind -- of disarmament in this circumstance. But now it kind of sounds like your objection is just to the process."[64]

Despite Wright's passionate advocacy, his historical focus and narrow definition of "rights-holding citizens" left many Justices skeptical of the *Bruen* framework's viability for domestic violence cases. Justice Jackson's pointed questions highlighted the potential exclusion of marginalized groups and the framework's difficulty in adequately addressing contemporary issues. While Wright defended the principle of considering dangerousness in historical context, his hesitancy to fully engage with the potential consequences of his argument further cast doubt on the framework's application in this particular case.

Fallout from *Bruen*

Rahimi and scores of other cases nationwide confirm that *Bruen* is profoundly influencing gun control policy in American. But that influence is inconsistent. Undoubtedly, the history and tradition test was intended to provide a clear framework

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Public Good Meets Private Property: the Hydra-Headed Takings Clause

By: ERICH EISELT,
IMLA Deputy General Counsel and Director of Legal Advocacy



The Fifth Amendment is an interesting amalgam, melding five constitutional protections. Three relate to criminal justice (indictment by grand jury, freedom from self-incrimination, and prohibition against double jeopardy). A fourth mandates Due Process before the deprivation of life, liberty, or property. And last but certainly not least is the subject of this note--the Takings Clause: "Private property shall not be taken for public use without just compensation."

As with virtually every provision in the Bill of Rights, interpretation of the Fifth Amendment Takings Clause is continually evolving. Some will argue that Takings, a principle made applicable to the states through the Fourteenth Amendment and also contained in every state constitution,[1] is relentlessly expanding in favor of hitherto unknown private property interests, to the detriment of the public. Others will view it as just the opposite: a crusade against ever-encroaching governmental overreach. Regardless of the perspective, IMLA's legal advocacy activities have afforded a front row to some of these contests, discussed below.

Prolog-The Primacy of Private Property, and its Limits: First, prefatory comments. The Takings cases garnering IMLA's participation build on more than two centuries of deliberation. Protection of private property has been a fundamental pillar of American democracy since our founding: as James Madison framed it in the Federalist papers: "Government is instituted no less for the protection of the property than of the persons of individuals."[2] But the Bill of Rights established that private property was never sacrosanct as against the federal government, which would require access to lands and facilities needed to accommodate a growing populus.

The United States Supreme Court first recognized federal eminent domain power in 1875 in *Kohl v. United States*.[3] The case involved a landowner's challenge to the power of the United States to condemn his land in Cincinnati, Ohio for use as a customs house and post office building. Justice William Strong called the authority of the federal government to appropriate property for public uses "essential to its independent existence and perpetuity."[4] That authority likewise resided in the States:

> No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.[5]

Local Government and Zoning Power: Subdivisions of states--local governments--would also exercise authority over private property, not only through eminent domain, but as a function of their police powers, by controlling use and development of real estate within their boundaries. In 1916, reacting to the deprivation of airspace and seven acres of sunlight from nearby urban dwellers by the newly constructed 42-story Equitable Life building, New York City instituted the nation's first citywide zoning law.[6] As the New York City Department of Planning site puts it:

> The groundbreaking Zoning Resolution of 1916, though a relatively simple document, established height and setback controls and designated residential districts that excluded what were seen as incompatible uses. It fostered the iconic tall, slender towers that came to epitomize the city's business districts and established the familiar

scale of three- to six-story residential buildings found in much of the city. The new ordinance became a model for urban communities throughout the United States as other growing cities found that New York's problems were not unique.[7]

Local authority over private property development would not go unchallenged. In 1924, a federal court in the Northern District of Ohio found that the zoning map enacted by the Village of Euclid worked a compensable taking of property rights from Ambler Realty Corporation, owner of 68 undeveloped acres in the municipality.[8] Two years later, in a groundbreaking reversal, the Supreme Court upheld Euclid's zoning scheme, determining that the legislation had a rational basis and comported with Fourteenth Amendment Due Process requirements.[9] *Village of Euclid v. Ambler Realty Co.* acknowledged that impairment of development rights could be considered in evaluating the constitutional challenges to a proposed zoning provision—but found the developer's assertions about lost profits to be conjectural and insufficient to override the Village's societal goals.

While striking down subsequent zoning measures which bore an inadequate relation to the public health, safety, morals, or general welfare,[10] the Court would continue to confirm the viability of local zoning regulations which satisfied rational basis standards, including a decision nearly 50 years later, in *Village of Belle Terre v. Boraas,* upholding an ordinance which limited occupancy of single residential dwellings to "family" members.[11] Today, while constitutional imperatives must be observed, there is little doubt that local governments have the authority under police power to exert significant control over the character and extent of land use within their jurisdiction. One arena, among many, in which that authority has been applied is housing—a topic of heightened interest today: whereas zoning power has often been exercised to limit growth and prohibit nonconforming usage, arousing challenges from developers and business interests, now that authority is increasingly wielded to encourage residential density and stimulate commercial activity, instigating lawsuits from existing homeowners.[12]

Regulatory Takings: The judicial latitude granted to governments in zoning matters was based primarily in Due Process and rational basis analyses, but implicit in those deliberations was an inquiry into the degree of economic diminution visited on the landowner: in the case of *Euclid*, for example, the injury had not been clearly demonstrated. The scenario where governmental regulations effectively deprived a landowner of *all* economic use of its property had been considered in a 1922 case brought by a coal company after the Pennsylvania legislature passed a regulation prohibiting mining where it might cause subsidence affecting nearby homes. In *Pennsylvania Coal Co. v. Mahon*,[13] the Court found that the legislative measure unconstitutionally eviscerated the mining company's property rights. Writing for the majority, Justice Holmes found that police power was inadequate to justify the mining prohibition, and warned of Fifth Amendment overreach:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.[14]

In the following decades, the Court continued to evaluate claims by landowners whose property interests were diminished by governmental regulation, but no clear analytic parameters emerged. That vacuum was addressed in 1978, when Penn Central Railroad found itself blocked by a New York City landmarks preservation law from developing airspace above its property encompassing Grand Central Station. *Penn Central Transportation Co. v. New York City* [15] would uphold the City's regulation, while providing some additional guidelines: to determine whether such a restriction on property use amounts to a taking, the Court would henceforth apply a flexible approach considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.[16]

Nexus and Proportionality: While remaining a touchstone for Fifth Amendment regulatory Takings analysis, the *Penn Central* test would be joined by a paradigm more challenging for local governments. Enter *Nollan*, *Dolan*, and *Koontz*. There the Court grappled with the requirement by local adjudicative entities that property owners provide exactions, whether in the form of financial payment or property interests, as a condition to building on their land.

In *Nollan*, homeowners desired to replace their 500 square foot beachfront bungalow with a 2500 square foot residence. Finding that the expansion would block views of the ocean, the California Coastal Commission conditioned the issuance of a construction permit on the couple's conveying a public easement across a 25-foot wide swathe of their land bordering the tideline.[17] That posture was upheld by the California Court of Appeal but did not survive at the United States Supreme Court. Writing for a 5-4 majority, Justice Scalia found unacceptable the lack of nexus between the Commission's easement requirement and the original purpose of the building restriction: "Unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion."[18]

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In *Dolan*, the owner of an Oregon plumbing and electrical supply business was told by the City of Tigard Planning Commission that she could expand her store and pave her parking lot if she dedicated land to a public greenway and helped develop a pedestrian and bicycle path in order to relieve projected traffic congestion; a *quid pro quo* which failed the Court's "unconstitutional conditions" test.[19] And in *Koontz*, a Florida water Management District refused to issue a wetlands building permit despite the property owner's offer to deed the District with a conservation easement on nearly three-quarters of his property: the District required a smaller development and a larger conservation easement, or the landowner's paying contractors to make improvements to District-owned wetlands several miles away.[20] Writing for a 5-4 majority, Justice Alito advised in *Koontz* that:

> [U]nder*Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.[21]

In the aftermath of *Nollan*/*Dolan*/*Koontz*, IMLA has seen Takings litigants increasingly asserting an "unconstitutional conditions" basis for their claims. While a more flexible *Penn Central* four-factor test may be urged by governmental actors, they increasingly face the demand that their property-related actions demonstrate (1) an "essential nexus" between a legitimate governmental interest and the required exaction (per *Nollan*) and (2) "rough proportionality" between the exaction and projected impact of the landowner's permitted use (per *Dolan*).

The Adjudicatory Versus Legislative Debate: Somewhat obscured behind the unconstitutional conditions lens in the *Nollan*/*Dolan*/*Koontz* trilogy was another common element. In each, an adjudicatory actor--appointed under or subject to executive authority--decided on a one-off basis what concession was appropriate in exchange for issuance of a building permit. Those adjudicative bodies did not undertake the findings, impact studies, public hearings, and other indicia of Due Process and reasonableness that might otherwise justify the government's requisites.

In contrast to the measures which failed constitutional scrutiny in *Nollan*/*Dolan*/*Koontz*, legislatively derived, generally applicable fees or concessions required of property owners to obtain development permits had, until recently, been granted latitude by some courts, particularly in California. Two decades ago, a California Supreme Court decision provided one rationale for such a distinction—legislative accountability to the electorate:

> A city council that charged extortionate fees for all property development …would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls."[22]

That logic played a role in *Building Industry Association-Bay Area v. City of Oakland*,[23] a 2019 case in which IMLA filed an amicus brief supporting the City. There, the Ninth Circuit rejected a Takings challenge to an Oakland ordinance which required developers to spend a small percentage (up to one percent) of the project budget to displaying art in areas freely accessible to the public, or, alternatively, to pay that amount directly into a city fund set up to further those public art goals. The court found that such a program did not force developers to cede property, but even if it had, the measure averted heightened scrutiny because it was legislatively derived:

> We find that the Ordinance conditions, which merely regulate how developers may use their property rather than forcing developers to cede property rights to the city, do not facially amount to a taking. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Moreover, even assuming that they did, BIA is precluded by our precedent from raising its claim in this posture, both because it is a facial claim and because the claim challenges a legislative act, rather than an adjudicative land-use determination.[24]

The legislative safe harbor is increasingly under fire. In 2022, IMLA provided amicus support to the Metropolitan Government of Nashville defending a case brought by two landowners who objected to the government's requirement that, as a condition of granting them permits to build or expand their homes, the applicants would be required to build sidewalks on their properties or contribute to an in-lieu sidewalk fund.[25] There, Nashville had argued that its legislatively derived permit program, intended to address the City's severe paucity of sidewalks, was immune from traditional exaction analysis because the City Council was subject to voter removal, and the generally applicable sidewalk measure had been subject to public hearings and related transparency. The Sixth Circuit reversed the lower court's grant of summary judgment to the City, finding that, irrespective of the provenance of the sidewalk ordinance, it did not satisfy the requisite nexus and proportionality standards.[26]

> [T]the parties here disagree over the "test" that we should use to judge whether the sidewalk ordinance commits a taking. The landowner plaintiffs ask us to apply the "unconstitutional-conditions" test that the Supreme Court adopted to assess conditions on building permits in *Nollan v. Califor-*

nia Coastal Commission, 483 U.S. 825 (1987). Nashville responds that the Court has applied *Nollan's* test only to ad hoc administrative conditions that zoning officials impose on specific permit applicants—not generally applicable legislative conditions that city councils impose on all permit applicants. For legislative conditions, Nashville says, we should turn to the deferential "balancing" test that the Court adopted to assess zoning restrictions in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978). We side with the landowner plaintiffs. Nothing in the relevant constitutional text, history, or precedent supports Nashville's distinction between administrative and legislative conditions. *Nollan's* test thus should apply to both types, including those imposed by the sidewalk ordinance.[27]

The adjudicative versus legislative argument recently made its way to the Supreme Court. *Sheetz v. County of El Dorado*,[28] another case where IMLA provided amicus support to the local government, arose when California's El Dorado County Board of Commissioners adopted a General Plan which conditioned the issuance of a building permit on the landowner's payment of a traffic impact mitigation (TIM) fee to finance the widening of existing County roadways and construction of new roads. The County did not make individualized analyses as to the traffic impact of each project, but based the TIM fee on a formula which considered the geographic zone of the proposed structure and the nature of the building involved (single-family residential, multi-family residential, general commercial).

Under that formula, the County agreed to issue a building permit to landowner George Sheetz, who sought to build a single-family modular home on his property, on the condition that he pay a TIM fee in the amount of $23,420. He paid, obtained the permit, and promptly challenged the TIM fee as violating the Takings Clause. Citing *Nollan* and *Dolan*, he argued that the TIM fee was an unconstitutional condition because the County had not made an "individualized determination" as to the "essential nexus" and "rough proportionality" between the amount of the fee and the traffic impact resulting from his project.

The California Court of Appeal held in favor of the County. It found that, in contrast to the one-off, ad hoc, adjudicative mechanisms in *Nollan* and *Dolan*, the TIM fee program had been legislatively derived and was generally applicable to all County landowners pursuant to a fully transparent formula. These differences meant that a lesser degree of scrutiny was appropriate for the TIM fee—one which the County satisfied.

Sheetz appealed, obtaining Supreme Court certiorari on the following question: "whether a permit exaction is exempt from the unconstitutional conditions doctrine as applied in *Nollan* and *Dolan* simply because it is authorized by legislation."[29] At oral argument on January 9, 2024, the Justices seemed uniformly skeptical of the presumption that a legislatively-derived measure inherently escapes heightened scrutiny: as Justice Gorsuch put it, there appeared to be "radical agreement" on that point. But many questions arose; some Justices queried whether the TIM fee was actually a tax, while others asked whether an impact fee was even subject to traditional Fifth Amendment Takings analysis at all.

Among other points, IMLA's amicus arguments—raised in a brief filed jointly with the City and County of San Francisco and IMLA's affiliates in the Local Government Legal Center--emphasized the importance of impact fees to local governments, particularly given the impediments localities face in raising taxes and the legal mandate that they balance their budgets. IMLA and the other amici also pointed out that many impact fees are the product of robust nexus studies used by localities as they craft fee structures, and pointed out the impracticality and cost which would result if individualized impact assessments of the sort demanded by Mr. Sheetz were to become mandatory.[30]

On one level, the *Sheetz* litigation presented a concerning possibility that impact fees nationwide could be deemed invalid under rigorous unconstitutional conditions analysis. Indeed, Justice Alito seemed willing to position the fee directly in the crosshairs of *Nolan/Dollan/Koontz*, offering the Sheetz counsel an opportunity to characterize the permit requirement as a "no building easement" demanded by the government.[31] But given the narrow parameters of the Question Presented by the Court and the subsequent tenor of oral argument, the consensus seems to be that the issue will be remanded to the California courts on relatively narrow grounds, leaving intact generally applicable impact fees, so long as supported by reasonable economic and policy rationales.[32]

The Right to Exclude as a Protected Property Right: IMLA has also been involved in another continually-evolving element in the Takings debate—the degree of governmentally-caused or authorized intrusion on private property which will offend the Constitution. The right to exclude others from one's land is undeniably one of the fundamental "sticks" of property ownership. We know from *Nollan* that granting the public a permanent high tide easement across private beachfront, unless closely tethered to the right being sought by the landowner, violates the Fifth Amendment. We also know from another foundational Supreme Court decision--*Loretto v. Teleprompter Manhattan CATV Corp*.-- that a governmental mandate which grants a third party the right of continuous presence on private property, even if the "presence" is no more than cable television wires and a small device attached to a building, constitutes a *per se* physical Taking.[33]

Other Supreme Court precedent illustrates that the intrusion need not be permanent to fail Fifth Amendment scrutiny. Intermittent low-altitude governmental overflights that impair a landowner's

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enjoyment of property is a Taking.[34] So is seasonal flooding caused by the government, as confirmed in *Arkansas Game and Fish Commission v. United States*,[35] another case where IMLA filed an amicus brief. Against that background, it was predictable that governmentally-mandated physical entry onto private property by third parties, even if only periodic, would be the subject of a Takings challenge.

Cedar Point Nursery v. Hassid [36] scrutinized a California law that required agricultural businesses to allow labor organizers onto their land three times a day for 120 days each year. A divided panel of the Ninth Circuit held that, although the regulation effected an uncompensated easement, it did not constitute a *per se* physical taking of private property because it did not allow continuous occupation.[37] Not surprisingly, the litigants disagreed as to the proper test to apply: while the labor union argued that a more nuanced *Penn Central* inquiry was appropriate, the nursery owner pointed to *Loretto's per se* analysis as the applicable reference.

The question presented in *Cedar Point* was whether the uncompensated appropriation of an easement that is limited in time effects a *per se* physical taking under the Fifth Amendment. The Court found that depriving landowners of their right to deny entry, even if the deprivation is only intermittent, violates the Takings Clause:

> [G]overnment authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation. As in those cases, the government here has appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers' property—to literally "take access," as the regulation provides. Cal. Code Regs., tit. 8, §20900(e)(1)(C). It is therefore a per se physical taking under our precedents.[38]

IMLA joined an amicus brief filed by a broad group of local government associations, arguing that occasional governmental entry onto private property was vital to civic order:

> State and local officials, and their delegees, routinely must enter onto private property as an incident to the exercise of their multitudinous duties. From restaurant inspections to guardian ad litem home visitations, limited purpose physical intrusions by governments are a ubiquitous feature of American life. . . . [Petitioners] posit that a landowner's right to exclude others not only comprises a distinct property interest in toto, but also that it is divisible into micro-interests abridged by anyone who intrudes for any period of time. In this way, each governmental entry onto private land, no matter how fleeting or unobtrusive, is transmogrified into a direct appropriation of a property interest—a classic taking.[39]

Illustrating the value of voicing to the Court the concerns of government, whether as a party or as an amicus, Chief Justice Roberts made it clear that *Cedar Point* is not fatal to legitimate health, safety, and related public functions:

> The Board, seconded by the dissent, warns that treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property. See post, at 11–14. That fear is unfounded. . . [T]he government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. . . . When the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections, both the nexus and rough proportionality requirements of the of the Court constitutional conditions framework should not be difficult to satisfy.[40]

The Right to Exclude and the Right to Evict: If the right to exclude is girded by the Takings Clause, is the right to evict similarly protected? That question is at the heart of a recent case where IMLA signed onto an amicus brief supporting a member. In *El Papel LLC v. City of Seattle*,[41] two landlords asserted that the covid-based eviction moratoria imposed by the City and by the State of Washington violated the Fifth Amendment.

The Ninth Circuit affirmed the lower court Takings outcome in favor of the governments, specifically rejecting the landlords' reliance on *Cedar Point*:

> While the Landlords make some compelling points, *Cedar Point Nursery* does not support their claim. Unlike in *Cedar Point Nursery*, where a state regulation required agricultural employers to grant entry onto their property to union organizers for up to three hours a day so that the organizers could solicit support for unionization, *see* 141 S. Ct. at 2069–70, Seattle's eviction restrictions did not impose a physical occupation on the Landlords, *see Yee*, 503 U.S. at 527 ("The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land."). Nor did Seattle's restrictions compel the Landlords to use their property for a specific purpose. The Landlords here chose to use their property as residential rentals; the tenants' occupancy was not imposed over the Landlords' objection in the first instance. *Cf. Yee*, 503 U.S. at 528 (finding that the government had not "required any physical invasion of [the owners'] property" by the park owners' existing tenants). And the challenged regulations allowed the Landlords to evict their tenants for some specified

purposes. . . . Although the Landlords assert that Seattle's eviction restrictions deprived them of their right to exclude, this right is not absolute in the landlord/tenant context. (*citations excluded*).[42]

In late January 2024, the *El Papel* plaintiffs petitioned the Supreme Court for certiorari, foreseeable in part due to their representation by the Pacific Legal Foundation (PLF). That group has filed in numerous similar cases, implicitly challenging *Yee* and arguing that any law limiting a landlord's right to evict a tenant, even if delayed temporarily in support of basic tenant fairness, violates a fundamental precept of property ownership.

Although certiorari was denied in *El Papel* in late February, the question seems destined for further debate: the Eighth Circuit has reached a diametrically opposite conclusion on the *El Papel* issue. *Heights Apartments v. Walz* challenges a Covid-era temporary eviction moratorium (Executive Order) issued by Minnesota Governor Tim Walz—similar to the Seattle measure—and those authorized by more than 30 states, the Supreme Court of North Dakota, the 116th Congress, and the Trump Administration.[43] In *Heights*, the Eighth Circuit found, citing *Cedar Point*, that the landlords had stated a Takings claim sufficient to reverse a lower court's dismissal:

> Heights alleges the [EOs] effectuated physical takings because they forced landlords to accept the physical occupation of their property regardless of whether tenants provided compensation. The Walz Defendants contend that no physical taking has occurred because landlords were not deprived of their right to evict a tenant. Rather, they argue, the [EOs] imposed only a restriction on when a landowner could evict a tenant, making it similar to Yee v. City of Escondido, 503 U.S. 519 (1992) (finding a rent control ordinance was not a physical taking). Since the parties briefed this issue, the Supreme Court decided Cedar Point Nursery, which is instructive in this case. . . . The Court explained:
>
> "Whenever a regulation results in a physical appropriation of property, a per se taking has occurred." Id. at 2072. It is immaterial whether the physical invasion is "permanent or temporary," "intermittent as opposed to continuous," or whether the government is directly invading the land or allowing a third party to do so.…
> According to Heights' complaint, the [Orders] "turned every lease in Minnesota into an indefinite lease, terminable only at the option of the tenant." Heights has sufficiently alleged that the Walz Defendants deprived Heights of its right to exclude existing tenants without compensation. The well-pleaded allegations are sufficient to give rise to a plausible per se physical takings claim under Cedar Point Nursery.[44]

Governor Walz sought rehearing en banc and failed; five judges would have granted his request, and one authored a vigorous dissent.

Further landlord cases seek Supreme Court review. *Kagan v. City of Los Angeles* challenges a law which requires one year's notice before terminating a lease and evicting the tenant.[43] The Ninth Circuit upheld that provision, generating this argument in PLF's request for cert:

> This decision is irreconcilable with physical takings precedent from this Court, such as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). *Loretto* and *Cedar Point* hold that government-authorized physical invasions of property, whether by things or people, qualify as a per se, physical taking of property. *Cedar Point*, 141 S.Ct at 2072. Moreover, a physical occupation is a taking whether it is for one year or a hundred. Thus, that a property owner may be able to remove their property from the rental market, after an unwanted tenant is permitted to remain for a year, does not cure the taking. A year-long, unwanted occupation is still a violation of the owner's right to exclude strangers from the property, and a taking. Id. at 2074.[44]

The petitioner in *Kagan* argues that, under *Cedar Point*, a Fifth Amendment violation occurs as soon as any such impairment in a landlord's rights is permitted, even without any actual entry:

> [A] completed intrusion into property is not needed to state a physical takings claim. A per se, physical taking arises as soon as government *authorizes* the occupation of property. *Cedar Point*, 141 S.Ct. at 2072.[45]

Other versions of the debate about a landlord's right to evict have sought answers at the Supreme Court. The Court recently considered petitions in two Takings cases arising from the Second Circuit, each challenging New York City laws designed to protect tenants. In *74 Pinehurst LLC v. City of New York* (no. 22-1130), owners of smaller New York City apartment buildings (10 to 33 units) challenge the City's Rent Stabilization Law (RSL). The RSL allows landlords to evict tenants under limited circumstances, including for breach of the lease, if the unit will be undergoing extensive rehabilitation, or if a family member requires housing in the unit. But beyond minimal exceptions, the RSL probits eviction of rent-paying tenants. The Second Circuit found no physical takings claim because Petitioners voluntarily entered the rental market in the first instance and could, in some circumstances, evict tenants who breach their leases. The Petitioners contended

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otherwise: the RSL grants tenants and their successors a perpetual right to renew the lease, which "strips owners of their right to exclude others from their property and prevents them from living in their own apartments."[46] The result, they say, violates the Court's *per se* Takings jurisprudence in *Loretto* and *Cedar Point* and departs from *Penn Central's* regulatory Takings analysis.[47]

The question presented in *74 Pinehurst* was "(1) Whether a law that prohibits owners from terminating a tenancy at the end of a fixed lease term, except on grounds outside the owner's control, constitutes a physical taking; and (2) whether allegations that such a law conscripts private property for use as public housing stock, and thereby substantially reduces its value, state a regulatory takings claim."[48]

Under the same rubric, the Petition in *335-7 LLC v. City of New York* (no. 22-1170) queried whether the RSL and related regulations which inhibit eviction effect any or all of the following: a per se physical taking (by expropriating petitioners' right to exclude); a confiscatory taking (by depriving petitioners of a just and reasonable return); or a regulatory taking (as an unconstitutional use restriction of petitioners' property).[49]

On February 20, 2024, as this article was being written, the Court denied cert in *74 Pinehurst* and *335-7 LLC*. But there is at least one vote for further consideration of the landlord-tenant Takings debate. As Justice Thomas put in in his dissent from denial:

> [T]o evaluate their as-applied challenges, we must consider whether specific New York City regulations prevent petitioners from evicting actual tenants for particular reasons. Similarly, petitioners' facial challenges require a clear understanding of how New York City regulations coordinate to completely bar landlords from evicting tenants. The pleadings do not facilitate such an understanding. However, in an appropriate future case, we should grant certiorari to address this important question. It remains to be seen whether the Court will seize upon such an opportunity to further expand the ambit of private property rights shielded under the Takings umbrella, and to check governmental efforts at protecting tenants.[50]

Law Enforcement Damage as a Taking: A recently emergent debate in another arena of Takings litigation seems unremarkable at first but requires close attention by local governments. It has long been virtually beyond question that damage to property caused during legitimate police activity is not a compensable Taking. In *Lech v. Jackson*,[51] IMLA provided amicus support to Greenwood Village, Colorado after a local couple sued the City's police chief and others to recover for extensive injury to their home caused by law enforcement as they pursued a barricaded gunman who repeatedly shot at police. The Circuit affirmed the district court's grant of summary judgment to the defendants, agreeing that the destruction was not, as plaintiffs argued, a species of eminent domain. Rather, citing numerous other Circuits, it held that officer-caused damage in the course of enforcing the criminal code is a legitimate exercise of police power, not susceptible to Takings-based compensation.[52]

That question of law was challenged by a Texas district court in 2022 as it considered Vicki Baker's suit to recover for damage to her home after City of McKinney police pursued a suspect who had entered the premises with a 15-year old hostage.[53] Baker conceded that officers' extensive use of teargas and destruction of her garage door and fence were legitimate police actions but disagreed that further analysis was foreclosed—a position the lower court adopted:

> The City asks this Court to adopt what would constitute a per se rule—that destruction to private property resulting from the exercise of valid police power cannot constitute a Fifth Amendment Taking. Neither the Supreme Court nor the Fifth Circuit have directly found a taking that requires just compensation when destruction of property results from the exercise of valid police power. The City correctly points out that other circuits have foreclosed recovery under similar circumstances. . . However, both the Fifth Circuit and the Supreme Court have suggested such action could amount to a taking.[54]

The court denied the City's motion to dismiss. Baker's claim went before a jury, which which found McKinney liable for $60,000 in damage to her residence and furnishings[55]

On appeal to the Fifth Circuit, the City sought IMLA's amicus assistance. Among other points, IMLA's brief emphasized the negative consequences which would result if police—or fire departments, EMTs, and other first responders—considered the costs to their departments before acting. The City and IMLA were pleased with the Circuit's reversal of the district court:

> We conclude that, as a matter of history and precedent, the Takings Clause does not require compensation for damaged or destroyed property when it was objectively necessary for officers to damage or destroy that property in an active emergency to prevent imminent harm to persons.[56]

Vicki Baker's case would not end there, and her Fifth Circuit trajectory is now coinciding with a similar police damage claim at the Sixth Circuit. In 2022, Mollie and Michael Slaybaugh sued the Town of Smyrna, Tennessee and Rutherford County for extensive damage to their home.[57] Officers had pursued the Slaybaugh's adult son to the residence based on a felony arson and murder warrant in the death of a neighboring county sheriff's deputy. The son was known to be armed and

refused to exit, prompting police to fire some 35 teargas cannisters into the house. The Slaybaughs sought more than $70,000 in damages—a claim which was denied by the Middle District of Tennessee.

Appealing to the Sixth Circuit, the Slaybaughs cited the still-valid Texas district court holding in favor of Vicki Baker.[58] The appellees-Rutherford and Smyrna-then cited the Fifth Circuit *Baker* reversal. While the Fifth subsequently denied *en banc* review in *Baker*, six of seventeen judges would have re-heard the case, and two authored a spirited dissent from the denial, criticizing what they view as the majority's improperly narrow application of the Takings Clause.[59] Unsurprisingly, the Slaybaughs' counsel promptly provided that dissent to the Sixth Circuit.

As noted by the district court in *Baker*, the Supreme Court has not formally opined on the intersection of police-caused damage and the Takings Clause. That status may soon change; the Institute for Justice, counsel for the homeowners in both *Baker* and *Slaybaugh*, has just petitioned the Court for certiorari in *Baker*. If granted, IMLA will have yet another opportunity to advocate for the interests of local government.

The Surplus Equity Conundrum: While the Court has yet to opine on the law enforcement property damage issue, last year it ruled emphatically on another facet of Takings: governmental retention of amounts in excess of unpaid real property taxes, interest, and penalties. *Tyler v. Hennepin County*--another case where IMLA filed as an amicus--was brought by PLF on behalf of an elderly homeowner who had not paid property taxes on her empty former residence and failed to answer notices about the potential governmental sale of her home. [60] Under Minnesota law, once a statutory timeframe passed without action by the taxpayer, absolute title vested in the County, which could then sell the property and retain the proceeds. The eventual $40,000 sales price exceeded the $15,000 owed to the County by Ms. Tyler, and she sued to recover the surplus.

The County argued that Minnesota's notice requirements, various redemption opportunities, lengthy timeframe before forfeiture, and other factors safeguarded Tyler's constitutional rights. The Court disagreed, ruling 9-0 that state law alone does not define "property" for Fifth Amendment purposes and that retention of the home's sales price in excess of amounts owed by Ms. Tyler to the County was unconstitutional.[61] While the Court clearly rejected the proposition that state law is the sole source of property rights under the Takings Clause, its statement that courts must "also look to 'traditional property law principles,' plus historical practice and this Court's precedents" left many questions unanswered. The decision does not provide clarity as to when the Takings actually occur or how the property is to be valued. And it creates significant issues for more than a dozen states with real property forfeiture regimes similar to Minnesota's.

***Knick*-The Private Property Shortcut:** As impactful as the foregoing precedents may be on Takings litigation, a decision that focused on process as much as on defining property rights, is arguably even more significant. Until 2019, it had been settled law for more than three decades that landowners seeking state law Takings recourse had to first pursue their remedies via inverse condemnation proceedings at state court, litigating whether compensation would be paid, and how much.[62] Rose Mary Knick, owner of 90 acres in rural Pennsylvania, became the object of an ordinance passed by Scott Township requiring unfettered public access to gravesites on private property. Initially directed to resolution at a state forum, she instead pursued a Section 1983 claim in federal court.

When the Third Circuit upheld dismissal of her case, she obtained Supreme Court certiorari, represented by the PLF. IMLA joined a large group of local government advocates in an amicus brief which emphasized that state law Takings compensation issues were most effectively resolved in state courts and that Knick's property rights were appropriately protected under such a process.

A 6-3 majority held for Knick. As Justice Roberts summarized the holding:

> We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time.[63]

Conclusion

The foregoing is not a complete catalog of the campaigns between private property owners and local governments where IMLA has provided amicus support. But this brief survey of real property Takings cases should serve to highlight the continuing pressures which localities will face as landowners wield a robust Fifth Amendment arsenal. IMLA looks forward to continuing its support of local governments in that debate.

ML

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Erich Eiselt is IMLA's Deputy General Counsel and Director of Legal Advocacy. In addition to his Legal Advocacy responsibilities, he leads IMLA's Affirmative Litigation group. He is a graduate of the University of Virginia Law School, where he was a member of the Virginia Journal of International Law. Erich is admitted to the New York bar, the Sixth Circuit and the United States Supreme Court.

Takings *cont'd from page 17*

Notes

1. Emilio Longoria, Properly Construing the Just Compensation Clause, 64 Bost. Col. L. Rev. 6, at.1379-80 (2023).
2. James Madison, *Federalist Papers* 54.
3. 91 U.S. 367, (1975).
4. *Id*. at 371
5. *Id*. at 371-72..
6. *City Planning History-2016 Zoning Resolution*, New York City Department of City Planning, City Planning History - DCP (nyc.gov).
7. *Id*.
8. Ambler Realty Co. v. Village of Euclid, 197 F. 307 (1924).
9. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
10. *See for example* Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928): "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." (citing *Village of Euclid*).
11. 416 U.S. 1 (1974).
12. *New York Supreme Court Upholds Town of Yorktown Zoning Law,* The Bcw, Nov. 29, 2023 (validating town's overlay districts formed to stimulate economic activity and add housing via multifamily and mixed-use development) NYS Supreme Court Upholds Town of Yorktown Zoning Law - Business Council of Westchester (thebcw.org)
13. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
14. *Id*.
15. 438 U.S. 104 (1978).
16. *Id*. at 124. The Court reasoned that the railroad still enjoyed the economic benefit it had always obtained from its operation of Grand Central-user fees, rents, and the like.
17. Nollan v. California Coastal Commission, 483 U.S. 825 (1987).
18. *Id*. at 837.
19. Dolan v. City of Tigard, 512 U.S. 374 (1994).
20. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 605 (2013).
21. *Id*.
22. San Remo Hotel v. City and County of San Francisco, 27 Cal.4th 643, 671 (Cal. 2002).
23. 775 Fed.Appx. 348 (2019).
24. *Id*. at 349.
25. Knight v. Metropolitan Government of Nashville and Davidson County, 67 F.4th 816 (6th Cir. 2023).
26. *Id*. at 818.
27. *Id*.
28. Sheetz v. County of El Dorado, No. 22-1074 (2024).
29. Petition for Certiorari, *Sheetz*.
30. IMLA Amicus Brief in Support of Appellee, *Sheetz*.
31. Oral argument, *Sheetz*, transcript at p. 13.
32. Amy Howe, *Court split over California man's takings dispute*, SCOTUSblog, Jan. 9, 2024.
33. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) construed a New York state law requiring property owners to permit installation and maintenance of cable television wires on their premises. After losing at the New York Court of Appeals, Jean Loretto, owner of a five-story apartment building on Manhattan's West Side, successfully argued at the United States Supreme Court that mandated installation of a ½-inch diameter cable and two 1½-cubic foot boxes on her roof was a Taking.
34. United States v. Causby, 328 U.S. 256 (1946). While invalidating the common law doctrine ("*ad coelum*") that landowners' rights extend indefinitely into the airspace above the subject property, the Court ruled that low elevation flights, below the public airspace, worked a compensable Taking.
35. 538 U.S. 623 (2012). In *Arkansas Fish and Game*, the state entity sought just compensation under the Takings Clause for six consecutive years of Army Corps of Engineers-caused flooding during the growing season, destroying more than 18 million board feet of hardwood timber. The Court of Federal Claims' $5.7 million award to the state was reversed at the Federal Circuit; a unanimous Supreme Court reversed in turn, restoring the award.
36. Cedar Point Nursery v. Hassid, No. 20-107 (2021).
37. *Id*.
38. *Id*.
39. IMLA amicus brief, *Cedar Point*.
40. *Id*. The Court cited pesticide inspections, hydroelectric project investigations, pharmaceutical inspections, and nuclear material inspections as the type of governmental functions that should satisfy unconstitutional conditions analyses.
41. No. 22-35656 (9th Cir. Oct. 26, 2023).
42. *Id*.
43. Kagan v. City of Los Angeles, No. 21-55233 (9th Cir. Nov. 10, 2022).
44. Petition for Certiorari, Kagan v. City of Los Angeles, NoA. 22-739 (April 2023).
45. *Id*.
46. Petition for Certiorari, *74 Pinehurst LLC v. City of New York*.
47. Not surprisingly, the Petition cites to Justice Thomas' comment that the Court's "current regulatory takings jurisprudence leaves much to be desired." Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n, 141 S. Ct. 731, 731 (2021) (Thomas, J., dissenting from denial of certiorari)
48. *Id*.
49. Petition for Certiorari, *335-7 LLC v. City of New York*.
50. Denial of Certiorari, *74 Pinehurst LLC* and 335-7 LLC, Feb. 20, 2024, Thomas, J. dissent.
51. No. 1801-51 (10th Cir. Oct. 19, 2019).
52. *Id*.

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DAY IN THE LIFE

An interview with
VICTORIA J. TAKAYESU,
Corporation Counsel,
Maui County, Hawaii

By: AVERY MORRIS,
IMLA Editorial Staff

Ditching the Pinstripes for Paradise



ML: Aloha, Tori! Why don't you tell us about your life leading up to your position as Corporation Counsel?
I was born in Queens, NYC, and moved to Manhattan when I was 10 years old. I read *Clarence Darrow for the Defense* in my teens, and that's when I knew I wanted to be a lawyer. Reading was my escape from my chaotic family life. This chaos actually led to me dropping out of high school. It took a couple of years to undo my earlier decisions, but I did go back to finish high school. I was still committed to being an attorney, so I applied and was accepted into an amazing program for urban legal studies at the City College of New York. It offered a combined B.A.-J.D.

ML: That sounds like a great opportunity. Tell us about your time there.
I ended up only completing two years of the program. I ride motorcycles, and was in a really bad accident in Central Park that had me in the hospital for a month. It took me a couple of years to get back to feeling passionate about a law career. When that time came, I was accepted into a general pre-law program. I was later accepted to the Benjamin Cardozo School of Law in New York, which offered a combined accelerated entry. The program was amazing. I ended up graduating and got a great job with a private civil law firm in Manhattan. Living the dream, right? I was making a lot of money, but I was so unhappy. I had gotten married, I had my daughter, and I was just looking around, thinking "This is not Clarence Darrow land." It was just a grind.

ML: You were still in New York at this point. How did you end up in Maui?
I was going through my drawer in the office, and I found a letter from the Maui Prosecutor's office. I pulled it out and read that I was invited to go to Maui and interview for the Deputy Prosecuting Attorney position. I didn't even remember receiving the letter! My secretary urged me to go for it, so that's what I did. After speaking to the deputy, I was full of confidence. They told me I would have to take the Hawaii bar, but they could hire me as an intern if I pass the interview. So, we picked up and moved to Maui.

ML: Tell us about your career path while working for Maui County.
I passed the bar and was hired as the Deputy Prosecuting Attorney. I really enjoyed what I was doing, and I felt like I had a purpose. I worked my way up through all the divisions, and then left to become a Deputy of administrative law at the Corporation Counsel. I moved into the Civil Litigation Division there, which was a steep learning curve. I went from focusing on solely state or criminal law to learning civil law. I then ended up in both state and federal courts, which was next level for me in terms of being prepared and knowing the law. At some point I wanted to take everything to another level. A position opened up at the Attorney General's office to head the Maui branch of the Child Support Enforcement Agency. I became a manager over there, and that really helped me to develop my managerial skills. As a prosecutor and Deputy Corporation Counsel, I was more on my own, but here, I was able to build a team. They were really supportive. I also got to have input in drafting a proposing new legislation and get into the political side of things. I was there for about 20 years before retiring.

ML: How did you end up as Corporation Counsel?
I went into private practice for about two years, and then my manager cacalled to hire me back, so I went back. Three months in, the position for Corporation Counsel came up. I decided to apply, and



here I am. It's super gratifying to be here when I think back to my past and the work it took me to overcome everything. It was a big transition for myself and the entire department because I have a different way of doing things. I was very into team building and never wanted anyone to feel disenfranchised. We had quite a few vacancies, which was a bit challenging, but my First Deputy has become my other half, and we have been able to build an incredible department. We're now fully staffed with amazing, smart, and communicative people. I don't think we could have pulled through the fires as successfully as we are without a team like this.

ML: What does a typical day look like for you as Corporation Counsel?
I start my day pre-dawn. We get in the water, and we paddle canoe for an hour. I can't think of a better way to start the day. The sun comes over the mountains, and sometimes you see dolphins or whales. It's amazing. Other days I'll ride my Harley, because I'm still riding, so that's also a nice way to clear your head. I come in, I do check-in, and I have meetings. I feel very strongly that I need to be available if there are questions or if people want to come in and chat. We've recently been doing a lot with the litigation and our departments are under unprecedented strain and pressure from the fires. We're working with agencies that we've never worked with, like FEMA or Army Corp.

ML: What about municipal law appeals to you most?
I would say the diversity. We also advise and appear before our County Council. We work closely with the Mayor's office and County departments in helping and advising them as well. These are challenging yet incredibly exciting times for us. We're navigating waters that we've never seen before. The community of municipal attorneys is so tight knit. When the fires happened, we were able to reach out to municipal attorneys from California, Washington, Arizona, Colorado, all over the country to give us advice. The outpouring of support we received was invaluable. I also love that you never know what's going to come through the door.

ML: What are some unique characteristics of working for Maui County?
We all have our own islands, so when Maui needs something, we might not want, or agree, with what O'ahu is doing. The County of Maui includes three different islands. We have the island of Maui, we have the island of Moloka'i, and we have the island of Lāna'i, so we have to make sure that we address the needs of all of our geographically separate communities. Historically, the people on the outer islands feel that they are sometimes neglected, so we really make an effort for them not to feel that way. So, I would say geographically, that's what makes us most distinct, trying to pull us all together and make sure everybody has a voice.

ML: What are some of your interests outside of the office?
As I mentioned earlier, I love to paddle canoe and ride my bike with friends on the weekends. I also volunteer for Maui Search and Rescue. We search for lost hikers, people with Alzheimer's, and people that are missing with no discernable reason. We fulfill a need for the community that I think is helpful, and we enjoy working together. I also do cake decorating. I haven't had much time recently, but I love to do that in my spare time. That's my creative outlet. I have my physical outlet and my volunteerism to help counter the stress. I also have four adorable little dogs. When you've had a hard day and you come home to a bunch of little dogs, you can't be mad about anything. **ML**

We would love to hear about a day in your life as a municipal lawyer! Email Avery (amorris@imla.org) if you are interested in being included in this series.



Avery Morris is the Administrative Coordinator for the International Municipal Lawyers Association. Avery joined the organization in 2023. Prior to joining IMLA, she attended La Salle University, where she received her BA in English. During her time at La Salle, she was an athlete on the Women's Rowing team.



AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

Lower Profile, but Important on Main Street: the Supreme Court's Local Government Cases

The 2023-2024 Supreme Court Term will likely be dominated with headlines about former President Trump's legal cases, which involve issues related to whether a state can bar him from the ballot under the Fourteenth Amendment as well as his claims of broad immunity from federal prosecution.[1] On top of that, the Court will decide two abortion cases and two cases involving the regulation of firearms. The word "blockbuster" gets thrown around a lot when talking about the Supreme Court, but this Term certainly seems to fall into that category.

While those issues will dominate the headlines, they are not nearly as relevant to local governments as many of the other lower profile cases on the Court's docket. These include: several First Amendment cases;[3] a Takings case;[2] a question related to the opioid settlement and Purdue Pharma's bankruptcy;[4] a Title VII employment discrimination case;[5] whether the Court should overrule *Chevron*;[6] the viability of the EPA's "Good Neighbor Plan" related to greenhouse gas emissions;[7] whether local governments must provide post-seizure probable cause hearings related to asset forfeitures;[8] and the contours of a federal criminal bribery law for state and local officials.[9] In addition to these cases, several of which have been previously summarized in *Municipal Lawyer*, the Court finalized its 2023-2024 Term docket by adding two more cases of relevance to local governments. *Grants Pass v. Johnson*[10] is a case involving the Eighth Amendment and homeless encampments and *Chiaverini v. City of Napoleon*[11] involves a Section 1983 malicious prosecution claim.

Grants Pass v. Johnson

The Supreme Court has agreed to hear *Grants Pass v. Johnson,*[12] which will answer "whether the enforcement of generally applicable laws regulating camping on public property constitutes 'cruel and unusual punishment' prohibited by the Eighth Amendment.[13] The story begins with the Ninth Circuit's holding in *Martin v. Boise,* which held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter" because such conduct is involuntary and "the state may not 'criminalize conduct that is the unavoidable consequence of being homeless.'"[14] The court left open the possibility for reasonable time, place, and manner restrictions on camping and also emphasized that its holding did not extend to those that did have access to "adequate temporary shelter."[15] Then, in *Johnson,* the Ninth Circuit reaffirmed *Martin,* applied it to a request for a pre-enforcement injunction on a class-wide basis and applied it to a series of ordinances that for the most part resulted in fines (though could eventually escalate to criminal penalties for trespass).[16]

In granting certiorari, the Supreme Court will decide whether the Eighth Amendment has anything to say about these ordinances. The decisions have created a tremendous amount of uncertainty and litigation in the Ninth Circuit. Localities face questions over what constitutes "adequate shelter," who is actually "involuntarily homeless," and how should they handle situations where shelter is declined but the person nevertheless refuses to vacate an encampment that has been deemed a health or safety hazard? In addition, localities face competing lawsuits from disability rights advocates who argue that failing to clear encampments from sidewalks violates the Americans with Disabilities Act as well as lawsuits from local businesses and residents near encampments that argue that failing to clear the encampments creates a public nuisance under state law.[17]

If the Supreme Court reverses *Martin* and *Johnson,* the decision will not solve the problem of homelessness. What it will do is return the issue to local governments and policymakers without an added layer of federal judicial intervention. Localities will continue to grapple with the complex issues associated with homelessness and will seek solutions that work for their communities. The case will be argued in April, and we should expect a decision before the end of June.

Chiaverini v. City of Napoleon

Over the years, the Supreme Court has wrestled with difficult questions related to malicious prosecutions. The first issue the Court tackled was whether such a common law tort could be brought under Section 1983 in the first place. After all, Section 1983 provides a cause of action for deprivations of rights secured by the Constitution. But there is no specific right to be free from malicious prosecutions in the text of the Constitution. Thus, to bring a malicious prosecution claim, the Court had to determine where such a claim would reside within the Constitution, if at all.

In *Albright v. Oliver,* the Court rejected the argument that a malicious prosecution claim could be brought under the Fourteenth Amendment.[18] More recently, in *Manuel v. Joliet*, the Court held that the petitioner's malicious prosecution claim challenging his pre-trial detention based on alleged fabricated evidence could proceed under the Fourth Amendment.[19] The Court reasoned that a person detained based on police officers' false statements or fabricated evidence is "confined without constitutionally adequate justification" and that claim was therefore a natural fit for the Fourth Amendment.[20] Although *Manuel* shed light as to which constitutional provision governed malicious prosecution claims, the Court left for another day the elements of, and rules associated with, an action seeking damages for its violation."[21]

The Supreme Court's most recent malicious prosecution case involved a question of what constitutes a favorable termination, a necessary element for a malicious prosecution claim. The Court held in *Thompson v. Clark* that a plaintiff "need only show that his prosecution ended without a conviction" rather than needing to show there was some affirmation of innocence.[22] *Thompson* set forth the Court's process for analyzing the elements of a malicious prosecution claim. In *Thompson,* the Court explained that to determine the elements of a malicious prosecution claim (or any constitutional claim under Section 1983), courts should "look to the elements of the most analogous tort as of 1871 when § 1983 was enacted, so long as doing so is consistent with 'the values and purposes of the constitutional right at issue.'"[23]

It is against this backdrop that the Court will hear *Chiaverini v. City of Napoleon.* In this case, Chiaverini managed a jewelry store in Napolean, Ohio. He purchased a men's ring and diamond earrings from Burns for $45.[24] Burns claimed to be the owner and Chiaverini had him fill out a "buy card" certifying that he was the lawful owner.[25] That same day, David and Christina Hill called Chiaverini to see if anyone had sold him their stolen ring.[26] He told them to make a police report and denied buying the ring.[27]

Both parties called the police. Chiaverini told the police "he believed he may have had the Hills' property" but clarified that he did not know if it had been stolen but that he wanted an officer to come help sort it out.[28] The officers came to the store and informed Chiaverini that the items were stolen and told him not to sell them.[29]

Officer Steward wrote an initial report on the incident and subsequently added an additional statement to the report noting that Chiaverini had allegedly said he thought the ring had been stolen when he bought it.[30] Chiaverini claims the added statement is false and that he never said that he believed the item was stolen.[31] Thereafter, the police sent a "hold letter" to Chiaverini telling him to "hold" the item as it is evidence in a crime, but the letter also said to "release it to David and Christina Hill."[32] Chiaverini thought this was inconsistent and claims he did not know what to do so he did not return the ring to the Hills even though they asked for it back.[33] The police also returned in person and instructed him to release the items back to the Hills, but Chiaverini refused.[34]

Chiaverini then confronted the police chief about the contradictory information in the letter. In talking to the chief, Chiaverini hinted that he did not have a precious metal license, as required by Ohio law.[35] After this conversation, the Chief confirmed on the Ohio Department of Commerce's website that Chiaverini's precious-metals-dealers license was inactive.[36] The officers sent the police reports to the City's law director who reviewed them and concluded Chiaverini's potential criminal offenses of receiving stolen property, operating without a valid license, and money laundering.[37]

One of the officers then applied for a search warrant and a municipal judge signed search and arrest warrants.[38] The officers searched Chiaverini's store and seized the Hills' stolen jewelry as well as items related to sales, purchases, and licenses and Chiaverini spent 3 days in jail.[39] A few days later, the same municipal judge held a preliminary hearing during which Chiaverini challenged the police narrative and testi-

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Amanda Karras serves as IMLA's Executive Director and General Counsel and is responsible for management of all facets of the organization. Prior to joining IMLA, she worked in private practice in Boston, focusing on employment law and litigation. Amanda holds a BA in sociology from Colby College and a JD from Suffolk University Law School, where she graduated magna cum laude and served as an Articles Editor for the Suffolk Law Review. Amanda is admitted to practice in Massachusetts, the U.S. District Court for Massachusetts, and the United States Supreme Court.

LISTSERV

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

Looking Towards the Second Act

The news this spring from a longtime friend and colleague of a health issue and pending retirement has gotten me to thinking about the retirement issues many of our Listserv members are beginning to face. I have been attending IMLA seminars for just over twenty years now, and it is sad to see some of the faces disappearing… Unfortunately, some friends have passed away: there was my great colleague Brad Bailey…Susan Rocha…Ron McKinney, a mentor and comrade from here in my home state… And there are others.

Since I got onto the subject of retirement, many things have crossed my mind. There are folks like my late father, who probably decided to retire too late. Dad had announced his retirement on January 1. It was to be effective April 1. He passed away on February 16, with many plans for the future falling by the wayside. I think dad's health had been worse than he let on.

On the flipside, there is my old friend Tom who retired from the practice of law and found himself still full of energy but without anything to do. Tom decided to "unretire" but did not return to the practice of law. Instead, he dove into the insurance industry and established an insurance agency with a friend of his. Tom is about 83 now, but still going strong and making a great go of it in the insurance business.

While the answer is bound to be different for everyone and everyone has different considerations, one has to wonder "When is the right time to retire? And Why Do Lawyers Retire?"

According to the U.S. Census Bureau, the average retirement age is 65 for men and 63 for women. In the legal profession, however, people tend to be a little older when they retire. The American Bar Association's 2021 ABA Profile of the Legal Profession revealed that *nearly 14 percent of lawyers are working past the age of 65*.

InfoTrack cites an article by Jennifer Anderson regarding signs it might be time to retire. While we may not all reach these signs at the same time, there are a few things to look for according to the article by Anderson. These include:

Cognitive Decline – "It is somewhat disheartening to hear that for most people, thinking abilities peak at age 30 then slowly decline thereafter. Nonetheless, many people continue to function quite well into their 70s, 80s, and even 90s. Lawyers, in particular, tend to have higher cognitive abilities later in life than people in other professions. In fact, twice as many lawyers practice after age 65 than people in other careers. That said, there comes a time when even the best lawyers begin to falter. Signs of cognitive decline may include:

- Feeling overwhelmed when faced with relatively minor decisions.
- Not remembering recent conversations or events.
- Impulsivity.
- Missing deadlines or appointments.
- Inability to organize regular tasks.

Of course, we all have bad days. But if these symptoms are starting to occur with frequency, "it's probably time to undergo cognitive testing and consider stepping away from the practice of law," Anderson says.

You Don't Enjoy Practicing Anymore – Anderson cites recent studies that reveal over 50 percent of lawyers are frustrated with their careers, claiming that as you age, a lack of enjoyment in your career becomes more poignant. "The truth is life is short. And not to be morose, but three of the top five regrets people have on their death bed have everything to do with continuing on in a career they didn't enjoy: (1) regretting they worked so hard; (2) regretting they didn't allow themselves to be happier; (3) regretting they didn't have the courage to live a life true to their own desires."

If these kinds of thoughts and problems are weighing you down, maybe it's time to consider retiring from the law and living a life more focused on personal fulfillment, Anderson concludes.

Your Practice Is Impacting Your Mental Health – The practice of law, no matter what area in which you practice, can sometimes be a very stressful endeavor. Anderson describes some things to think about in this area:

"Unfortunately, over time, stress can cause all sorts of mental and emotional issues. Things like substance abuse,

anxiety and depression are rampant in the legal profession. While there are certainly ways to deal with those issues without walking away from your career, there may come a time when the mental costs of doing the job outweigh the benefits. When it comes to making that assessment, it's probably a good idea to meet with a therapist or career coach who understands the demands of your job and how those demands are impacting your life."

Your Practice is Impacting Your Physical Health – In addition to mental health, the practice of law and the stress of being a lawyer can be a hindrance to one's physical health as well. The ABA indicates, for example, that attorneys are more likely to encounter heart disease than other professionals

Anderson states: "To add insult to injury, the sedentary nature of an attorney's work increases the chances of things like obesity, diabetes, colon cancer, and high blood pressure. Those of us who've faced serious health challenges know that there's nothing to make you rethink early retirement like learning that your job is threatening your life. If you think your health is starting to suffer because of your practice, it's time to talk to your doctor about how retirement might improve your future." Anderson offers some solid practical advice if you do indeed find it is that time:

"If you've made the decision that it is time to retire from practicing law, don't despair. The truth is, there are all sorts of things you can do. We're not going to presume you need a list from us of all the fun things you can do in retirement (like traveling, volunteering, and pursuing hobbies). You might, however, need some ideas for ways you can continue to make money." She adds a few popular post-law occupations:

- Writer: Lawyers are very well-suited to become professional writers. Whether you want to be a journalist, novelist, or freelance content creator, the opportunities are endless.
- Entrepreneur: Lawyers have been trained to understand every aspect of their clients' business (in addition to the business of lawyering). It's not surprising then that lawyers frequently found their own start-ups.
- Teacher: Let's face it: lawyers know a lot of things about a lot of things. We also have that fancy doctorate degree that buys us entry into several teaching arenas. While teaching can undoubtedly be stressful, it can also be very personally rewarding.
- Recruiter: Just because the practice of law isn't working for you anymore doesn't mean you can't spot a good legal hire from a mile away. Lawyers tend to make wonderful legal recruiters because they understand the business and its demands like no one else.

She concludes: "We understand that the decision to retire from the practice of law is one of the biggest decisions you'll ever make. Be sure to give yourself grace and patience in weighing this option. Talk to your friends, family, and colleagues. Seek professional help if you need or want to. And then, should you decide to step away, try to find a new occupation that feeds your heart and soul, whether it's a new career or a meaningful life pursuit."

In my own situation, I lean toward finding a "retirement career" that requires (to put it bluntly) "a lot less thinking and worrying." There is some merit after all these stressful years to finding a retirement job that not only is lower on the stress scale, but that you can also "leave at the office" when you head home for the day. A former colleague who has retired within the past year is now working for an hourly wage. I saw him in the grocery store not long ago and asked him how his "retirement job" was going. He replied that it was allowing him to do things he had not done in forty years like "my wife and I watching an entire movie without being disturbed by a phone call."

While I do have a few years to go, I have given some thought to what I might like to do as a "post legal" career. Many of you know that I was a beach bum before going to law school. My days were spent fishing, swimming, walking on the beach and working four days a week at a golf course. I am currently finding that scenario more to my liking every day. Then, of course, I can't help but laugh and think to myself "What have I accomplished here? That's exactly what I was doing before I went to law school. Did I really have to work this hard to return to what I was doing in the first place?"

My post legal career thoughts revolve around something with much less stress than that which is described in the Anderson article. Back to the golf course? Sell lemonade on the beach? Revive my radio broadcasting career? Find some other position in the sports industry? I do have a little experience as a football scout… Hmm… I feel another article coming soon on this topic.

What is your ideal "retirement job?" Let me know and I may include

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Bradford T. Cunningham is the Municipal Attorney for the Town of Lexington, SC. He earned a B.S. in Finance, and a J.D., both from the University of South Carolina. He is licensed to practice law in South Carolina and Georgia, and worked in Banking before earning a law degree. He is the Past President of the South Carolina Municipal Lawyer's Association, and an IMLA Board Member and State Chair for South Carolina. Brad is a recipient of the Joseph I. Mulligan Award for Distinguished Public Service, and has been received multiple awards for his service to the community. He is a self-professed beach bum who has survived several hurricanes, and is also a local radio sportscaster.

Rahimi *cont'd from page 9*

for assessing the constitutionality of gun legislation. However, as Jacob D. Charles argues in "The Dead Hand of a Silent Past: *Bruen*, Gun Rights, and the Shackles of History," implementing this test has proven challenging.[65] Different courts have interpreted and applied it in varying ways, resulting in disparate outcomes for seemingly similar cases.

Charles' analysis is based on a review of nearly 470 federal court decisions citing *Bruen* in the year following its issuance.[66] He found a significant number of cases reaching irreconcilable judgments, with courts offering inconsistent conclusions about what the test requires and how it works in practice.[67] This lack of clarity leaves conscientious lawmakers uncertain about the scope of their authority and creates conflicting and incompatible legal rules across the country.[68]

More Gun Cases After *Rahimi*

As Charles aptly describes, *Bruen* has unleashed a torrent of uncertainty and inconsistency into the Second Amendment landscape. The Court's silence on these critical questions has only exacerbated the problem, and the inadequacies of the *Bruen* framework were on full display in the *Rahimi* arguments. The general consensus of those observing the *Rahimi* proceedings was that the Court would attempt to preserve the federal law which criminalizes gun possession after firearm prohibition incident to a domestic abuse restraining order, at least where the accused has an opportunity to be heard and challenge the restraint.[69] It is too early to know whether and how *Bruen's* "history and tradition" mandate will be moderated to accommodate a more generalized "dangerousness" inquiry. In the meantime, several additional gun cases have arising which seem destined for Supreme Court consideration in the wake of *Bruen* and *Rahimi*.

Bevis v. City of Naperville

In Illinois, The Protect Illinois Communities Act ("PICA"), signed into law by Governor Pritzker on January 10, 2023, established new regulations for the sale and distribution of assault weapons, high-capacity magazines, and switches within Illinois.[70] PICA took immediate effect, with existing owners of these items required to register them through their Firearm Owner's Identification Card account by January 1, 2024. Unsurprisingly, the gun restriction was quickly challenged. As the Seventh Circuit put it, "The ink was barely dry on the pages of the Act when litigation began."[71] Six unsuccessful Second Amendment challenges against the law were consolidated into *Bevis v. City of Naperville*, involving 26 plaintiffs.[72]

While the Second Amendment's guarantee is undeniable, as affirmed in landmark cases like *Heller* and *Bruen*, the *Bevis* court acknowledged that "even the most important personal freedoms have their limits."[73] The task before the Seventh Circuit was to define the scope of "arms" protected under the Second Amendment.[74] The court observed that, while everyone may agree that a handgun for self-defense falls within this category, everyone can also easily agree that "the now-retired M388 Davy Crockett system, with its 51-pound W54 warhead," should be reserved for military use, "even though it is light enough for one person to carry."[75] The court's task was to draw the line between personal arms and military-grade weaponry, specifically regarding assault weapons and high-capacity magazines.

Analyzing history and tradition, the court determined that the state and municipalities have a "strong likelihood of success" in their argument.[76] On November 3, 2023, the Seventh Circuit upheld the lower court's decision not to enjoin the law and vacated the injunctions previously imposed on it.[77] Following the Seventh Circuit's denial of their *en banc* petition, Bevis and several Second Amendment organizations filed an emergency injunction request with Justice Barrett, seeking to halt the Illinois' gun restriction.[78] That request was denied in early December 2023.[79] Despite facing ongoing legal challenges regarding its constitutionality, PICA went into effect on January 1, 2024. Consequently, Illinois residents are currently required to adhere fully to its restrictions.

Garland v. Range

In a major win for Second Amendment advocates, the Third Circuit Court ruled that Bryan Range, convicted of a minor income misstatement in 1995, cannot be barred from owning guns.[80] This comes despite a federal law--the Gun Control Act (18 U.S.C. §922(g)(1))—which prohibits individuals convicted of a crime carrying a potential imprisonment of over a year from possessing firearms or ammunition.[81] The decision, likely heading to the Supreme Court, throws open gun rights for people with minor offenses and raises concerns about community safety. Though Range has been an upstanding citizen for decades, Pennsylvania's lengthy and difficult process for restoring gun rights casts a shadow on fairness and accessibility.[82] *Garland v. Range* may reshape the landscape of Second Amendment rights for minor offenders, requiring careful consideration of both individual rights and public safety.

The government has petitioned for certiorari, and the case is currently being considered by the Court.[83] *Range* presents a critical opportunity to define the scope of permissible gun restrictions in light of *Bruen's* history and tradition analysis. Adding further intrigue to *Range's* potential Supreme Court journey was a brief exchange during oral argument in *Rahimi*. Justice Barrett, in a pointed question to General Prelogar, hinted at a possible alternative approach: "Why can't I just say that [dangerousness] is the

standard?" she asked, suggesting a potential willingness to move beyond the historical and traditional justifications for felon disarmament and focus on individual risk assessment.[84] This exchange, while brief, underscores the potential for a significant shift in the Court's approach to gun rights for minor offenders, with implications far beyond the *Range* case itself. For example, what impact would a narrower interpretation of felon disarmament laws have on existing gun control measures, and how might a decision in *Range* affect future gun control legislation and legal challenges?

Antonyuk v. Chiumento

New York's Concealed Carry Improvement Act ("CCIA") was enacted following *Bruen*.[85] Initially, New York's laws mandated applicants to demonstrate "good moral character" and a unique "proper cause" for carrying firearms outside their homes, irrespective of employment or location.[86] However, no such requirements existed for possessing firearms at home.

Under the CCIA, both in-home and concealed-carry license applicants must exhibit "good moral character," defined as possessing essential qualities needed for firearm trustworthiness and responsible usage.[87] Specific additional requisites for concealed-carry licenses include disclosing personal contacts, providing character references, divulging social media accounts, and meeting training requirements, including in-person firearm safety courses and live-fire range training.[88] Furthermore, the CCIA designates numerous "sensitive locations" where carrying firearms, even with a concealed-carry permit, is prohibited.[89] These sites include government buildings, schools, places of worship, healthcare facilities, and behavioral care centers, among others.[90] The law also criminalizes possessing firearms in "restricted locations" without explicit consent, even on private property where firearms are not permitted through clear signage, barring express approval.[91]

In *Antonyuk v. Chiamento*, the Second Circuit dealt a blow to certain provisions of the CCIA, adding another layer to the ongoing legal battles surrounding Second Amendment rights.[92] Amidst diverse legal challenges to the CCIA, the Second Circuit heard an interlocutory appeal filed by the state, consolidating four major cases encompassing numerous plaintiffs.[93]

The court invalidated requirements

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INSIDE CANADA

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

Renovictions and Tenant Displacement: Hamilton's By-law Addressing "Bad Faith" Evictions

Background: The City of Hamilton, like many municipalities across Canada and the United States, is experiencing a housing affordability crisis, with average market rents far outpacing inflation over the last several years. This has significantly impacted long term tenants in rent-controlled units; as their rents remain below current market levels, there is a significant economic incentive for landlords to induce tenants to move out so that they can increase rents on vacated units to market levels.

Hamilton's ageing housing infrastructure contributes to tenants' vulnerability to bad faith evictions, commonly referred to as "renovictions." Over the past decade, Hamilton has lost almost 16,000 rental units that had rent below $750/month (affordable for a household with an income of $30,000/year). Many of these units still exist, but rents have increased due to inflation, vacancy decontrol, or renovation and above-guideline rent increases/evictions – "renovictions." In addition to rental units found in purpose-built apartment buildings, Hamilton has approximately 40,000 rental units located in single detached structures, townhouse/row housing, or duplexes. These units are also at highest risk of being lost to the rental market through private sale to new owners who may utilize the property for personal use – a situation that is overwhelmingly difficult to address at the municipal level.

Provincial Legislation: *Residential Tenancies Act*

In Ontario, the *Residential Tenancies Act*, 2006 S.O. 2006, c. 17 (*RTA*) is in place to regulate disputes between landlords and tenants. It allows landlords to issue an "N-13," which is a notice to terminate a tenancy because the landlord seeks to make repairs or renovations to its rental unit that cannot be completed while the tenant is continuing to live in the unit. If an N-13 is issued, section 53 of the *RTA* protects tenants from "permanent eviction" by giving the tenants 120 days to determine if they want to re-occupy the rental unit after the completion of the repairs or renovations, at a rate that is no more than what the landlord could have charged if there had been no interruptions to the tenant's tenancy. The *RTA* makes no provision for any short-term accommodation for tenants who exercise their right of first refusal.

Under the *RTA*, when the repairs and renovations proposed by the landlord are "voluntary," tenants who do not wish to return to the rental unit are entitled to compensation or an alternative rental unit, meaning that the landlord can increase the rental price by re-renting the unit to another tenant at a higher rent at the completion of the repairs or renovations. This legal justification for eviction (repairs or renovations) creates a legal opportunity for those landlords who, in bad faith, wish to increase their rent by evicting a tenant in a rent-controlled unit with the hope that such tenant does not return.

As this situation exists in provincial legislation affecting tenancies across the Province, the issue of renovictions is not a Hamilton-only problem; not only is it an issue in every Ontario municipality where there are long-time tenants that are paying significantly lower rents than the current market rent levels in a community, but it is a problem in many other Canadian provinces and American states with similar residential tenancy legislation. Importantly, no municipal jurisdiction has found a "silver bullet" to solve what is effectively a problem born out of the real estate market and gaps in provincial or state legislation. Instead, municipalities that aim to address renovictions generally employ multiple methods simultaneously, involving a variety of policies and programs across a number of municipal divisions and the participation of civil society organizations that provide tenant support.

It is important to note that not all instances of tenant displacement due to renovation are completed in bad faith. In some cases, vacant possession is required to maintain the quality of residential

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Monica Ciriello is the Director of Municipal Law and Licensing Compliance at the City of Hamilton, where she provides legal and policy leadership for a multi-functional workforce. Monica holds many professional designations in Canada and the United States, having practiced as a municipal and planning lawyer, mediator, and adjudicator. She has contributed to legal and policy lectures at McMaster University and Western University, as well as a monthly Canadian law column with IMLA since 2013. In her spare time you can find her hiking with her husband Greg and goldendoodle George.

IMLA

Charles Thompson Jr. Local Government Law Scholarships – 2024 Recipients

Inaugurated in 2023, the Charles Thompson Local Government Law Scholarships are competitive awards intended to recognize rising 2Ls and 3Ls with demonstrated interest and accomplishment in the study of municipal law. All candidates submit written expressions of interest, law school transcripts, and letters of recommendation. In addition, those seeking the larger $5,000 scholarship were required to submit an original work relating to local government law.

We were fortunate to receive a significant number of outstanding applications from law students in the US and Canada who evidence a clear interest in serving their communities as local government lawyers. The IMLA Scholarship Committee, consisting of Kimberly Rehberg, City Attorney, Durham North Carolina; Doug Hoffer, Deputy City Attorney, Eau Claire, Wisconsin; Victoria Huynh, Deputy City Attorney, Plano, Texas; Lori Bluhm, City Attorney, Troy, Michigan; and Erich Eiselt, IMLA Deputy General Counsel and Director of Legal Advocacy, Rockville, Maryland, has now completed the challenging task of rating each candidate's submissions and selecting the recipients.

IMLA is pleased to announce the winners of the 2024 IMLA Charles Thompson Jr. Local Government Law Scholarships:



$5,000 Thompson Scholarship
Award winner **Isabella White**,
University of Georgia Law School, Athens, Georgia



$2,500 Thompson Scholarship
Award winner **Casey Simoneau**,
Washburn Law School, Topeka, Kansas



$2,500 Thompson Scholarship
Award winner **Eric Moon**,
University of Manitoba Robson Faculty of Law, Winnipeg, Manitoba



In anticipation of IMLA's 2024 Comparative Law Seminar to take place at Lake Como, Italy in October, we are pleased to present this article submitted by Avv. Antonella Trentini, National President and National Secretary of Italy's National Union of Public Bodies Lawyers (Unione Nazionale Avvocati Enti Pubblici-UNAEP). We look forward to our meetings with Antonella and her UNAEP colleagues later this year!

Local Government Lawyers in Italy: A Study in Duality

Since the origins of Greek mythology the theme of "doubleness" has been embodied in an extraordinary emblem, both etymologically and figuratively. A being half-human and half-animal references the supernatural, which gives rise to the concept of hybrida, or cross between genders, different social conditions, beliefs, and so on, in which the imaginary often prevails over the known.

This same dichotomy, and the power of imagination in pursuing what really should be explored and known, applies to the position of the "lawyer of public bodies" (government lawyer in American parlance), a figure with a double status, half human and half animal: a bit of an independent independent practitioner yet fully dependent on its employer, part employee and totally lawyer for the National Bar Council (CNF), which considers such professionals as anomalous figures--an anomaly which does not exist elsewhere in the Italian legal profession.

Such anomalous figures abound in mythology--such as the offspring of Echidna, an imaginary woman with the lower torso of a serpent; or the Sphinx, with the face of a woman or man on the body of a lion; or the Satyrs, with a human face and goats' ears, horns, tail and legs; or the Sirens, hybrid figures with the upper body of a human and the lower part of a fish; or the Minotaur, with the head of a bull on the body of a man.

These and other examples illustrate the "crossroads" that mankind has considered from the beginning of time. In a sense, similar "crossroads of choice" are felt today by those who are called to operate as government lawyers. Autonomy and independence, on the one hand, are the absolute values that must be ensured by the profession, and on the other, competence and continuity are the characteristics of governmental service which must be honored. The conflict between autonomy and subordination can generate uncertainty, with repercussions on the quality of the activities carried out, potentially contributing to "the weakness of the Administration, due to the absence or insufficiency of professional roles," which forces Administrations to rely on external parties for all specialized legal services.

A conceivable remedy is that the government lawyers should be organized in bodies separate from lawyers in general, with a legal status and economic treatment that attract adequately trained personnel. The CNF has intervened several times precisely on this point. Until a few years ago, under the previous Professional Law and due to the *stricto sensu* interpretation of the rule, the CNF considered such professionals as anomalous figures with respect to their public employment, but not an anomaly with respect to the legal profession, given that the law considers the lawyers of public bodies to be lawyers in all respects, except for the sole particularity of the employing body being the "single client."

In the last twenty years there has been an intense "race" by public bodies to establish their own "internal legal offices" (apart from some entities that have existed for over a century, such as Bologna, Rome, Naples), so much so that the number of those registered in the special list now exceeds 4000, with a very strong growth in the last decade. This seems to respond to one need above all: to allow public bodies to have their own technical-legal bodies, similar to the State Attorney's Office, for the performance of professional functions strictly connected with the internal mechanisms of the administration (the so-called " adherence and closeness to the fact").

A two-way "interest." That is to say that even on the part of the employed lawyers themselves, a greater awareness has arisen of their role as a fun-



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damental "link" between the various protagonists of the process and of historical memory of the body's jurisprudence. Public lawyers swear twice to fulfill their duties in the public interest, and therefore of the Nation. The first time is when they register. The second is when they take up their role at the public body. In the second instance, there is a coincidence between our function in defending the public entity and the collective interest, because it is the former, in itself, that must guarantee the latter. Public lawyers protect a general interest through the defense of a person appointed, by Article 97 of the Constitution, to guarantee that interest.

For this reason it is essential to guarantee the autonomy of public lawyers, in order to protect the general interest together with that of the Public Administration. The position of "independence from public authorities" is aimed at guaranteeing the effectiveness of the right of defense and the proper conduct of justice, and is closely connected to autonomy, the absence of conflicts of interest, professional secrecy, and more. They are all fundamental values in a legal profession that represents the public interest, and as such are protected and safeguarded in a supranational context (art. 6 ECHR Convention, Nice Charter, EU Court of Justice, etc.), as well as by forensic law.

Jurisprudence has clarified that the activity of the lawyer-employee takes place within the full context of the profession, while involving certain limitations due to the fact that the employee lawyer has legal obligations arising from the employment relationship. The dual role of the employed lawyer is:

a) the "instrumental" one of a public employee with the duties and consequences of the employment relationship;
b) the other "essentials" of a lawyer, equipped with jus postulandi, even if only for a single client.

The CNF also considers this second trait (essentiality) to prevail over instrumentality, because it is special in its relevance, compared to the common, general trait of the employee. For these and other reasons (reimbursement for registration, reflected charges, autonomy and independence, court fees, working hours, separate bargaining, etc.), an organic, modern reform, adapted to the new characteristics of public administration, can no longer be postponed. The administrative jurisprudence, the Court of Cassation and the rulings of the CNF agree on the essential need to guarantee lawyers the autonomy and independence from the rest of the administrative machinery, for the purposes of maintaining registration in the special list attached to the 'Albo.

It is the professional law that provides for such autonomy which cannot be derogated, as a special law, from a general law (such as that on public employment or the consolidated law of local authorities), especially since this status enjoys constitutional protection (art. 33, paragraph 5, Constitution), and is therefore hierarchically superior to any other source of law. What is not normal is that, to affirm these principles of constitutional rank, the lawyers of public bodies must very often have recourse to judicial authorities.

Why an internal, autonomous and independent lawyer? The growth of the bodies, the federalist reforms which began with the modification of Title V of the Constitution, the complexity of the institutional tasks entrusted to them, the relevance of the interests, the unsustainability of the costs of professional services needed on a continuous basis, the mandate to control public spending--constitute some of the main reasons why specialist legal assistance in public affairs is more relevant and irreplaceable than ever.

If we think about the daily collaboration between the "parties" that operate to administer legality and justice (i.e. judges, lawyers of the free court, and public lawyers), we see that the lawyers' constant presence and availability, their specialization, their "closeness to the facts," and their efforts to research the "administrative quality" of the measures implemented by the bodies, are all in pursuit of the public interest and not the simple interest of their client. Think, for example, of their effort to avoid all-out defenses when not justified or disrespectful of the public interest and good administration, and the best use of various tactics in litigation, such as self-defense, where possible.
If there is a lack of decision-making autonomy and independence from politics and administration, all this risks being nullified.

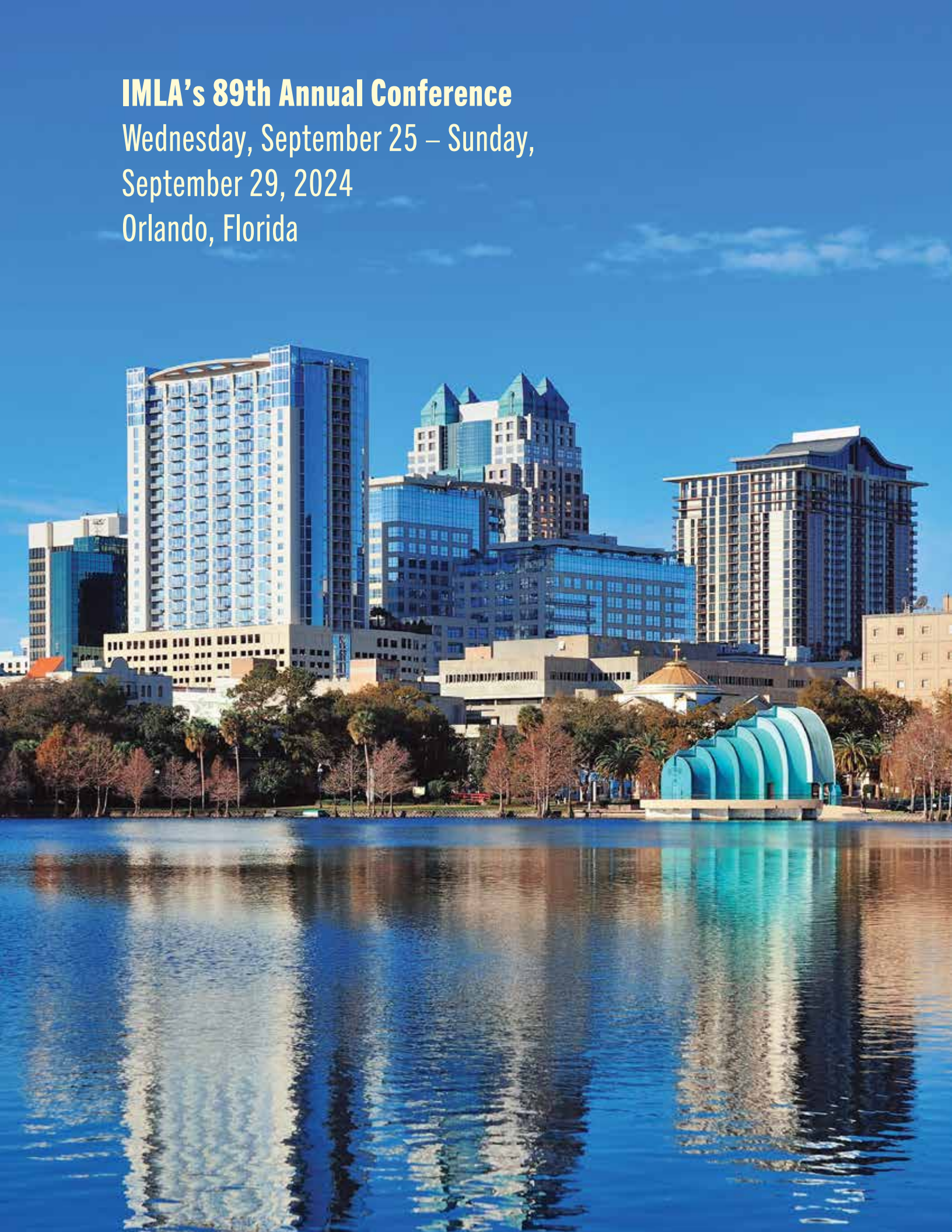
But also think about the cost savings that all this entails, while at the same time raising the quality of services in the public interest--which, in these times, is not of little importance!

Excerpted from *Status of the Employee Lawyer Registered in the Special List Annexed to the Register of Lawyers*, Gli Avvocati degli Enti Pubblici, A. Trentini, Filodiritto Editore 2013.

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Rahimi *cont'd from page 27*

for concealed carry permit applicants to disclose their social media accounts and for a default ban on gun possession on private property.[94] It also prevented the state from enforcing a ban on gun possession at places of worship against a group of plaintiffs.[95] However, the ruling emphasized that it does not conclusively determine the ultimate constitutionality of the challenged provisions, leaving room for further legal developments.[96]

The Second Circuit's December 8, 2023 decision brought both clarity and uncertainty to the legal battle surrounding New York's CCIA.[97] While it clarified jurisdictional boundaries and narrowed the scope of injunctions, it left the ultimate fate of several contested provisions hanging in the balance. The court's affirmation of the "good moral character" requirement offered a temporary victory for the state, but restrictions on social media disclosure, location bans, and the overall constitutionality of the law remain open questions.

Conclusion

The Court's upcoming decision in *Rahimi* promises to be a landmark moment in the ongoing saga of Second Amendment rights. While the oral arguments revealed a Court grappling with the complexities of "dangerousness," "responsibility," and the *Bruen* framework's historical limits, the ultimate outcome remains shrouded in uncertainty. Lower courts, meanwhile, face the daunting task of navigating *Bruen's* inconsistencies, with cases like *Bevis* and *Garland* further highlighting the potential for disparate interpretations and conflicting legal landscapes. As the legal battle over gun control intensifies, one thing is clear: the ripples of *Bruen* will continue to reshape the American gun landscape for years to come. ML

Notes

1. Transcript of Oral Argument at 79, United States v. Rahimi ___S. Ct. __ (2023)(No. 22-915) [hereinafter *Transcript*].
2. United States v. Rahimi, 59 F.4th 163, 168 (5th Cir. 2023).
3. Petition For Writ of Certiorari at 2, *Rahimi*.
4. *Id.* at note 1.
5. *Id.*
6. Unlawful Acts, 18 U.S.C. §922(g)8.
7. *Id.*
8. *Id.* at 169.
9. *Id.*
10. New York State Rifle & Pistol Assn., Inc. v. Bruen, 142 S.Ct. 2111 (June 23, 2023).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* (Justice Kavanaugh and Chief Justice Roberts concurring).
16. *Id.*
17. *Id.* (Justice Breyer dissenting, joined by Justice Sotomayer and Justice Kagan).
18. *Id.*
19. *Supra*, note 5.
20. *Id.*, at 15-24.
21. *Id.* at 24.
22. *Id.* at 25.
23. *Id.* at note 7.
24. *Id.* at 8-10.
25. *Id.* at 8-9.
26. *Id.*
27. *Id.*
28. Petition For Writ of Certiorari at 2, *Rahimi*.
29. *Id.*
30. *Transcript*, at 1.
31. *Id.* at 3-5.
32. *Id.* at 9.
33. *Id.*
34. *Id.* at 10.
35. *Id.* at 11.
36. *Id.*
37. *Id.* at 12.
38. *Id.*
39. *Id.*
40. *Id.* at 38.
41. *Id.*
42. *Id.* at 38-40.
43. *Id.*
44. *Id.*
45. *Id.* at 40.
46. *Id.* at 40-41.
47. *Id.* at 40.
48. *Id.* at 16-17.
49. *Id.* at 56.
50. *Id.* at 56.
51. *Id.* at 56.
52. *Id.*
53. *Id.* at 76.
54. *Id.* at 84.
55. *Id.* at 87.
56. *Id.*
57. *Id.* at 88.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 88-89.
64. *Id.* at 80.
65. Jacob D. Charles, *The Dead Hand of A Silent Past: Bruen, Gun Rights,* and *The Shackles of History*, 73 Duke L. J. 123 (2023).
66. *Id.*
67. *Id.*
68. *Id.*
69. *See*, Jay Willis, *The Supreme Court's Big Gun Case Was Humiliating for the Justices,* Slate, (Nov. 7, 2023), http://tinyurl.com/5ef5my7x; Andrew Chung and John Kruzel, *US Supreme Court leans toward allowing domestic-violence gun curbs*, Reuters, (Nov. 7, 2023), http://tinyurl.com/2v3msj5n; Josh Gerstein, *Supreme Court looks poised to uphold ban on guns for accused domestic abusers*, Politico, (Nov. 7, 2023), http://tinyurl.com/2axujdfx; Ariane de Vogue, *Takeaways from the Supreme Court oral arguments on the Second Amendment and domestic violence*, CNN, (Nov. 7, 2023), http://tinyurl.com/ajmhsubb; Kelly Rissman and Alex Woodward, *Supreme Court seems poised to keep guns away from domestic abusers*, The Independent, (Nov. 7, 2023), http://tinyurl.com/3tt5tuap.
70. Bevis v. City of Naperville, No. 23-1353 (7th Cir. Nov. 3, 2023).
71. *Id.* at 8.

72. *Id.*
73. *Id.* at 3.
74. *Id.*
75. *Id.*
76. *Id.* at 4.
77. *Id.* at 2-4.
78. Letter to the Clerk from Applicants at 2, Bevis v. City of Naperville, No. 23A486 (U.S. Dec. 14, 2023), http://tinyurl.com/22mfw3ce.
79. *Id.*
80. Range v. Garland, No. 21-2835, 5-6 (3d Cir. 2023).
81. 18 U.S.C. §922(g)(1)(2022).
82. Andrew Willinger, *SCOTUS Gun Watch - Week of 2/5/24*, Duke Center for Firearms Law (Feb. 2, 2024), http://tinyurl.com/59ehtw7s.
83. Supreme Court of the United States, Docket Search, supremecourt.gov, http://tinyurl.com/2s3prdmk.
84. Transcript, at 50.
85. Antonyuk v. Chiumento, Nos. 22-2908 (L), 22-2972 (Con); 22-2933; 22-2987; 22-3237, 16 (2d Cir. 2023).
86. *Id.* at 16-17.
87. *Id.*
88. *Id.* at 16-20.
89. *Id.* at 21-23.
90. *Id.*
91. *Id.*
92. *Id.* at 15.
93. *See id.* at 16-31 *for a more in-depth discussion on the parties and procedural history.*
94. *Id.*
95. *Id.*
96. *Id.* at note 116.
97. *Id.* at 15.

Takings *cont'd from page 18*

53. Baker v. City of McKinney, No. 21-CV-0176 (E.D. Tex. June 22, 2022).
54. *Id.*
55. *Id.*
56. Baker v. City of McKinney, No. 22-40644 (5th Cir. Oct. 11, 2023).
57. Slaybaugh v. County of Rutherford, et al, No. 3:23-cv-00057 (M.D. Tenn. Aug. 23, 2023).
58. Appellants' Brief, Slaybaugh v. County of Rutherford, et al, No. 23-5765 (6th Cir. Nov. 17, 2023).
59. Denial of rehearing en banc, Baker v. City of McKinney, No. 22-40644 (6th Cir. Feb. 14, 2024), Elrod, Oldham dissent.
60. Tyler v. Hennepin County, No. 22-166 (2023).
61. *Id*
62. Knick v. Township of Scott, 139 S.Ct. 2162 at 2167-68 (2019).
63. *Id.*



units. However, in all cases, tenants have the right to return to the unit once repair or renovation are completed at the same rent as they had been paying prior to eviction, yet many barriers exist that prevent tenants from being able to do so.

Bad Faith Evictions or "Renovictions"

A "renoviction" is most often defined as a situation where a tenant is formally evicted through the provincial legal process prescribed in the *RTA*. It is initiated when a landlord issues a tenant an N-13 notice of eviction or it may occur informally when a tenant is evicted outside the proper legal process, because the landlord needs vacant possession to make repairs or renovations to the rental unit. Situations where a tenant is driven out of their home because the repairs and renovations are making their home uninhabitable, and situations where a tenant is driven out of their home as a result of severe disrepair that makes their home uninhabitable are not technically renovictions because they are not being driven by an N-13 notice, but they have the same result, that being displacement of the tenant.

Hamilton's Initiatives to Address Renovictions

To address these issues, Hamilton will be implementing the "HARP": Hamilton Apartment Rental Program. This program comprises of three separate but interconnected new initiatives to address renovictions, tenant displacement and property standards in Hamilton. HARP is made up of a permanent Tenant Support Fund, a Safe Apartment By-law and the first in Ontario Renovation Licence and Relocation By-law.

Tenant Support Fund

The Tenant Support Fund is a program designed to provide legal assistance to tenants and will fund the Hamilton Community Legal Clinic to increase its capacity to support tenants beyond their provincially-funded service levels.

The Safe Apartment Buildings By-law

The Safe Apartment Buildings By-law will help maintain existing building standards and improve substandard building conditions throughout Hamilton. The objective is to contribute to reducing renovictions as a long-term outcome, as buildings would be required to be kept in a state of good repair and the likelihood of requiring a renovation with vacant possession would be reduced.

The By-law will apply to an estimated 858 buildings in Hamilton which makes up approximately 47,816 units. Enforcement will be proactive in terms of inspecting and evaluating registered properties, and reactive when responding to complaints submitted relating to interior property standards issues. Outside of the evaluation process, officers may attend proactively at their discretion.

This By-law will come into effect in January 2026, with all 858 Apartment Buildings evaluated and inspected by September 2027.

The Renovation Licence and Relocation By-law

The first in Ontario Renovation Licence and Relocation By-law was drafted to fill gaps in the *RTA*, taking a reasonable and complementary approach to the *RTA*, balancing the pressing local issue with the overall responsibility of the province to govern landlord and tenant matters.

The By-law accepts that a local government cannot prohibit a landlord from issuing an N-13 under the *RTA*, however a City can use it as the starting point for obtaining a renovation licence.

Under the By-law, within 7 days of issuing an N-13, a landlord must submit an application to the City for a renovation licence. The application shall include:

1. The building permit;
2. A report from a professionally designated engineer or other person with requisite qualifications, stating that vacant possession is required;
3. A copy of the N-13 that was issued to the tenant; and
4. Confirmation that a Tenant Rights and Entitlement Package has been provided to the tenant.

Furthermore, if a tenant does choose to exercise the right to re-occupy the unit following the repair or renovation, under the By-law the landlord is required to make arrangements with the tenant for the duration of the renovation.

An "arrangement" is either a:

1. Temporary comparable accommodation during the duration of the renovation; **or**
2. Compensation in the amount equal to the difference between the rent rate currently paid by the tenant for the rental unit being renovated and the average market rent outlined by the Canada Mortgage and Housing Corporation (CMCH).

If the landlord and tenant are unable to make arrangements in accordance with the By-law, a landlord may apply to the City for an exemption to the arrangement provision of the By-law to obtain a renovation licence notwithstanding.

Enforcement of the By-law will be based on a predominantly reactive approach, as officers must receive either a formal complaint from a tenant who has been or may be issued an N-13 notice or be in receipt of an application for a Renovation Licence. Officers will use their discretion to issue Orders to obtain compliance, and fines may follow for non-compliance.

This By-law will come into effect on January 1, 2025.

Implementation

The Hamilton Apartment Rental Program was approved by City Council on February 15, 2024 and will roll out consecutively, starting with the Tenant Support Fund in 2024, the Renovation and Relocation By-law in 2025, and the Safe Apartment By-law in 2026. The annual cost of the program is approximately $1.3 million, and 33 new full-time positions will be hired between 2024-2026 to administer and enforce the program city-wide.

LISTSERV *cont'd from page 25*

you in a future article. After all, not one of us is a "one trick pony." We all have talents and backgrounds that would allow us to do many different things.

***

Another true story from the wonderful world of Municipal Court. A lawyer was charged in our court with unlawful use of the median. Whatever it may be called in your state code, we are talking about the area in the middle of the roadway that has double yellow lines on both sides. It is usually reserved for the passage of emergency vehicles, and you are only allowed to "cross it" when making a left turn. It is not intended as an express lane to pass a long line of cars to get to your destination more quickly. Lastly, you *are* allowed to use it for brief travel if the regular travel lane is "impeded by an obstacle."

The officer explained the infraction: there was a long line at a traffic signal; the defendant entered the emergency lane with his left turn signal on, passing between fifteen and twenty cars before arriving at the traffic light which was red. The officer then pulled the driver over and cited him for illegally using the median--or "emergency travel lane" if you prefer.

The defendant took the stand and cited the portion of the statute that allows emergency lane travel to avoid an obstruction in the roadway. The following conversation ensued between the Judge and the defendant:

Judge: "You are telling me there was an obstruction in the roadway that prevented your normal travel in the roadway."

Defendant: "Yes, your honor, there was."

Judge: "What was the obstruction, sir?"
Defendant: "The obstruction was between fifteen to twenty cars, as testified to by the officer, that prevented me from reaching the traffic signal in the normal lane of travel."

Judge: "Seriously? Your defense is that the other cars on the road constituted an obstacle, allowing your use of the emergency lane for travel?"

Defendant: "Yes, your honor."

Judge: (breaks out in a Cheshire Cat grin) "Do you have anything else to say?"

Defendant: "No, your honor."

Judge: "I find the defendant guilty."

Defendant: "Your honor, that statute does not define obstacle."

Judge: "Go try that argument on appeal. Next!"

The prosecution rests, your honor. ML

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Amicus *cont'd from page 23*

mony that he had allegedly indicated he believed the items were stolen when he bought them.[40] The municipal judge concluded that probable cause existed for all charges and bound them over for trial.[41] Later, however, a court dismissed the charges without prejudice for failure to be timely presented to a grand jury.[42]

Chiaverini then sued the officers and the City under Section 1983 for malicious prosecution. The Sixth Circuit upheld the district court's grant of summary judgment based on the existence of probable cause to arrest Chiaverini.[43] Even though the municipal judge and federal district court both found probable cause existed to arrest Chiaverini for all three charges, the Sixth Circuit only analyzed two of the charges, relying on a rule from the Circuit that if probable cause supports one or more of the three charges, then dismissal of the claim for all charges is appropriate.[44] The court reasoned:

> If probable cause did exist for at least one of the charges, we can conclude that he was no more seized when [he was] detained to await prosecution for several charges than if he were seized for just one valid charge. For that reason, even tacked-on meritless charges . . . [do] not change the nature of the seizure.[45]

The Sixth Circuit found that probable cause supported the charges of receipt of stolen property and the license violation and dismissed the malicious prosecution claim.[46] In terms of the receipt of stolen property charge, the court explained that under Ohio law, retention of stolen property falls under the statute so even if he did not know it was stolen when he received it (as he claimed), once he was on notice that it was stolen and refused to return it, there was probable cause to believe he had committed the crime. *Id.* at *5. The court simply did not reach the question of probable cause for the money laundering charge, finding it did not need to decide that issue based on the "any charge" rule followed by the Circuit.[47] There is no evidence in the case that Chiaverini's detention would have been any shorter without the additional money laundering charge.

Chiaverini petitioned the Supreme Court for certiorari, arguing that there is a circuit split on the question of whether "Fourth Amendment malicious-prosecution claims are governed by the charge-specific rule," "under which a malicious prosecution claim can proceed as to a baseless criminal charge, even if other charges brought alongside the baseless charge are supported by probable cause."[48] The Institute for Justice, which filed an amicus brief in support of the petition at the certiorari stage argued that even if the addition of charges that are not supported by probable cause resulted in no additional detention or other damages, the plaintiff would be entitled to nominal damages under Section 1983 for the charge that lacked probable cause.[49]

However, as IMLA will argue in its amicus brief in this case, the petitioner and IJ's position is counter to the "values and purposes" of the Fourth Amendment, which the *Thompson* case instructs must be a part of the analysis. If Chiaverini's detention was not prolonged by the additional charge that (arguably) lacked probable cause, there simply cannot be a Fourth Amendment violation as the seizure would be reasonable.

The Petition points out that hundreds of district court cases per year involve malicious prosecution claims.[50] If these claims may be brought for cases involving no actual increased detention and only nominal damages, local governments will be subject to significantly more risk exposure. Given that Section 1983 claims carry with them the ability to recoup attorney's fees under Section 1988, these claims can be expensive, and plaintiffs' attorneys will be incentivized to bring them and the potential liability for local governments therefore is anything but nominal. As with the *Johnson* case discussed above, this case will be argued in April, and we can expect a decision before the end of June. ML

Notes

1.On February 28, the Court granted cert in Trump v. United States, No. 23-939; the Question Presented is "Whether and if so to what extent does a former president enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office."
2. Gonzalez v. Trevino, No. 22-1025 (First Amendment retaliatory arrests), Lindke v. Freed, No. 22-611 (when is a public official's social media account governmental in nature and subject to the constraints of the First Amendment); O'Connor-Ratcliff v. Garnier, No. 22-324 (accord); National Rifle Association of America v. Vullo, No. 22-842 (the issue involves government speech versus government coercion and threats); Murthy v. Missouri, No. 23-411 (accord).
3. Sheetz v. County of El Dorado, No. 22-1074 (the issue involves impact fees and the Takings Clause).
4. Harrington v. Purdue Pharma, No. 23-124.
5. Muldrow v. City of St. Louis, No. 22-193.
6. Relentless v. Department of Commerce, No. 22-1219; Loper Bright Enterprises v. Raimondo, No. 22-451.
7. Ohio v. EPA, No. 23A349.
8. Culley v. Marshall, No. 22-585.
9. Snyder v. United States, No. 23-108.
10. City of Grants pass v. Johnson, No. 23-175.
11. Chiaverini v. City of Napoleon, No. 23-50.
12. Grants Pass was previously discussed in the January-February 2023

issue of *Municipal Lawyer* when it was still in the lower courts, but now that the Supreme Court has taken the case, this article will briefly discuss the case and its importance to local governments. For additional information about the case, please refer to Amanda Karras, Litigation Trends Surrounding Homelessness, 64 Muni Lawyer (Jan.-Feb. 2023) at 18.

13. See Petition for Writ of Certiorari, available at: https://www.supremecourt.gov/DocketPDF/23/23-175/275911/20230823153037814_Grants%20Pass%20v.%20Johnson_cert%20petition_corrected.pdf.

14. Martin v. City of Boise, 920 F.3d 584, 616 (9th Cir. 2019).

15. Id. at 617, n8.

16. Johnson v. City of Grants Pass, 72 F.4th 868, 888-891 (9th Cir. 2023).

17. *See e.g.*, Claire Rush, *Portland, Oregon, to Clear Sidewalk Tents to Settle Suit with People with Disabilities*, Associated Press (June 2, 2023), https://apnews.com/article/portland-ada-lawsuit-homelesstents-sidewalks-aee2d079440d5f9427a18d9e4771d92a (detailing settlement regarding Portland ADA lawsuit); Freddy Brown, et al. v. City of Phoenix, No. CV2022-010439 (Maricopa Cnty. Superior Ct. May 10, 2023) (ordering Phoenix to clear encampments and require homeless individuals to leave the encampment).

18. Albright v. Oliver, 510 U.S. 266, 275 (1994).

19. Manuel v. Joliet, 580 U.S. 357, 360 (2017).

20. Id. at 367.

21. Id. at 370.

22. Thompson v. Clark, 596 U.S. 36, 39 (2022).

23. Id. at 43.

24. Chiaverini v. City of Napoleon, Ohio, No. 21-3996, 2023 WL 152477, at *1 (6th Cir. Jan. 11, 2023).

25. Id.

26. Id.

27. Id.

28. Id.

29. Id.

30. Id. at *2.

31. Id. The officers for their part claim they omitted this statement from the original narrative because at the time, Burns was the suspect, not Chiaverini..

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at *3.

39. Id.

40. *Id.*

41. *Id.*

42. *Id.*

43. Id. at *4.

44. Id. Although the Sixth Circuit did not reach the money laundering charge, the judge overseeing the criminal charges found probable cause to arrest existed for all three charges before binding them over for trial. *See* Chiaverini v. City of Napoleon, No. 3:17-CV-2527, 2021 WL 4502730, at *9 (N.D. Ohio Sept. 30, 2021). And then, the federal district court examining the malicious prosecution claim relied on that conclusion and held that plaintiff's malicious prosecution claims were barred based on the existence of probable cause for all three charges. *See Id.* at *10.

45. Chiaverini, No. 21-3996, 2023 WL 152477, at *4. (internal quotations omitted).

46. *Id.*

47. *Id.*

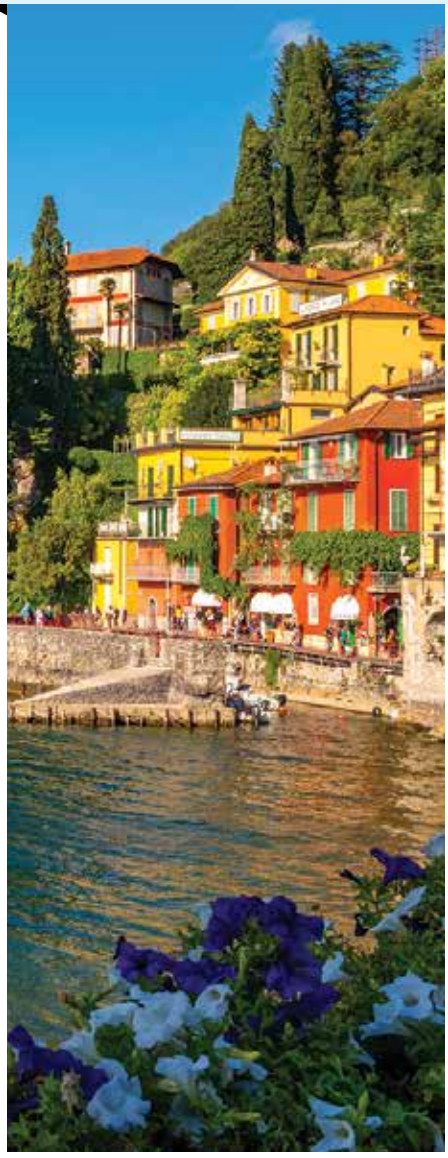
48. *See* Petition for Writ of Certiorari, available at: https://www.supremecourt.gov/DocketPDF/23/23-50/272074/20230714130421379_No.%2023-__%20Chiaverini%20Petition.pdf

49. *See* Brief of Institute for Justice as Amicus Curiae Supporting Petitioners, p. 7, available at: https://www.supremecourt.gov/DocketPDF/23/23-50/272844/20230725114439371_Brief%20of%20the%20Institute%20for%20Justice%20as%20Amicus%20Curiae%20Supporting%20Petitioners.pdf.

50. *See* Petition, *supra* note 48, at 26.

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