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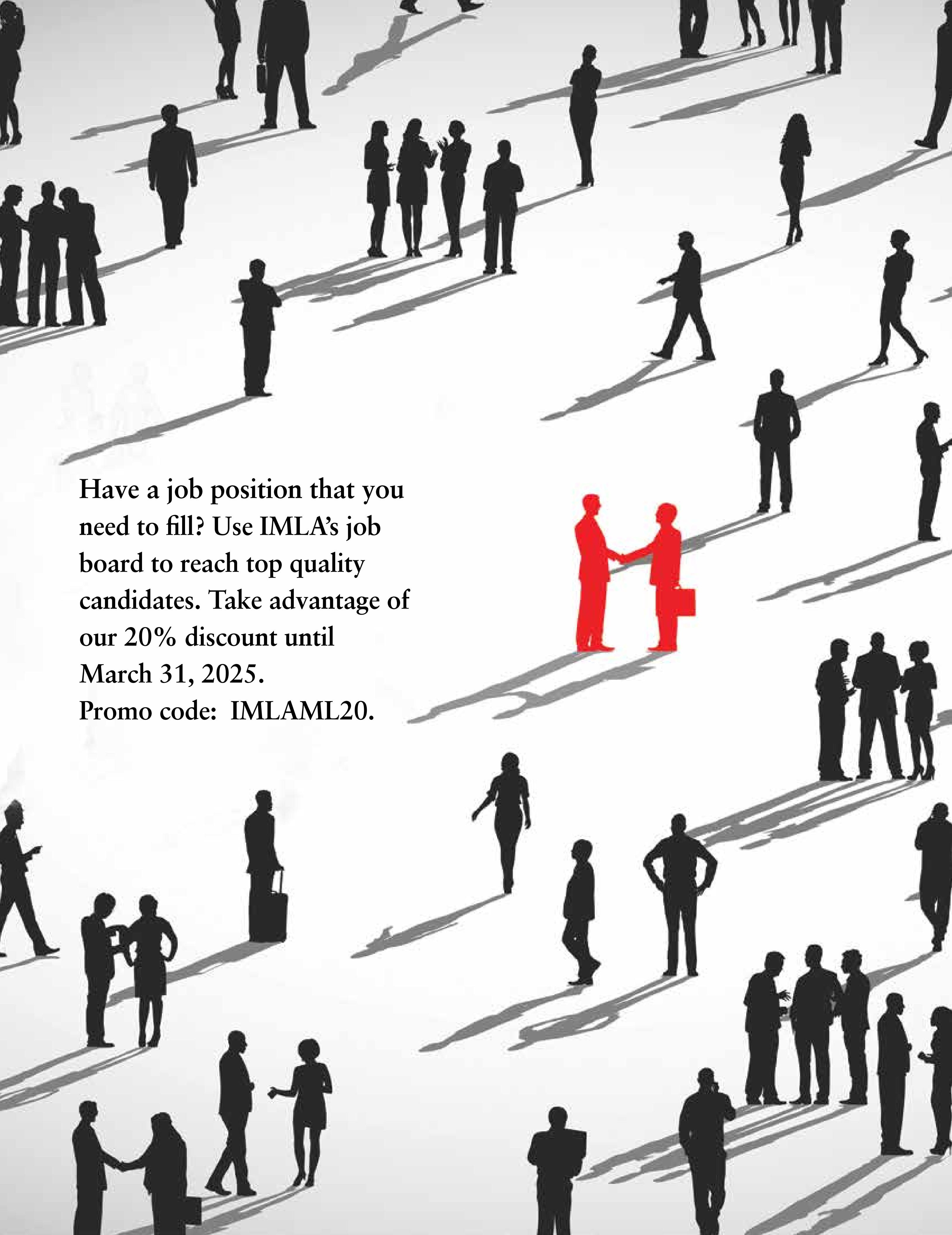
"SHOW ME YOUR HANDS!" Analyzing a Critical Element in Qualified Immunity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THIS IS THE WAY: EQUAL ACCESS TO BROADBAND THROUGH MUNICIPAL FRANCHISING

By: Michael R. Bradley, Partner, Bradley Werner, LLC, Minneapolis, Minnesota

As the FCC meets resistance in its efforts towards ensuring that all consumers have equal access to broadband, local governments have a major role to play. Through franchising, localities can leverage use of valuable rights-of-way, extracting concessions from providers and protecting constituents.

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"SHOW ME YOUR HANDS!" -ANALYZING A CRITICAL ELEMENT IN QUALIFIED IMMUNITY

By: Robert W. Higgason, Senior Assistant City Attorney, Houston, Texas

In analyzing the justification for use of deadly force by law enforcement, few factors are more important than the ability of an officer to see the hands of a suspect. A quarry's decision about whether to reveal both hands, clearly and free of weapons, can be the decisive factor in assessing qualified immunity.

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Preparation, education, and communication add up to success.

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EDITOR'S NOTE

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

One Hundred Years in the Life of a Man and a Nation

As this issue of *Municipal Lawyer* goes to press, America takes time to honor our thirty-ninth president. We remember Jimmy Carter's lifetime of public service, expressed through actions large and small. In office, he forged the Camp David Accords and advanced the Strategic Arms Limitation Talks, yet still made time to teach Sunday school. And in his remarkable span of 44 years after leaving the White House, he continued to promote global health and diplomacy, winning the Nobel Peace Prize in 2002, while championing Habitat for Humanity and countless other charitable causes.

His path after a challenging presidential term is described in a passage from *Life After Power*, a book I cited in an earlier Editor's Note: "The White House was out of reach, as well as any national elected office. He had few connections in the business world. So Carter decided to do something different. He turned the post-presidency into a lifetime appointment with power of its own." One remarkable result of that self-appointment: the virtual eradication of parasitic Guinea worm disease around the world, from 3.5 million recorded cases in 1986 to just 11 in 2024.

Carter's life and times chronicle much about the nation. He was our first president to be born in a hospital, and the first to have attended public school instead of more patrician institutions. As of his birth in 1924, women had been allowed to vote for a mere five years, and other change was underway, if gradually: three decades prior, *Plessy v. Ferguson* had legitimized separate but equal public facilities, and three decades later, *Brown v. Board* of *Education* would reverse that inequity, beginning an evolution driven in large measure by federal authorities. The Carter administration expanded governmental influence, creating the Departments of Education and Energy and working to make climate change a federal concern.

Ironically, there would be a development during President Carter's term that brought major challenges for government at the local level. Although not attributable to his administration, a sea-change in local government accountability occurred in 1978 under the Burger Supreme Court. Reversing its earlier posture in *Monroe v. Pape* that local governments could not be held liable for violating individuals' civil rights, the Court held the contrary in *Monell v. Department of Social Services,* finding that the Civil Rights Act of 1871 was enforceable against local governments as well as their officials. The rest, as they say, is history, with an expansion in Section 1983 cases reaching the courts and becoming a dominant source of federal litigation for IMLA members and other localities around the country.

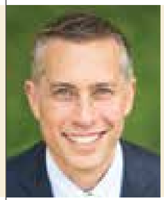
Which, eventually, brings us to this issue of the *ML*. The aforementioned Section 1983 is the source of caselaw in our cover feature by Robert Higgason, discussing the nuances of hand visibility and the constitutionality of police use of force. Our second feature is not constitutionally based, but altogether timely: Michael Bradley points to the virtue of local government bargaining power in ensuring broadband access, only one week after the FCC's rules for net neutrality were invalidated by the Sixth Circuit. In *Practice Tips*, Nastasha Anderson offers hints to aid in successful labor negotiating, and in *Inside Canada*, Monica Ciriello summarizes another sampling of interesting cases from North of the 49th parallel. In *Amicus*, your editor discusses a number of challenging entries on the Supreme Court docket, many propelled by Section 1983, and other appellate developments which may present hurdles for local governments. Finally, Avery Morris introduces us to Kenai City Attorney Scott Bloom in *Day in the Lif*e, affording a brief look at municipal lawyering in a bucolic Alaska locality.

On our transition to a new administration almost a half-century after Jimmy Carter left office, the role of local government will continue to be tested, and the issues facing municipal attorneys will continue to evolve. We hope you find this issue of *Municipal Lawyer* useful, and returning to the lead of this note, find inspiration in the life and accomplishments of an American public servant as we begin the New Year.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



BY: **JEFF DANA**
City Solicitor, Providence, Rhode Island and IMLA President

Hello IMLA members and welcome 2025!

I'd like to start the new year by thanking the phenomenal IMLA Staff. IMLA wouldn't be the incredible organization it is without the hard work of Trina Shropshire-Paschal, Jenny Ruhe, Caroline Storer, Carolina Moore, Deanna Shahnami, Erich Eiselt, Avery Morris, Ravinder Arneja, Chuck Thompson, and Amanda Karras. I'm sure that I speak for the entirety of membership when I communicate our appreciation for your efforts.

It is common to embark on a new year with a slew of resolutions for things we'd like to accomplish, changes we'd like to make, and so on. The challenges and time-consuming tasks of daily life frequently get in the way of fulfilling such resolutions and, by February, many of us have already forgotten what some of our New Year's resolutions may have been. While that often leads to feelings of guilt for not accomplishing unmet goals, there should be no shame in being aspirational.

IMLA provides numerous professional opportunities to its members and, in the spirit of making resolutions for a new year, below are some suggestions for ways to be involved and to take full advantage of your membership. No pressure!

1. Participate in a working group. IMLA helps members create, and supports, topical working groups. Examples include groups such as the Affirmative Litigation Group, the Homelesssness Group, the Code Enforcement Group, the Police Alternatives Group, the Environmental Group, and many more. These working groups provide opportunities for members to engage in productive discussions and share strategies for dealing with legal issues that various members are dealing with. IMLA has demonstrated its ability to nimbly serve its membership as it has helped create, and support, working groups to deal with novel issues upon request of member law departments.

2. Attend the Mid-Year Seminar and the Annual Meeting. The Mid-Year Seminar is held in Washington, DC each spring and runs parallel tracks of programming on hot municipal law topics and sessions focusing on Section 1983 defense. Another seminar highlight each year is the Supreme Court panel featuring some of the nation's leading appellate lawyers. The sessions are always informative and collegial atmosphere amongst colleagues is inspiring.

The host committee for the Annual Meeting (in New Orleans in October 2025) is hard at work preparing for a conference which will provide both fabulous learning opportunities and a whole lot of fun.

3. Sign up for virtual programming and on-demand webinars. IMLA has an impressive on-demand webinar library that is available to all members. IMLA additionally provides virtual programming options which offer useful CLE opportunities.

4. Be present, and supportive, as part of a network for fellow members: as a mentor, a mentee, or simply a helpful colleague. Please allow yourself to not only give, but to receive, such support. Our jobs as municipal attorneys are rewarding, but can also be uniquely challenging, and our friendly IMLA colleagues share that professional experience.

I wish everyone an enjoyable and peaceful start to the new year!

Jeff Dana

ML

This is the Way: Equal Access to Broadband Through Municipal Franchising

MICHAEL R. BRADLEY, *Partner, Bradley Werner, LLC, Minneapolis, Minnesota*

The goal of equal access to broadband is not controversial or partisan. Most agree that citizens should have equal access to the same quality of service to broadband; that broadband networks should be built out to serve all citizens over a reasonable time; that there should be reasonable customer service and consumer privacy protections; and price protections.[1] The importance of ensuring equal access to broadband is particularly relevant today as federal and state governments are making historic public grants to improve broadband networks throughout the country.[2]

Surprisingly, despite historically high public investments, there remain no long-term guardrails to ensure residents receive equal access to the same quality of service, pricing, and consumer protections. While the FCC enacted digital discrimination regulations,[3] the FCC likely lacks express authority to implement additional broadband rules.[4] In an effort to presumptively assert additional regulatory authority over broadband, the FCC reclassified broadband earlier this year.[5] While this reclassification would have arguably allowed the FCC to develop additional broadband rules, the Sixth Circuit stayed the reclassification, which forecasts the reclassification will likely fail.

Regardless of the outcome of the appeal, local governments are in the best position to ensure equal access to broadband through franchising. If available, local governments must use their existing home rule or statutory authority to franchise broadband.[6] If necessary, state laws must be amended to clarify municipal authority to franchise. Broadband is the future of municipal franchising. Local franchising is the way to ensure equal access to broadband.

A Valuable Special Privilege

Generally, a city has the sovereign power delegated by state law to grant a franchise to convey a highly valuable special privilege to corporations to use the scarce public right-of-way to deliver services to a city's residents.[7] A franchise is a special privilege that allows a franchisee to profit from the use of the public right-of-way in a manner not generally available to the public as a common right.[8] Without question, broadband providers must have this privilege in order to access the public right-of-way to cost effectively (and profitably) deliver services. Franchisees, in return for this valuable special privilege, pay franchise fees, which is essentially the rent for the use and occupation of the public property.[9] While organizations like the Free State Foundation suggest that fees are the only policy benefit of franchising,[10] they ignore the value of the privilege to use public rights-of-way[11] or how local governments require franchisees to comply with requirements benefiting citizens, as discussed in detail below.

Source of Municipal Franchise Authority

The source of local franchising authority arises from a number of sources including, but not limited to, state law,[12] state constitutions,[13] municipal charters,[14] and state common law, including state statutory and common law recognition of local authority to manage the public rights-of-way. Local franchising is a sovereign power that resides in the states and is not derived from federal law, including the Communications Act.[15] To the extent the Communications Act does not lawfully restrict or address a particular service, a local government may regulate the service as state law provides.[16] To that end, courts recognize that the Communications Act creates a dual federal-state regulatory structure.[17] Today, broadband is classified under federal law as a Title I information service.[18] Title I does not preempt local franchising of broadband,[19] just as it did not preempt local franchising of cable service when cable service was an information service prior to the passage of the federal Cable Act.[20]

Earlier in the year, when attempting to reclassify broadband, the FCC once again recognized the dual federal-state regulatory system over communications networks and made it clear that

it would not preempt franchising even if broadband was reclassified to a Title II telecommunications service.[21] The order states:

> We decline requests to categorically preempt all state or local regulation affecting [broadband internet access service] in the absence of any specific determination that such regulation interferes with our exercise of federal regulatory authority. The [Communications] Act establishes a dual federal–state regulatory system in which the federal government and the states may exercise concurrent regulatory authority over communications networks.[22]

Additionally, the FCC affirmed other roles typically included in franchises by local governments regardless of the federal reclassification of broadband, such as:[23]

- "[G]enerally policing such matters as fraud, taxation, and general commercial dealings."
- "[P]rotecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints."
- State Consumer Protection Laws, such as the California Internet Consumer Protection and Network Neutrality Act of 2018.
- Promoting Broadband Affordability Programs.[24]

Municipal Franchising Success Story

Cities have a long history of protecting citizens through franchising. Through cable franchising, for example, cities have ensured that their residents are served by the cable system over a reasonable period of time with the same quality of service and pricing.[25] When necessary, municipal franchising authorities have required cable system upgrades, which resulted in superior broadband offerings compared to phone companies.[26] Cable franchises also have customer service protections and provided for public benefits such as public, educational, and governmental (PEG) access channels. Local cable franchising has undeniably been effective in ensuring universal access, universal pricing, area-wide buildout, and upgrades.[27] As local governments explained to the FCC recently:[28]

> For decades, local governments have protected the public interest through franchises and other rights-of-way management tools.[29] In the cable franchise context, local governments have required every cable operator to construct its cable system to serve everyone in the municipality, and, later, required system upgrades to ensure the cable system provided an appropriate level of service.[30] Local governments have, as required in the 1984 Cable Act, prohibited cable operators from redlining lower income communities.[31] They have also included important public benefits, such as public, educational and government (PEG) access programming in local franchises to ensure access to local news, information, public meetings, high school sports and events, and more.[32]

National and regional organizations agree that municipalities should be a part of the solution to ensuring equal access to broadband. As the League of Minnesota Cities explained in its Digital Discrimination Comments:

> Local governments are in the best position to recognize and respond to the needs of their residents. It is simply not possible for the federal government to create a "one size fits all" plan that will ensure efficient access to broadband across the entire country or to prevent or eliminate digital discrimination."[33]

The National League of Cities echoed those comments stating, "Local government, as the level of government closest to the consumer, is in the best position to identify potential or actual digital discrimination and should take a leading role in preventing and addressing it."[34]

The effectiveness of franchising authority has been supported by the FCC in two recent orders. In its Digital Discrimination Order, the FCC adopted the recommendations of the Communications Equity and Diversity Council ("CEDC"), which acknowledged the importance of local franchising. [35] The CEDC Recommendations and Best Practices recognized the long-standing efforts of local governments to promote nondiscriminatory access to communications services through franchises and rights-of-way management.[36]

Continued on page 8

Michael R. Bradley is a partner in the Municipal Telecommunications firm Bradley Werner, LLC. Mike has spent nearly his entire 30-plus year career representing local governments on a wide variety of telecommunications and franchising issues. Mike successfully defended the right of cities to receive cable franchise fees in Oklahoma and also litigated in federal court whether revenues from the provision of internet service should be included in cable franchise fees. He is one of a handful of attorneys in the country that has represented local government clients in the formal cable franchise renewal process. Mike and his firm represented municipal clients in all three FCC Section 621 cable franchising proceedings from 2006 to present, including the recent litigation before the Sixth Circuit. He has also filed in the FCC Digital Discrimination and Cable Pricing dockets. He has drafted and testified on communications legislation in multiple jurisdictions, including the Minnesota Equal Access to Broadband Act in 2024, and is a long-time officer, including past Chair, of the Minnesota State Bar Association's Communications Law Section. Early in his career, he assisted the City of St. Paul in obtaining public funding for a new hockey arena and bringing the NHL back to the State of Hockey. Mike is a graduate of Hamline University School of Law (J.D.) and the University of Minnesota (B.A.) and is admitted to practice before multiple state and federal courts, including the United States Supreme Court.

Broadband *cont'd from page 7*

Broadband Franchising Results in Equal Access to Broadband

Plain and simple, local franchising has a history of success and should be used to ensure equal access to broadband. The following is a sampling of the issues that franchising can address.

Long-Term Protection.

Updating state laws to clearly authorize broadband franchising is particularly important now, as states across the country are about to distribute over $42 billion in federal grants to broadband companies over the next two years.[37] Additionally, the broadband industry is seeking additional public benefits, such as sales tax exemptions for purchasing broadband facilities and government subsidies to serve low-income families.[38] Current federal and state programs do not address the long-term interests of residents, which is somewhat shocking considering the hundreds of millions of public dollars being given to the broadband industry. Franchising provides long-term protection.

Equitable Buildout.

Broadband franchising will allow local governments to require reasonable build-out schedules to ensure all residents are served with the same quality of services. The effectiveness of local cable franchising buildout is undeniable. Compare the availability of a standard quality of service throughout the country and it will consistently show the local cable system outperforms the local telephone company. Local governments have required every cable operator to construct its cable system to serve everyone in the municipality, and, later, required system upgrades to ensure the cable system provided an appropriate level of service.[39] Additionally, local governments have, as required in the 1984 Cable Act, prohibited cable operators from redlining lower income communities.[40]

Minnesota cities saw this firsthand when granting cable franchises to the local ILEC (incumbent local exchange carrier) phone company. According to the ILEC, to provide cable service to a household, the ILEC needed to be capable of providing a certain minimum broadband download speed. In reviewing build-out data from the ILEC, it became immediately apparent that, unlike the traditional franchised cable operator, the ILEC had an inconsistent, non-universal, quality of broadband service when compared to the cable system. Since local franchising of phone companies was prohibited by state law in Minnesota, local governments were never allowed to require the ILEC to provide universal service across its service territory. When franchising the ILEC's cable service, it was the first time the phone company was required to equitably build out its network with significant investment throughout a city.[41] These provisions resulted in deployment of fiber optic facilities and the availability of cable service and high speed broadband services in all areas of cities, including areas with low income households and historically underrepresented populations.[42] Franchising ensures broadband systems will be built in a way that serves all residents equally.

Customer Service.

When it comes to broadband service, residents want a local person they can call with service issues and questions about their bills. Cities do that today with cable providers, but not with other broadband providers. There are instances when a broadband provider's service is down, but the customer and the city have no way of communicating with the provider. For example, in one Minnesota city recently, an elderly resident was without service for over six weeks. In another instance, an administrative law judge found that customers of state's largest phone provider, "experienced multiple services outages or disruptions caused by deficient outside plant or equipment over an approximately four-and-a-half-year period."[43] With broadband franchising, customers will have someone advocating for them, there will be standards for response to customers, and there will be consequences for failing to comply.

Through franchising, local governments protect their residents by negotiating and enforcing customer service requirements in cable franchise agreements.[44] These customer service provisions include call response times, installation response times, late fee restrictions, access channels, electronic programming guide provisions, anti-redlining, and anti-discrimination requirements.[45] Local governments have supported, and the state of Maine recently adopted, customer service requirements relating to access television and refunds.[46] Contrast these efforts to the broadband customer in Wisconsin who was told that she could not terminate her service just because she called on a weekend. Franchising will protect these customers with reasonable customer service protections.

In addition to negotiating and enforcing cable franchise customer service provisions, local governments are relied upon by the FCC to participate in consumer protection dockets. Just in the past year, local governments from across the country have supported consumer protection rules at the FCC, and they have also supported digital discrimination rules at the FCC.[47] Local government Comments and reply Comments were cited favorably by the FCC numerous times in its final Report and Order that adopted digital discrimination rules.[48]

Local government franchising authorities supported All-In Cable Pricing rules to require the disclosure of all cable fees, including some referred to as junk fees.[49] These fees include extra fees to receive local broadcast channels, sports programming, and even high-definition television service. Once again, local government Com-

ments and Reply Comments were cited throughout the FCC's final Report and Order.[50] Municipalities have also participated in the development of state Digital Equity Plans.[51] These efforts show that municipalities will protect all residential consumers through broadband franchising. Municipalities have an undeniably successful record of using its franchising authority to protect consumers.

Public benefits.

Receipt of public benefits is another valuable function of franchising. Broadband franchising will allow cities to continue to fund access television and to address other digital adoption and equity programs.[52] The CEDC recognized this principle, finding that "the privilege of using public assets comes with an obligation to provide a benefit to the public, which includes ensuring that all members of the community have equal access to broadband… ."[53]

For cable franchises, important services, such as public, educational and government (PEG) access programming in local franchises to ensure access to local news, information, public meetings, high school sports and events, and more.[54] Local broadband franchising will allow local governments to negotiate public benefits to help promote equal access to broadband and to eliminate digital discrimination. Some examples of these public benefits could include computer centers, training on the use of digital services, the next generation of access television, and consumer protections.

The Minnesota Equal Access to Broadband Act

In 2024, the state of Minnesota began exploring the role that franchising can play in ensuring equal access to broadband for all Minnesotans. The Minnesota Equal Access to Broadband Act, HF 4182[55]/SF 4262,[56] was introduced in the 2024 legislative session. The bill authorized cities to franchise broadband providers, which would ensure that all their residents will receive the same broadband. It would also allow cities to receive other public benefits such as access TV and promote digital equity. Through an amendment during committee hearings, the bill capped fees to mirror cable fees.

While the bill did not pass this year, it generated significant legislative support. The bill was heard multiple times in the House of Representatives and ultimately added to the House Commerce Policy Omnibus Bill,[57] which passed out of committee to the House floor where it received its Second Reading on April 4, 2024. The bill was also heard by the State and Local Government Committee in the House and laid over for possible inclusion in the State and Local Government Omnibus Bill.

The Equal Access to Broadband Act enjoyed widespread support from the League of Minnesota Cities, MACTA, NATOA, ACM, the League of Women's Voters, and others, but was opposed by the cable and phone associations and the state Chamber of Commerce. While the Minnesota Equal Access to Broadband Act is fairly technical and Minnesota-centric, it could be a starting point for drafting model broadband franchising legislation for use throughout the country.

Challenges to Municipal Broadband Franchising

The broadband industry raised several challenges to the Minnesota Equal Access to Broadband Act, most of which were self-serving with no factual or legal basis.

Franchise Fees.

Rather than recognizing the valuable special privilege of enjoying access to the public rights-of-way to conduct their business, the broadband industry opposed the Minnesota Equal Access to Broadband Act claiming franchise fees were taxes amounting to a "slush fund" for cities. As shown above, franchise fees are the consideration for the special privilege to use the public right-of-way for private profit.[58] It is a very valuable privilege that few companies enjoy. Without this privilege, communications companies could not operate their businesses in a cost-effective way. The franchise fees allowed by the Minnesota legislation mirrored the fees currently paid by cable operators. As the Texas Court of Appeals recently recognized, public property – the right-of-way – should not be given away below its fair market value.[59] No government should give away public property for nominal or no consideration and it is fundamentally fair to require all users to pay franchise fees, not just some.

Stacking.

Opponents to the Equal Access to Broadband Act claimed fees on franchisees would be unfairly "stacked" on providers. One claim was that multiple governmental entities could require a broadband franchise, thus forcing a provider to obtain multiple franchises for the same area. No reasonable reading of the Equal Access to Broadband Act could support that argument. Nevertheless, the bill was amended to clarify that there is one local franchise authority in each city, so there would be no so-called stacking.

Secondly, opponents claimed that fees would be stacked on multiple services provided by individual providers, such as cable and broadband. This stacking argument fails to recognize the valuable privilege of using the public right-of-way.[60] In rejecting a similar stacking argument, the Texas Court of Appeals held such an argument "would do violence to the concept of consideration, and we are directed to no authority that would compel such an anomalous result."[61]

Impact on Low Income Residents.

The broadband industry presented no solutions to lowering rates for low-income persons, even though the industry

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Broadband *cont'd from page 9*

would be receiving $750 million in federal and state broadband grant funding and was requesting additional public benefits for the industry. Instead, the industry claimed that franchise fees will impact low-income residents with higher broadband costs. No credible information was submitted in support of this claim. On the other hand, local governments testified in support of the Equal Access to Broadband Act that local franchising authorities stood up for subscribers in terms of digital discrimination and fair pricing.

Impact on Buildout.
The broadband industry testified that allowing franchising will slow down the build out of broadband and that they would not build to cities that chose to require a franchise. Given the pending billions of dollars of state and federal funding at stake, the argument lacked veracity. The expenditure of $42 billion of taxpayer dollars would be irresponsible without protecting the long-term interests of residents. Local franchising will encourage and promote more equitable broadband deployment - not less. Only local governments through cable franchising have been able to demand buildout maps and ensure full build out to every neighborhood, home and apartment. In other words, franchising promotes equal access to broadband.

Preemption.
Industry opponents claimed that federal law would preempt the proposed Minnesota Equal Access to Broadband Act. First, the industry claimed the bill would be preempted by the Internet Tax Freedom Act ("ITFA).[62] The ITFA allows fees for the conveyance of privileges. A franchise grants the privilege of use of the public right-of-way. There is no preemption. Next, industry claimed the bill would be preempted by the FCC's Small Cell Order.[63] Since the bill excluded small cell wireless facilities, the Small Cell Order would have no preemptive effect on the bill. Finally, industry opponents claimed preemption by the FCC's Mixed-Use Rule.[64] The Mixed-Use Rule has a somewhat tortured history. The original order preempted local governments from regulating noncable services over a cable system.[65] The legal reasoning behind the Mixed-Use Rule was largely rejected on appeal and the court ruled that regulation of non-cable services of a cable operator is allowed if it is consistent with the federal cable act.[66] This was also addressed in the bill amendments.

Conclusion
The goal of equal access to broadband is not controversial. The way to obtain the goal is through franchising broadband service providers. Municipal franchising is the best path forward to ensure buildout, quality of service, customer service, privacy protections, fair pricing, and public benefits to address digital adoption and education, all of which residents want and expect. Municipalities have a successful franchising history. Local governments without current statutory or home rule authority should seek legislative change to allow municipal broadband franchising or risk their communities being less competitive and underserved. Franchising is the future and the way to equal access to broadband.

Editor's Note: On January 2, 2025, the Sixth Circuit released Ohio Telecom Ass'n v. FCC, 2025 WL 16388, ___ F.4th ___ (6th Cir. 2025), setting aside the FCC's 2024 Safeguarding and Securing the Open Internet Order that reclassified broadband internet access service as a Title II telecommunications service subject to FCC common carrier regulations and net-neutrality restrictions. Citing Loper-Bright and the demise of agency deference, the court held that the FCC's reclassification order exceeded its statutory authority and that based on a plain reading of the statute broadband internet access service is a Title I information service. The Court similarly rejected the FCC's reclassification of mobile broadband. This development makes state initiatives regarding equal access and broadband franchising, neither of which are preempted by the Act or by the Sixth Circuit decision, even more significant.

Notes
1. *See, e.g.,* City of Minneapolis Digital Opportunity Plan Comments and Qualitative Data to the Minnesota Office of Broadband Development (June 30, 2023).
2. *See* Broadband Equity Access and Deployment Program – Overview, https://broadbandusa.ntia.gov/funding-programs/broadband-equity-access-and-deployment-bead-program (last visited Oct. 30, 2024) ("The Broadband Equity, Access, and Deployment (BEAD) Program, provides $42.45 billion to expand high-speed internet access by funding planning, infrastructure deployment and adoption programs in all 50 states, Washington D.C., Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands").
3. *See* In re Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Report and Order, 89 Fed. Reg. 4128, GN Docket No. 22-69, 2023 WL 8614401 (rel. Nov. 20, 2023), appeal docketed, Minn. Telecom. Alliance v. FCC, No. 24-1179 (8th Cir. 2024) (the "Digital Discrimination Order").
4. *See* Mozilla Corp. v. FCC, 940 F.3d 1, 80-81 (D.C. Cir. 2019) (per curiam) ("Not only is the Commission lacking in its own statutory authority to preempt, but its effort to kick the States out of intrastate broadband regulation also overlooks the Communications Act's vision of dual federal-state authority and cooperation in this area specifically;" Ohio Telecom Ass'n v. FCC, Case No. 247000, Document: 51-2 (6th Cir. 2024) (FCC's 2024 Title II broadband reclassification order

stayed, unlikely to succeed on the merits).

5. *See* In re Safeguarding and Securing the Open Internet, Declaratory Ruling, Order, Report and Order, and Order On Reconsideration, FCC 24-52, 89 Fed. Reg.45404 (Pub. May 22, 2024), appeal docketed, Ohio Telecom Ass'n v. FCC, Case No. 247000, Document: 51-2 (6th Cir. 2024) (Title II reclassification stayed, unlikely to succeed on this merits) ("2024 Open Internet Order").

6. *See, e.g.,* Lincoln Mun. Code Ch. 5.12 (2021).

7. *See* Bank of Augusta v. Earle*,* 38 U.S. 519, 595, 10 L. Ed. 274, 1839 WL 4294 (1839); State of California v. Central Pac. R. Co., 127 U.S. 1, 41, 8 S. Ct. 1073, 32 L. Ed. 150 (1888); *see also* Village of Blaine v. Ind. Sch. Dist. No. 12*,* 265 Minn. 9, 121 N.W.2d 183 (1963); Northern States Power Co. v. City of Granite Falls, 186 Minn. 209, 242 N.W. 714 (1932); City of Saint Paul v. Northern States Power Co., 462 N.W.2d 379 (Minn. 1990); Burns, 164 P.3d at 483; 12 McQuillin Mun. Corp. § 34:2 (3d ed.).

8. *See*, *e.g.,* Burns, 164 P.3d at 483; 12 McQuillin Mun. Corp. § 34:2 (3d ed.).

9. *See* City of St. Louis v. Western Union Tel. Co., 149 U.S. 465, 13 S. Ct. 990, 37 L. Ed. 810 (1893); Burns, 164 P.3d at 483; 12 McQuillin Mun. Corp. § 34:53 (3d ed.).

10. *See*, *e.g.,* Daniel A. Lyons, *Municipal Broadband Fees Are Bad Law and Bad Policy*, 19 Free State Foundation, No. 39 (Oct. 18, 2024).

11. *See* City of McAllen v. Texas, ___ S.W.3d ___, 2024 WL 4799325, *5 (Tex. Ct. App. Nov. 15, 2024) (for a wireless node, "no case holds that a $250 statutory fee constitutes sufficient consideration under the gift clause for a good potentially worth $2,500 if acquired in an arm's-length transaction").

12. *See*, *e.g.*, Minn. Stat. § 222.37; Minn. Stat. Ch. 238.

13. *See*, *e.g.*, Okla. Const. art. XV, § 5(a).

14. *See*, *e.g.*, Philadelphia Home Rule Charter, *available at* https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-262986; Minneapolis, Minnesota, Charter, *available at* https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=CH.

15. *See* 12 McQuillin Mun. Corp. § 34:10 (3d ed.); Burns, 164 P.3d at 483.

16. *See* note 4 *supra.*

17. *See*, *e.g.*, Mozilla, 940 F.3d at 81 (noting "the Communications Act's vision of dual federal-state authority and cooperation" on broadband regulation); ACA Connects America's Commc'ns Ass'n v. Bonta, 24 F.4th 1233 (9th Cir. 2022); City of Eugene v. FCC, 998 F.3d 701, 711 (6th Cir. 2021) (noting that "Congress went out of its way not to suggest that federal law is the fountainhead of all franchisor regulatory authority"); City of Dallas v. FCC, 165 F.3d 341, 345 (5th Cir. 1999) (stating that the 1984 Act "preserve[d] the role of municipalities in cable regulation"); Sprint Telephony Pcs, L.P. v. County of San Diego, 543 F.3d 571, 576 (9th Cir. 2008) (cert. den'd, Sprint Telephony PCS, L.P. v. San Diego Cnty., 557 U.S. 935 (2009)) (noting that "Section 332(c)(7)(A) preserves the authority of local governments over zoning decisions regarding the placement and construction of wireless service facilities…"); CNSP, Inc. v. City of Santa Fe, (10th Cir. 2019) (after the Telecommunications Act of 1996, "local governments retain the authority 'to manage the public rights-of-way'").

18. Nat'l Cable &Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 993-96 (2005) (cable internet service is a Title I information service); In re Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities, 17 FCC Rcd. 4798, 4824 ¶ 41 (2002) (cable internet service classified as Title I information service); In re Promoting the Open Internet, Report and Order On Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) (broadband reclassified as a Title II telecommunications service); In re Restoring Internet Freedom, 33 FCC Rcd. 311 (2018) (broadband reclassified as Title I information service); *Mozilla Corp. v. FCC*, 940 F.3d 1, 18-21 (D.C. Cir. 2019) (per curiam) (Title I reclassification upheld); 2024 Open Internet Order (order reclassified broadband as Title II telecommunication service, stayed on review).

19. *See Mozilla,* 940 F.3d at 75-6 (D.C. Cir. 2019) (per curiam) (FCC local preemption directive vacated); N.Y. State Telecomms. Ass'n v. James, 101 F.4th 135, 140-41 (2nd Cir. 2024).

20. *See* 47 U.S.C. § 152(a); CATV and Community Antenna Systems, 2 F.C.C.2d 725, 6 R.R.2d 1717 (1966).

21. 2024 Open Internet Order*,* at ¶¶ 265-275.

22. *Id.*, at ¶ 268.

23. 2024 Open Internet Order, at ¶¶ 268-275.

24. *Id.*, at ¶ 275 ("We also clarify that the mere existence of a state affordability program is not rate regulation").,

25. *See e.g.*, H.R. Rep. No. 98–934 at 94, reprinted in 1984 U.S.C.C.A.N. 4655, 4731 (From the 1984 Cable Act House Report, "A state may, for instance, exercise authority over the whole range of cable activities, such as negotiation with cable operators; consumer protection; construction requirements; rate regulation or deregulation; the assessment of financial qualifications; the provision of technical assistance with respect to cable; and other franchise related issues—as long as the exercise of that authority is consistent with Title VI."); *see also* Frederick E.

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Broadband *cont'd from page 11*

Ellrod III & Nicholas P. Miller, *Property Rights, Federalism, and the Public Rights of Way*, 26 Seattle U. L. Rev. 475 (2003).
26. *See, e.g.,* Comments of the City of Philadelphia, et al., at 7, In re Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, https://www.fcc.gov/ecfs/document/1022165457449/1 (Feb. 21, 2023) ("City of Philadelphia Digital Discrimination Comments").
27. *See e.g.,* City of Philadelphia Digital Discrimination Comments at 7; Comments of the League of Minnesota Cities, at 2; In re Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, at 2, https://www.fcc.gov/ecfs/document/10222116501122/1 (Feb. 21, 2023) ("League of Minnesota Cities Digital Discrimination Comments").
28. *Id.*
29. *See, e.g.,* City of St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893) (upholding regulations of telegraph company's use of rights-of-way); Comments of the City of Philadelphia, et al., In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, at 9-12, https://www.fcc.gov/ecfs/document/11141552701020/1 (November 14, 2018). ("City of Philadelphia 621 Comments").
30. See, e.g., 47 U.S.C. § 546(b)(2); Northwest Suburbs Cable Communications Commission Cable Franchise Ordinance with King Videocable Company - Minnesota, Section 5.4 (Upgrade of Home Subscriber Network) (November 20, 1997).
31. *See* 47 U.S.C. § 541(a)(3) ("In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.")
32. *See, e.g.,* City of Philadelphia 621 Comments, at 9; National Association of Telecommunications Officers and Advisors, et al. Comments, In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, at 10 (Nov. 14, 2018) ("NATOA 621 Comments").
33. League of Minnesota Cities Digital Discrimination Comments, at 2.
34. National League of Cities Digital Discrimination Comments, In re Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, at 1 (Feb. 21, 2023).
35. *See* Digital Discrimination Order, at ¶¶ 175-178.
36. Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity Submitted to the Federal Communications Commission by the Working Groups of the Communications Equity and Diversity Council, at 31, https://www.fcc.gov/sites/default/files/cedc-digital-discrimination-report-110722.pdf (Nov. 7, 2022).
37. *See* note 2 *supra*.
38. *See e.g.,* Joe Supan, *Could the Election Revive the Affordable Connectivity Program?*, CNET, https://www.cnet.com/home/internet/could-the-election-revive-the-affordable-connectivity-program/ (last visited October 30, 2024).
39. *See, e.g.,* 47 U.S.C. § 546(b)(2); Northwest Suburbs Cable Communications Commission Cable Franchise Ordinance with King Videocable Company - Minnesota, Section 5.4 (Upgrade of Home Subscriber Network) (November 20, 1997).
40. *See* 47 U.S.C. § 541(a)(3) ("In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.")
41. An example of the equitable buildout language stated in part:

> The Parties agree that the following is a reasonable build-out schedule taking into consideration Grantee's market success and the requirements of Minnesota state law.
> (i) **Complete Equitable Build-Out**. Grantee aspires to provide cable service to ***all households*** within the City by the end of the initial term of this Franchise. In addition, ***Grantee commits that a significant portion of its investment will be targeted to areas below the median income in the City***.
> (ii) Initial Minimum Build-Out Commitment. Grantee agrees to be capable of serving a minimum of fifteen percent (15%) of the City's households with cable service during the first two (2) years of the initial Franchise term, provided, however that Grantee will make its best efforts to complete such deployment within a shorter period of time. ***This initial minimum build-out commitment shall include deployment to households in every Ward in the City and to a significant number of households below the medium income in the City.*** Nothing in this Franchise shall restrict Grantee from serving additional households in the City with cable service; ...

See A Cable Television Franchise Agreement Between City of Minneapolis, Minnesota and Qwest Broadband Services, Inc., D/B/A CenturyLink, City of Minneapolis Code of Ordinances, Appendix H, Chapter 2, Section 1.2 (2014) (emphasis added).
42. *See* City of Philadelphia Digital Discrimination Comments, at 8-9 (City of Minneapolis, the Northwest

Suburban Cable Communications Commission, North Metro Telecommunications Commission, and South Washington Telecommunications Commission all approved franchises with similar equitable buildout provisions with similar results).
43. *See* In re Formal Complaint Regarding the Services Provided by the Qwest Corporation d/b/a CenturyLink in Minnesota, on Behalf of the Communications Workers of America, MN-PUC Docket No. C-20-432, at 23 (Mar. 13, 2024).
44. *See, e.g.,* NSCC Digital Discrimination Reply Comments, at 2.
45. City of Philadelphia Digital Discrimination Comments, at 7, NSCC Digital Discrimination Reply Comments of the NSCC, at 2.
46. *See* An Act to Ensure Nondiscriminatory Treatment of Public, Educational and Governmental Access Channels by Cable System Operators, 2019 Me. Laws 469 (codified at Me. Stat. tit. 30-A, §§ 3008(5), (7), 3010(5A), (5B), (5C)); *NCTA v. Frey*, 7 F.4th 1 (1st Cir. 2021) (Maine law upheld).
47. *See, e.g.,* City of Philadelphia Digital Discrimination Comments, at 20-21.
48. *See* Digital Discrimination Order.
49. *See, e.g.,* City of Oklahoma City et al. Comments, at 4-6, In re All-In Pricing for Cable and Satellite Television Service, FCC 24-29, MB Docket No. 23-203, https://www.fcc.gov/ecfs/document/107312541918310/1 (July 31, 2023); City of Oklahoma City et al. Reply Comments, at 3-5, https://www.fcc.gov/ecfs/document/108291549807734/1 (Aug. 29, 2023).
50. *See* In re All-In Pricing for Cable and Satellite Television Service, FCC 24-29, MB Docket No. 23-203 (Rel. March 19, 2024).
51. *See, e.g.,* City of Minneapolis Digital Opportunity Plan Comments to the Minnesota Office of Broadband Development (June 30, 2023).
52. *See* City of Philadelphia Digital Discrimination Comments, at 7, NSCC Digital Discrimination Reply Comments, at 3.
53. Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity Submitted to the Federal Communications Commission by the Working Groups of the Communications Equity and Diversity Council November 7, 2022, at 35 (https://www.fcc.gov/sites/default/files/cedc-digital-discrimination-report-110722.pdf).
54. *See, e.g.,* City of Philadelphia 621 Comments at 9; NATOA 621 Comments at 10.
55. Minn. H.F. No. 4182 (2024), https://www.revisor.mn.gov/bills/bill.php?b=house&f=HF4182&ssn=0&y=2024.
56. Minn. S.F. No. 4262 (2024), https://www.revisor.mn.gov/bills/bill.php?f=SF4262&y=2024&ssn=0&b=senate
57. Minn. H.F. No. 4077 (2024) (Article 4, Sections 1-11), https://www.revisor.mn.gov/bills/text.php?number=HF4077&type=bill&version=1&session=ls93&session_year=2024&session_number=0&format=pdf.
58. *See* notes 9 and 11 *supra*.
59. *See* City of McAllen, at ___, 2024 WL 4799325, *5 (Tex. Ct. App. Nov. 15, 2024) (consideration must be sufficient).
60. *See* notes 9 and 11 *supra*.
61. *See* City of McAllen, at ___, 2024 WL 4799325, *8 (Tex. Ct. App. Nov. 15, 2024).
62. *See* 47 U.S.C. § 151, note. The "taxes" prohibited in the ITFA "do[] not include any franchise fee or similar fee imposed by a State or local franchising authority, pursuant to [the Cable Act], or any other fee related to obligations or telecommunications carriers under the Communications Act of 1934[,]" nor do "taxes" include "fee[s] imposed for a specific privilege, service, or benefit conferred" by a governmental entity, such as the privilege of using local assets.
63. *See* Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment, Declaratory Ruling and Report and Order, 33 FCC Rcd. 9088 (2018).
64. *See* In re: Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, 34 FCC Rcd. 6844 (2019); 47 CFR § 76.43 (Mixed-Use rule).
65. *Id.*
66. City of Eugene v. FCC, 998 F.3d 701, 710 (6th Cir. 2021).

2025 MID-YEAR SEMINAR APRIL 25 – APRIL 28, 2025 WASHINGTON, D.C.

"Show Me Your Hands!"-Analyzing A Critical Element In Qualified Immunity

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Officers frequently face unknown threats when encountering a suspect. For their own safety and for the safety of other persons nearby—indeed, for the safety of the suspect as well—officers must be ready to respond appropriately if the suspect begins to act violently. Police departments sometimes refer to the lawful and proper use of force as "response to resistance." That presupposes that the suspect is resisting a lawful command from the officer.

Some high-risk encounters happen so quickly that the officer has no time to give a command before responding to the suspect's threatening act, such as pointing a gun at the officer or charging at the officer with a knife. More typically, the officer has time—even if only a few seconds—to command the suspect to do something or to stop doing something. This is to expose unknown threats, if any, and to reduce apparent threats.

The possibility of a threat remains unknown for as long as the suspect's hands are out of sight. Public complaints that officers don't do enough to de-escalate high-risk encounters often overlook the need for a suspect's hands to be completely exposed and empty. How does an officer get the suspect to show his hands? And why is it so important?

An officer's view of a suspect's empty hands is critical to deciding whether the decision to use deadly force was objectively reasonable. Where the suspect's hands are not visible, the unknown possible threat weighs in favor of objective reasonableness. If the officer's use of deadly force is objectively reasonable, he is protected by qualified immunity even if the suspect is later found to have been unarmed. When the officer cannot see the suspect's hands (which could well be empty), he must view that unknown in light of other surrounding clues, such as the facts that gave rise to the encounter, the suspect's verbal statements of intent, the suspect's actions immediately before the question of force arises, and the suspects bodily movements, bodily tension, and even facial expressions.

This article focuses on the need for an officer to have a clear view of the suspect's hands (and for those hands to be visibly empty) and seeks to illustrate how qualified immunity applies to such situations.

Reviewing the Standard

The Supreme Court held in *Graham v. Connor*[1] that a claim for a Fourth Amendment violation by excessive force—deadly or not—is to be analyzed under the "objective reasonableness" standard rather than under substantive due process.[2] There, the Court explicitly held what was implicit in *Tennessee v. Garner*.[3] In *Garner*, the Court had observed that the question regarding use of force is "whether the totality of the circumstances justifies a particular sort of seizure."[4] The phrase "totality of the circumstances" is central to analyzing the objective reasonableness of the officer's decision. Moreover, the Court also held in *Graham* that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[5]

Thus, three phrases from *Garner* and *Graham* combine for a succinct statement of the standard for evaluating the use of deadly force (or lesser force): whether the officer's use of force was objectively reasonable in light of the totality of circumstances known to a reasonable officer on the scene. But it does not stop there. Still in *Graham*, the Court added that evaluating reasonableness from the perspective of the officer must encompass the speed at which events may unfold and the accompanying mental and physical effects on the officer:

> "The calculus of reasonableness must embody allowance for the fact

that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[6]

But neither *Graham* nor *Garner* was about qualified immunity; that connection comes from other Supreme Court cases, notably from *Malley v. Briggs*,[7] where an officer claimed absolute immunity in applying for a warrant based on an affidavit that failed to establish probable cause. The Supreme Court disagreed and held that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[8]

The Court put it another way in *Mullenix v. Luna*: "The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[9] This describes two prongs: (1) whether plaintiff has alleged facts that state a constitutional violation; and (2)whether the law was clearly established at the time.[10] Courts are free to consider either prong first.[11] As police defense counsel, we cannot afford to become complacent with familiar citations and overlook the impact of this standard. We must firmly assert how each aspect of this analysis comes to bear on the officer's entitlement to qualified immunity.

How does this apply to the visibility of a suspect's hands in a high-risk encounter?

The Danger of Hidden Hands

It is obvious that a suspect can be holding a gun or a knife in a hand that is out of the officer's view. But there are also other weapons, some of which are unusual, that are smaller and harder for an officer to detect. This is especially so in low-light conditions. Many uses of force occur after dark, which increases the unknown threat to an officer. Whether day or night, hidden hands present a heightened risk.

The FBI's Law Enforcement Bulletin has published lists and photos of numerous unusual weapons of various sizes, many of which are small enough to conceal easily. Some of those include: a coin key chain that houses a knife,[12] a working lighter that conceals an automatic knife,[13] a money clip knife,[14] a necklace knife,[15] an object that appears to be a house key but conceals a blade,[16] a knife gun,[17] a folding knife the size of a credit card,[18] a six-inch long flashlight gun,[19] a six-inch long pen gun,[20] and a nine-inch long bolt gun.[21] Courts have recognized many things that are atypical deadly weapons, many of which are small and easy to conceal, while others might appear innocuous. These include: a loose handcuff;[22] a lighter, by using it to start a fire;[23] a belt buckle, by placing in the hand and striking at the officer;[24] a pencil;[25] and a lock inside a sock.[26]

A suspect can be in a variety of postures with one or both hands out of view. If the suspect is inside a vehicle, as in *Manis v. Lawson*,[27] or walking away from the officer, as in *Salazar-Limon v. City of Houston*,[28] it would be easy for the hands to be hidden from view, and a weapon could easily be within reach. Where a suspect is lying in a prone position, some might interpret that as either compliant or controlled and non-threatening. But the visibility of the hands is paramount. If the hands are underneath the suspect's body, then the prone position actually favors a suspect who wishes to do harm. The Force Science Institute has studied reaction times based on varied positions and has found that "Some suspects lying flat with hands hidden under chest or waist can produce and fire a gun at an approaching officer faster than any human being on earth can react to defend himself[.]"[29]

Action beats Reaction

Studies of reaction times during stress, such as those from Force Science Institute, have established that an action beats a reaction every time. For that reason, an officer cannot wait until a suspect points a gun at him. The officer must act according to an objectively reasonable belief about what is in the suspect's hands, evaluating the clues that suggest a suspect's next act. If the officer waits until the gun is pointed at him, the officer will not be able to react in time to stop that threat.

But aren't we talking about hands? What if the hands are not holding a weapon? Why can't the officer at least wait until he sees a weapon? Again, it's because action beats reaction. Review the above noted finding from Force Science about a prone suspect with hidden hands. No one knows what, if anything, might be in the suspect's hands. But the FSI study showed that the prone suspect could change his position and produce and fire a gun at an approaching officer before the officer could react to stop the threat. So the officer has to act when he is facing what is still the unknown possible threat in the hidden hands. When the suspect makes a move that reasonably suggests an imminent harm, the officer cannot afford to wait to see if it actually happens.

Salazar-Limon v. City of Houston

The unknown possibility of a weapon in hidden hands was central to the officer's qualified immunity in *Salazar-Limon v. City of Houston.*[30] And as the case indicates, the significance of hidden hands also depends on what else is happening—i.e., the totality of the circumstances.

Around midnight, Officer Chris Thompson of the Houston Police

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Show Your Hands *cont'd from page 15*

Department observed a truck speeding and weaving in and out of lanes on Houston's Southwest Freeway. Officer Thompson pulled the truck over onto the shoulder on an overpass, and Thompson parked his vehicle a few feet behind the truck.[31] The truck driver, Ricardo Salazar-Limon, produced a Mexican driver's license. Salazar had drunk at least four or five beers in the previous two hours, and he had the rest of a 12-pack in the truck with him. Three other men were also in the truck.[32]

Officer Thompson was on the scene solo, and he had not yet had an opportunity to search all four men and the truck's cab for weapons. As a safety measure, he asked Salazar to get out and come to the rear of the truck, and Salazar did so. Thompson and Salazar were then standing on the overpass shoulder between the rear of the truck and the front of Thompson's patrol car.[33] The Fifth Circuit succinctly described the rest of the encounter to the point at which Thompson used deadly force against Salazar:

> Officer Thompson and Salazar dispute certain details of what happened next, but it is undisputed that: 1) **Officer Thompson tried to handcuff Salazar;** 2) **Salazar resisted;** 3) **a brief struggle ensued** (in which neither party was injured); and 4) after the brief struggle, **Salazar pulled away, turned his back to Officer Thompson, and walked away along the retaining wall** and the passenger side of his truck.
> At this point, **Officer Thompson pulled out his handgun and ordered Salazar to stop**. Salazar did not immediately comply and took "one or two" more steps. **Officer Thompson testified he then saw Salazar turn left and reach toward his waistband, which was covered by an untucked shirt that hung below his waist.** Further, Officer Thompson testified that **he perceived the combination of Salazar's actions to be consistent with a suspect retrieving a weapon from his waistband.** Officer Thompson **fired a single shot, hitting Salazar in the right lower back.** Upon inspection, Officer Thompson determined that **Salazar was not armed.** Salazar survived, but the gunshot wound left him partially paralyzed.[34]

As Salazar walked away, his hands were hidden from view. That alone would not have been enough to justify Officer Thompson using deadly force. But in the totality of the circumstances as described above, Salazar's reach toward his waistband was enough for Thompson to reasonably believe that Salazar was reaching for a weapon. Had that belief turned out to be true, Salazar could have turned and fired before Thompson could have reacted. On the other hand, had Salazar's hands both been visible, empty, and not reaching, the calculus of objective reasonableness might have led to a different result. As it was, the Fifth Circuit held that Thompson did not violate Salazar's constitutional rights, and it affirmed summary judgment for Thompson on grounds of qualified immunity.[35] The court concluded:

> Thus, based on our precedent and the undisputed facts, considering the **totality of the circumstances—**which include Salazar's **resistance, intoxication**, his **disregard** for Officer Thompson's orders, the threat he and the other three men in his truck posed while unrestrained, and Salazar's actions leading up to the shooting (including suddenly ***reaching towards his waistband***)—it seems clear that it was not unreasonable for an officer in Officer Thompson's position to **perceive Salazar's actions to be an *immediate threat to his safety*.** And, it follows that it was not "clearly excessive" or "unreasonable" for Officer Thompson to use deadly force in the manner he did to protect himself in such circumstances.[36]

One takeaway from *Salazar-Limon* reflecting the "action beats reaction" finding of the FSI study is captured in this line: "[W]e have never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure their safety."[37]

Manis v. Lawson

The movement of a suspect's hands out of an officer's sight was again central to qualified immunity for the officer's use of deadly force in *Manis v. Lawson*.[38] In October 2005 in Gretna, Louisiana, Officer Douglass Zemlik and Sergeant Scott Vinson responded to a call around 3:00am reporting that an occupied vehicle was sitting on a railroad track with its engine idling.[39] Vinson observed Michael Manis in the driver's seat either sleeping or passed out. Vinson approached Manis's car on the passenger side, and Zemlik approached on the driver's side. Both officers identified themselves as policemen and "verbally and physically tried to wake Manis."[40] The court described what then transpired:

> The parties dispute what happened after Manis was roused. According to Zemlik and Vinson, Manis immediately began shouting obscenities and flailing his arms aggressively at them. After Zemlik opened the driver's side door and attempted to calm Manis, Vinson turned the ignition off and walked around the front of the vehicle to join Zemlik. **Manis**, still seat-belted, then **began to repeatedly reach underneath the front seat.** The **officers drew their weapons and ordered Manis several times to show his hands**. He **ignored them.** When **Manis appeared to retrieve some object and began to straighten up**, Zemlik **fired four rounds**, killing Manis.[41]

The court continues with the claims from decedent's family:

> The Appellees contend that Manis did not curse the officers and only moved his arms out of drunken confusion, not combativeness. They state that Manis, oblivious to his fastened seat belt, tried

> unsuccessfully to get out of the Jeep at Zemlik's instruction. **Manis then leaned forward over the front seat in a stupor, leading the officers to order him to show his hands.** According to the Appellees, Zemlik shot Manis as he was attempting to straighten up and raise his hands in a display of submission. **No weapon was recovered.** An autopsy showed that Manis was drunk and under the influence of cocaine and barbiturates at the time of his death.[42]

As with Salazar, Manis was unarmed. But in neither case could the officers make that determination.[43] In each case, the officer was protected by qualified immunity because he did not violate a constitutional right that was clearly established at the time, and it was objectively reasonable for the officer to believe that the suspect was reaching for a weapon. As in *Salazar-Limon*, if that belief had been true, the officer would have faced an imminent threat of harm; since action beats reaction, the officer would have been unable to neutralize that threat. The Fifth Circuit reversed the district court's denial of summary judgment and held that Zemlik was entitled to qualified immunity.

Estate of Valverde by and through Padilla v. Dodge

Officers from Denver Police Department, including a SWAT team, set up an undercover drug transaction with cocaine dealer Joseph Valverde.[44] DPD Sergeant Justin Dodge was assigned as SWAT team supervisor for this incident. When the drug deal was consummated, the SWAT team moved to arrest Valverde. The Tenth Circuit describes the use of deadly force here:

> As Dodge exited [the SWAT van], one or more of the other **officers ordered Valverde,** who was facing the van, **to raise his hands. Valverde did not immediately comply;** he **appeared to flinch or jump slightly backward** in reaction to the flash bang.
>
> * * *
>
> **Although officers surrounded Valverde and yelled at him to put his hands up and get down, he moved slightly forward and then slid to his left,** in front of the right front tire of the parked sedan. * * * **Dodge said that he saw Valverde keep grabbing for something in his pocket or waistband area.** The two-man team also observed **Valverde reaching for something in his shorts**. Valverde then **pulled out a gun** with his right hand, at waist level. Directly facing Valverde from across the hood of the sedan, **Dodge saw the muzzle of a gun.**
>
> * * *
>
> **Less than a second after Valverde pulled out this gun, Dodge fired his carbine at Valverde five times in rapid succession.** Three of the five shots struck Valverde—one in his right chest, one in the back of his right elbow, and one in his right back.
>
> * * *
>
> About four seconds elapsed from the time Dodge stepped out of the van to the time Valverde went to the ground.
>
> There is no dispute that Valverde drew a gun, and that Dodge saw Valverde take the gun out before using deadly force.
>
> * * *
>
> Valverde died from his wounds.[45]

Unlike in *Salazar-Limon* and *Manis*, the suspect here had a gun, which multiple officers saw. Officers yelled at Valverde to put his hands up; rather than immediately complying with that order, Valverde moved in a way that might have been a reaction to the flash bang device. But Sergeant Dodge did not fire then. A moment later, however, Valverde brought his gun up, and Sergeant Dodge fired multiple rounds, killing Valverde.[46]

The district court denied Dodge's motion for summary judgment on qualified immunity grounds. That court concluded that "evidence could support a finding that Valverde was not shot until after he had disposed of his gun and was raising his hands in surrender."[47] The Tenth Circuit, however, noted that the district court had "overlooked two fundamentals of the necessary analysis."[48] The two fundamentals the court notes reflect the principles discussed in this article. The first of these has to do with the speed at which high-risk encounters can develop: "First, the district court failed to consider that allowance needs to be made for the fact that the **officer must make a split-second decision**. The Constitution **permits officers to make reasonable mistakes.** Officers cannot be mind readers and **must resolve ambiguities immediately.**"[49]

The second fundamental has to do with perspective: "The district court's second error was that it failed to appreciate that **the facts must be viewed from the perspective of the officer.**"[50] Seeing the unfolding events as the officer saw them is a necessary component of the objective reasonableness analysis. The Tenth Circuit reversed the district court's ruling and held that Dodge was entitled to qualified immunity.[51]

Oakes v. Anderson

Oakes v. Anderson is another case where a hidden hand was the catalyst for an officer using deadly force. DeKalb County, Georgia, police officers were dispatched to a shopping center in response to a 911 call regarding possible trouble between some people in the parking lot.[52] First to respond was Officer Daniels, who met Karen Maxwell, the girlfriend of Carter Oakes, the person of interest here. Also present was Ben Wheeler, whom Maxwell had called for help in dealing with Oakes.[53] Maxell told Officer Daniels that Oakes had been drinking for three days and had threatened suicide. She also showed him an empty gun case she had removed from his car. Maxwell and Wheeler, along with Officer Daniels, believed that Oakes had a gun in his vehicle.[54]

Oakes was leaning against his car in the parking lot when Daniels arrived, and then he moved into the driver's seat. Daniels talked with him and offered to take him somewhere to get

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INSIDE CANADA

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

Pride Month, Reasonable Accommodation, Site Plan Denial, and More

Pride Month: Tribunal Sanctions Township and Mayor for Discrimination

Borderland Pride v. Corporation of the Township of Emo, 2024 HRTO 1651 https://canlii.ca/t/k81ws

The Applicants, Borderland Pride, a not-for-profit organization supporting the LGBTQ2 community, filed an application against the Township of Emo ("Township") for discrimination under the *Human Rights Code*, R.S.O. 1990, c. H. 19 ("*Code*"). The application stemmed from the Township's refusal to declare June as "Pride Month" and display the Pride Rainbow Flag.

The Applicants argued that this refusal amounted to discrimination under the Code based on sexual orientation, gender identity, gender expression, creed, and family status. The Township raised a preliminary objection, arguing that Borderland Pride, as a corporation, lacked standing to bring the application.

HELD: The Township and Mayor discriminated against the Applicants.

DISCUSSION: The Tribunal dismissed the Township's preliminary objection, relying on *Pride Hamilton v. Hamilton Police Services Board*, 2022 HRTO 1427, which confirmed that corporations, including not-for-profit entities, qualify as "persons" under the Code and may file applications under section 34(1). On the substantive issues, it was undisputed by both parties that the Applicants made two requests to the Township, and municipal council denied the Pride Month proclamation and never voted on the request to fly or display the Pride Rainbow Flag.

To successfully establish discrimination, the onus is on the Applicant to prove on a balance of probabilities that their protected characteristic under the Code was a factor, in the Township's actions. In reviewing the council meeting evidence, the Tribunal found no evidence that the Township's failure to accommodate the flag request—due to a lack of a flagpole—was motivated by discriminatory intent. However, the Tribunal found that the Township's denial of the Pride Month proclamation was influenced by the remarks made by the Mayor about the absence of a flag for straight people. The Tribunal held that the Mayor's remarks were demeaning to the LGBTQ2 community and found that discriminatory intent was a factor in his vote against a Pride Month proclamation. Since this vote influenced the Township's overall decision, the Tribunal found the denial of the proclamation constituted discrimination under the *Code*. The Tribunal ordered the Township to pay $10,000 in damages to the Applicants, that the Mayor to pay $5,000 personally, and required the Mayor to complete human rights training. The Township has filed for judicial review.

Claim for Site Plan Denial is Dismissed

Meffe v. City of Toronto, 2024 ONSC 6994 https://canlii.ca/t/k8c1x

The Plaintiff, a land developer, applied for site plan approval, which included requests for minor variances, all of which were denied by the City of Toronto ("City"). After unsuccessfully appealing to the Toronto Land Appeal Board, the Plaintiff submitted a revised application and initiated legal action against the City seeking costs and damages following the denial of the site plan approval application. The Plaintiff claimed that the City acted in bad faith and contrary to municipal policies, the Official Plan, the Zoning By-law, and provincial legislation. The City moved to strike the action pursuant to Rule 21.01(1)(a), and 21.01(3)(b) and (d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

HELD: Action dismissed.

DISCUSSION: It was the Plaintiff's position that the City had a duty to provide him with information related to the planning process for which the site plan application was denied. The Court noted that negligence claims require the Plaintiff to prove the existence of a duty of care, a breach of that duty, and harm resulting from the breach. The Court found that the Plaintiff failed to demonstrate that the City owed him a duty of care, noting that it is difficult to establish such a duty in the context of a land-use planning application, as the City's role is to act in the public interest, not to provide specific advice to developers. A duty of care could place the City in a conflict of interest, as it would create a potential liability for lost opportunities that might have arisen from the Plaintiff's own decisions.

The City moved to dismiss the claim as an abuse of process. The Court determined that the Plaintiff's claim was an abuse of process, as it sought to hold the City liable for harm resulting

from the Plaintiff's own actions, including his decision to pursue the legal action instead of continuing with his revised application. Additionally, the Plaintiff lacked legal standing to bring the action, as he did not own the property involved in the application—the property was owned by a corporation. The Court ruled that the Plaintiff's claim was a collateral attack on administrative decisions made in relation to the site plan approval process. Therefore, the City's motion to strike the action was granted, and the claim was dismissed.

No Jurisdiction on Motion to Intervene as Friend of the Court
Heegsma v. Hamilton (City), 2024 ONCA 865 https://canlii.ca/t/k845w

The Ontario Human Rights Commission ("OHRC") appealed the dismissal of its motion for leave to intervene in an application before the Ontario Superior Court of Justice. The application concerns individuals ("Applicants"), who set up tents in various public parks throughout the City of Hamilton ("City"). The City evicted the Applicants from those encampments under several municipal by-laws.

The Applicants are currently challenging the constitutionality of these by-laws under sections 7 and 15 of the Canadian Charter of Rights and Freedoms. The OHRC sought to intervene as a friend of the court under Rule 13.02 of the Rules of Civil Procedure 1990, Reg. 194 ("Rules"), with the Applicants consenting and the City not opposing the motion. The application judge denied the motion, concluding that the OHRC had little to add since the Applicants were well-represented. The OHRC appealed the decision, alleging errors in the application of the law.

HELD: Appeal quashed for lack of jurisdiction.

DISCUSSION: The Ontario Court of Appeal quashed the OHRC's appeal, ruling that it lacked jurisdiction to hear an appeal from a decision denying a motion for leave to intervene as a friend of the court. The OHRC acknowledged that the dismissal of a motion to intervene is typically considered a final order, citing *Maybank Foods Inc. Pension Plan v. Gainers Inc* (1990), 77 D.L.R. (4th)236 (Ont. C.A.). However, it relied on Bedford v. Canada (Attorney General) 2009 ONCA 669, where the Court had granted an appeal from the denial of intervener status as a friend of the court. The Court of Appeal distinguished the two types of intervention: party intervention and friend of the court intervention. While both are discretionary, the Court of Appeal emphasized that party interventions are concerned with ensuring that non-parties with substantive interests can participate in litigation, whereas friend of the court interventions focus on whether the proposed intervention will assist the court in resolving the issue at hand. The Court of Appeal concluded that a decision to deny a motion for leave to intervene as a friend of the court does not impact substantive rights, and thus, there is no jurisdiction to appeal such a decision. The Court of Appeal noted that while *Bedford* involved a similar scenario, it did not address the jurisdictional issue and should not be taken as establishing a precedent to appeal motions for leave to intervene as a friend of the court. The Court of Appeal quashed the application for lack of jurisdiction.

Court Upholds Decision to Strike Harassment Claim
Kantoor v. City of Hamilton, 2024 ONSC 6991 https://canlii.ca/t/k8c1t

The Plaintiffs sued the City of Hamilton ("City") and a property standards officer, seeking $14,000 based on allegations of harassment and bad faith. The Deputy Judge struck the Plaintiffs' claim finding that they did not plead a reasonable cause of action and that the Small Claims Court lacked jurisdiction. The Plaintiffs appealed.

HELD: Appeal dismissed.

DISCUSSION: The Court found that while the Deputy Judge erred in determining that the Small Claims Court lacked jurisdiction, it properly dismissed the claim. The Deputy Judge had found that the Plaintiff's appeal of the property standards order to Small Claims Court was improper. The Court disagreed, finding it was proper as City did not establish that the Plaintiffs were served properly with the property standards order, therefore the normal route for appeal, first to the committee then to the Superior Court of Justice under the Building Code Act, 1992, SO 1992, c.23 was not engaged. Therefore, the Court found it was reasonable for the Plaintiffs to appeal to the Small Claims Court. Nevertheless, the Court held that the appeal was properly dismissed by the Deputy Judge due to the Plaintiffs' failure to plead a reasonable cause of action. Appeal dismissed.

Reasonable Accommodation or Discrimination
Bixby v City of Medicine Hat, 2024 AHRC 147 https://canlii.ca/t/k88gs

The Complainant, an employee at the City of Medicine Hat ("City"), filed a complaint alleging discrimination in employment on the grounds of mental and physical disability under section 7 of the Alberta Human Rights Act, RSA 2000, c A-25.5. The Complainant claimed that the City's

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DAY IN THE LIFE

SCOTT BLOOM
City Attorney, Kenai, Alaska
Interview by Avery Morris, IMLA Editorial Staff

Municipal Lawyering on the Kenai River

Scott, thanks for taking the time to talk at this busy time of year. Tell us about your route to the City Attorney's office--where were you born and raised, and how did you end up in Kenai?

I was born and raised in Juneau, and got my undergraduate education at Whitman College in Walla Walla, Washington. Then I went to law school at Gonzaga University in Spokane. At the same time, my wife was getting her teaching degree at Gonzaga. The school district in Kenai was recruiting teachers at Gonzaga, and she got a job offer to go there. I said, "Well, let me see if I can find one, too." So, I obtained a clerkship with a Kenai Superior Court Judge, Judge Huguelet. That's what brought us here to start with, back in 2005. We didn't really intend on staying in Kenai. But after my clerkship was over, I accepted a job with the Kenai Peninsula Borough as an Assistant Borough Attorney. I served in that role until 2012, when I moved over to the City of Kenai as the City Attorney.

So a native born Alaskan returned home! Thirteen years as City Attorney is a long stint—has your job changed over that time?

Not a whole lot. Our department has a lot of long-term employees, but I'm certainly one of the longer-term department heads. I think I've grown my position in the organization--one of the things I like about my job is that I don't just do legal work. I help out in a lot of different areas. For example, if we have a planner opening for a while, I'll kind of tag team with others to help out in the planning department until we get a planner in position, that sort of thing. I've been fortunate that a lot of our City Council members have been here since I started. I've developed really good, long-term relationships with a lot of our Council members, so I'm able to work with them well and help them with their projects and initiatives.

Tell us about your law department.

It's just myself. There are no other attorneys here. I have an administrative assistant, not a paralegal. While the help I have is excellent, it can make things difficult because there's nobody else to act in my position or take over, so I'm really cognizant about when I do things outside of work. I still have to be in touch with the office all the time, meaning it's never really a full break, even if I go on vacation.

That's a lot to handle. We know that Kenai, and the Kenai River, are famous for fishing—is that one of your interests?

Yes, I've fished commercially my whole life, and until last year took weeks off in the summertime to fish commercially. I always take my inReach, which is a satellite communication device, on the boat with me so that if something does come up at work, I can always respond because there's nobody else. I live on the Kenai River, but that's just sport fishing. The commercial fishing I do is actually in Bristol Bay.

What other hobbies do you have?

Like most people that live in Alaska, I really like the outdoors. I do a lot of sport fishing and hunting and I also do a lot of coaching. I have three daughters, and all of them are soccer players.

I coach their competitive soccer teams, and then I also help out with the girls high school soccer team.

That's wonderful. Did you grow up playing soccer?

Yes, in high school, but not in college. They just sort of needed a coach in our small town, and I've been doing it ever since.

Can you tell us about some of the unique municipal legal activities in Kenai—is any of it related to hunting and fishing?

One of the things that's unique about Kenai is that we have a municipal airport here that is run by the City. We took it over from the Federal Government, and part of transfer included a huge land grant, so the city owns a lot of property that came from the Federal Government. We do a lot of land transactions here because we're such a large property owner within the municipal boundaries. We also have a lot of oil and gas activity outside the City, and inside the City there are a lot of active wells and other associated

oil and gas activityThere's also something unique in the Kenai River: we have what's called a personal use dip net fishery. People from all over the state travel to Kenai to catch their salmon for the season, so we have this huge influx of Alaskan residents that come to the City every July to do what's called dip netting, catching fish in a hoop shaped net as the fish travel upstream.. That's been a huge lift for us and has really transformed over the years.

As the landowner of the beaches, the parks, the launch ramps where people the dock and where people access the fisheries, we take many steps to manage everything. There's such a high volume of fish that are taken from the river during this time that we've taken a new step--to rake the beaches with tractors every day to make sure that all the fish carcasses get put back into the water. That's a big effort that we do for a short period, about three weeks every year. Thousands of visitors come, and we're a pretty small population.

Within City boundaries, we're probably just under 8,000 residents, but we're kind of a hub for the area. There are a lot of other towns or census areas around where people come from to do their shopping, like at Home Depot and Walmart, so we provide a lot of services and economic activities for people outside of our borders. Otherwise related to fisheries, which can become very political with all the different user groups; sport, personal use, guided, subsistence, and commercial, the City stays out of allocation issues, and focuses any advocacy with state and federal regulators on healthy runs and opportunity for all.

Within City limits, are residents fairly spread out? Is there a central hub of Kenai?

Yes, we are spread out, although Kenai certainly has a central commercial core and a large residential area. I think a lot of people that work outside the city live in the City. Alaska is really heavy in oil and gas development, and many of our residents work in other places around the state. We have many people here that work shifts on the North Slope--they'll go to work for two weeks and then they're off for two weeks and they'll come home to Kenai.. A lot of our residents might not work here in the City but choose to live here because it's such a great place to live.

Do you often work with native organizations in Kenai?

Yes, that's one of the newer approaches that we've taken; we've really tried to work closely with some of the native organizations. The Kenaitze Indian Tribe and the Salamatof Tribe have a big presence in the City and our City Council has taken the initiative with the tribal councils to have at least one or two meetings together each year. We've partnered on things from culverts going under the road to improve fish passage to building parks and playgrounds. We've worked with them to apply for grants for new fire trucks and other resources. We have a really close relationship with the tribal organizations and work with them to make the City a better place for everybody.

Is there any one thing you enjoy most about being City Attorney of Kenai?

I think what I enjoy the most is the diversity of the legal issues that come to me Every day is something new. I also really enjoy the opportunity to collaborate with our departments on the front end of things before problems arise, working on policies with our police or other departments. I think a lot of attorneys are used to coming into issues when there's a prob-

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AMICUS

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

New Challenges on the Horizon for Local Government

The 2023-2024 Supreme Court Term yielded some wins for local government, and other cases where, despite ruling against the governmental entity, the Court declined to impose more far-reaching and detrimental holdings. But the prior Term also produced numerous outcomes which will present challenges for local government. And judging from recent appellate court decisions—many of which are headed to the Supreme Court--there will be ample continuing tests ahead for America's cities and counties.

These cases, including many where IMLA has or will provide amicus support, involve a wide range of issues which could prove complex and costly, including: inmate rights to jury trials, Section 1988 attorney's fees for preliminary injunctions, the extent of "final policymaker" liability, the limits of public nuisance claims, and takings compensation for law enforcement damage to private property.

***Richards v. Perttu*: Inmates and the Seventh Amendment (Supreme Court)**

In 2022, Kyle Richards (Richards), an inmate held by the Michigan Department of Corrections, filed a Section 1983 action alleging that Thomas Perttu (Perttu), a Resident Unit Manager employed at the Baraga Correctional Facility, had sexually harassed him and other inmates, retaliated against them, and destroyed their property and paperwork, in violation of the First, Fifth, and Eighth Amendments. Decades ago, Richards' claim could have been presented to a federal jury via Section 1983. But in 1996, responding to a meteoric rise in inmate actions clogging the federal dockets, Congress passed the Prison Litigation Reform Act (PLRA), which requires inmates to first exhaust all available administrative remedies before bringing a Section 1983 action:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[1]

Against the constraints of the PLRA, however, Richards is asserting a Seventh Amendment right to jury trial. His argument is that Perttu's actions in retaliating against him and destroying his documentation of grievances prevented him from exhausting the administrative remedies intended by the PLRA, and that the analysis of whether he has satisfied the administrative exhaustion requirement will necessarily involve the material facts of his underlying Section 1983 claim. In that circumstance, he says, it would be a deprivation of his Seventh Amendment right to jury trial for a district court judge to assess facts surrounding his exhaustion of administrative remedies.

The Sixth Circuit, reversing the lower court, agreed with Richards, finding that where factual elements which would otherwise require determination by a jury are intertwined with the PLRA-mandated administrative exhaustion analysis, the inmate's Seventh Amendment rights are superior, and a federal jury proceeding is appropriate:

> We therefore conclude that the Seventh Amendment requires a jury trial when the resolution of the exhaustion issue under the PLRA would also resolve a genuine dispute of material fact regarding the merits of the plaintiff's substantive case.[2]

The only other appellate court to have considered the issue—the Seventh Circuit—had not found a right to jury trial on the issue of administrative exhaustion. As that court held:

> [N]ot every factual issue that arises in the course of a litigation is triable to a jury as a matter of right . . . juries do not decide what forum a dispute is to be resolved in. Juries decide cases, not issues of judicial traffic control.[3]

The *Perttu* court declined to follow that analysis, creating a circuit split and instigating the Supreme Court's grant of certiorari on the following issue:

> Whether, in cases subject to the Prison Litigation Reform Act prisoners have a right to a jury trial concerning their exhaustion of administrative remedies where disputed facts regarding exhaustion are intertwined with the underlying merits of their claim.[4]

In so doing, the Sixth Circuit also opened the door to a potential explosion in inmate litigation. History provides a basis for governmental concern. While litigation at the federal level by state and local inmates was relatively rare through the 1970s, the number of federal civil rights suits brought by inmates steadily increased during the following decades: in 1995 alone, inmates filed almost

40,000 new actions, comprising nearly 20 percent of the federal civil docket.[5] Although some of these inmate suits had merit, the vast majority did not. The National Association of Attorneys General estimated that 95 percent of inmate filings in federal courts were frivolous; and that the preponderance of suits arose from "[j]ailhouse lawyers with little else to do" other than tie the federal "courts in knots with an endless flood of frivolous litigation."[6] That flood was placing a massive financial strain on state and local governments, where more than 80 percent of the nation's inmates are housed. As one sponsor noted, the huge number of frivolous lawsuits posed "an enormous drain on the resources of . . . States and localities, resources that would be better spent incarcerating more dangerous offenders instead of being consumed in court battles without merit."[7]

The PLRA made great strides in reducing inmate litigation. After two decades, the inmate filing rate in United States District Courts dropped by more than half, going from 24.6 filings per 1,000 inmates in 1995 to 12.1 filings per 1,000 inmates in 2018.[8] But the potential for frivolous filings remains. One example of a creative prisoner litigant arises from the Sixth Circuit itself. The inmate in question brought two unsuccessful *in forma pauperis* actions under Section 1983, alleging in one that prison officials were deliberately indifferent to threats against his safety, and in the other filing seven civil cases against state employees. The Sixth Circuit held that the deliberate indifference claim was properly dismissed by the district court judge as frivolous: "After a careful review of the record, we conclude that the factual allegations presented in this matter prevent the plaintiff from making an Eighth Amendment claim with even an arguable basis in law."[9]

The outcome of that case may be less notable than the particulars of the inmate bringing the action. At the time he brought suit, the plaintiff had filed a combined total of over 70 complaints according to Ohio Attorney General figures—seven in the Southern District of Ohio and 50 in the Northern District, as well as 17 appeals in the Sixth Circuit. At least eight of his complaints were dismissed as frivolous prior to the enactment of the PLRA, with an additional six dismissed thereafter.[10]

As IMLA's Supreme Court amicus brief in *Perttu* emphasizes, a decision affirming the Sixth Circuit's PLRA jury trial analysis will spur creative Section 1983 filings, increase inmate litigation before federal juries, stress over-burdened dockets, lengthen time to trial, require more jurors and hours of jury duty, and impose significant costs on already insufficient judicial budgets. *Richards v. Perttu*, no. 23-1324, will be argued before the Court on February 25, 2025.

Lackey v. Stinnie: Section 1988 Attorney's Fees for Preliminary Relief (Supreme Court)

In July 2016, five named plaintiffs brought a class action against the Virginia Department of Motor Vehicles, challenging the constitutionality of a provision of the Virginia Code which required courts to suspend driver's licenses for motorists who fail to pay certain court fines and fees. The plaintiffs alleged the law violated their procedural and substantive due process rights on various grounds, including the lack of a hearing before their suspensions took effect. Finding a likelihood that the plaintiffs would succeed on the merits as to their due process claims, the District Court granted their motion for preliminary injunction, deferring enforcement of the suspension law and reinstating the plaintiffs' driver's licenses.

Before a scheduled bench trial began, the Virginia General Assembly passed a Budget Amendment suspending enforcement of the law for one year, staying the case. At the next legislative session, the suspension law was repealed in full, after which the court dismissed the class action as moot. Although no permanent injunction had issued, and the law was never declared unconstitutional (it was only found to be "likely" unconstitutional), the plaintiffs sought nearly $800,000 in attorney's fees from the State, relying on 42 U.S.C. § 1988(b), which provides that, in certain civil rights cases, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."

At issue was the meaning of "prevailing party." The Supreme Court had provided guidance on that question in 2001, holding that, for a party to "prevail" under Section 1988, the relief must be "judicially sanctioned,"[11] and that "[a] defendant›s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change" to prevail under the statute.[12] The Court subsequently held that a plaintiff also does not prevail when it obtains preliminary relief but fails to obtain a favorable final judgment—essentially winning a battle but losing the war.[13] But left unanswered was the question of whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction could warrant an award of attorney's fees. In that vacuum, appellate courts have reached contrary conclusions as to whether preliminary relief is a "merits based" result and whether it confers an "enduring" outcome.

The Fourth Circuit initially affirmed the district court's denial of attorney's fees but vacated on rehearing *en banc*. The seven-judge majority enunciated a new rule for determining when a party may be entitled to attorney's fees upon the award of a preliminary injunction:

> When a preliminary injunction provides the plaintiff concrete, irreversible relief on the merits of her claim and becomes moot before final judgment because no further court-ordered assistance proves necessary, the subsequent mootness of the case does not preclude an award of attorney's fees.[14]

The Circuit opined that "all preliminary injunctions" are "solidly merits-based" and should satisfy the "judicial

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Day in the Life *cont'd from page 21*

lem, and I really appreciate getting to work on the front end of things to avoid problems before they happen.

I know you said that there's a lot of variety in your work, but can you walk us through a typical day in your life?

Sure. For example, today I have traffic court which takes place once a month. It reminds me of when I was a kid and I used to watch Night Court. I enjoy it. It's a lot of fun. It's a good opportunity for me to interact with our residents. So, I have that today. We'll do anywhere between two to ten mini-trials a day. I draft a lot of legislation for our Council and for the administration. I work on code amendments. I review every contract and help develop contracts. I also do a lot of HR work. We do have an HR director, but I get involved in a lot of disciplinary matters or other HR issues. I enjoy getting to work with our employees, finding solutions, and trying to make the City a good environment for all of our workers. We also do a lot of administrative hearings --"Board of Adjustment"-- for planning issues or other types of things. We also run senior housing here in a senior center, so I get to work with housing and feeding some of our senior population. I work with our animal control, police and fire, parks and recreation. I just enjoy, like I said, the diversity of all the different issues and working with everybody to get projects done in the City.

Are there any thoughts you'd like to leave us about Kenai?

I just really feel grateful that I get to live and work here. It's a great community. One of the things that I really enjoy is that I can come home from work and go fishing from my front yard and catch dinner. There are a lot of unique experiences. We have caribou and moose in our yard almost every day. Our closeness to the natural environment has been a great place for me to raise my three daughters and share my interests with them.

Thanks a lot, Scott, and Happy New Year!

ML

Amicus *cont'd from page 23*

imprimatur" necessary under Supreme Court standards, finding that in Stinnie's case there was "little question that [the] preliminary injunction's 'alteration of the legal relationship of the parties'" satisfied the necessary Section 1988 standard, because it afforded precisely the relief the plaintiffs had sought – the reinstatement of their licenses. Four judges dissented, arguing that "the relief must come from a judicial decision, not the voluntary act of the opposing party, so that it is enforceable by the court," and offering a non-legal analogy for the inadequacy of a preliminary injunction as the metric for attorney's fees:

> If anyone doubts that there is a difference between actually prevailing and having a likelihood of success, just ask the Atlanta Falcons—or better yet, their fans. Mid-way through the third quarter of the 2017 Super Bowl, the Falcons had achieved a great deal of success. . . . The Patriots came back to win 34-28, the largest comeback in Super Bowl history. Likelihood of success is just not the same thing as prevailing.[15]

Challenging the Fourth Circuit's analysis and citing a circuit split on the issue, the Commissioner of the Virginia Department of Motor Vehicles sought review by the Supreme Court, which granted cert on questions it had not previously resolved: whether, to "prevail" for Section 1988 purposes, "a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success" and "whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a non-judicial event that moots the case."

Lackey v. Stinnie, no. 23-621, was argued before the Court on October 8, 2024, and an opinion awaits. Some Court watchers perceived that a majority of justices agree that the plaintiffs achieved "prevailing party" status for Section 1988 purposes. If so, the outsized financial implications of *Stinnie* for governmental defendants are evident, given that attorney's fees in Section 1983 civil rights cases can be massive, exceeding damage awards or other compensation, in some cases reaching millions of dollars. A decision establishing that a mere likelihood of success and/or a non-judicial event that moots a case satisfies the requisites for a Section 1988 fee award will no doubt stimulate further Section 1983 filings.

***Whitson v. County of Sedgwick*: Governmental Liability for Criminal Acts by "Final Policymakers" (Tenth Circuit)**

Sheriff Thomas Hanna, the highest-ranking law enforcement officer of Sedgwick County, Colorado, sexually assaulted an intellectually disabled prisoner at his home while transporting her between county jails. The victim's civil rights suit under Section 1983, filed through her guardian ad litem, resulted in a $8.25 million award of compensatory and punitive damages against Hanna, who was also criminally charged. But her action was dismissed by the district court as to the County and Sheriff's Department, on the basis that they could be liable only if "the challenged conduct [had] been taken pursuant to a policy adopted by the official or officials" and because "Hanna's actions were not pursuant to Department policies, but in direct contravention of them."[17]

On appeal, the Tenth Circuit reversed in a split decision, holding that "Sheriff Hanna's actions fell within the scope of his policymaking authority regarding the custody and care of prisoners and flow the municipal defendants to liability."[18] The majority cited a Colorado statute which provides that the Sheriff "shall have charge and custody of the jails of the county, and of the prisoners in the jails, and shall supervise them himself or herself or through a deputy or jailer," and concluded that "Hanna's

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PRACTICE TIPS

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Reaching the Finish Line: Some Practical Tips on Negotiating Labor Agreements

INTRODUCTION

Most governmental entities encounter labor negotiations in some form or fashion each year. When some people think of labor negotiations, they may think of strikes, walk-outs, and demands from the workforce for greater pay and benefits. They may even think of picket lines or see a news story discussing the latest lawsuit between an employer and a labor group.[1] For example, in 2018, the relationship between the labor group representing the City of Arlington firefighters and City management had deteriorated and a lawsuit was ultimately filed.[2] The lawsuit briefly made the news and the labor association even released a statement discussing the relationship between the firefighters and management.[3]

Labor agreement negotiations do not always result in the worst-case scenarios as the examples above. Five years after the filing of the lawsuit in Arlington, the resulting litigation was resolved, and the relationship had improved drastically – so much so that a Memorandum of Understanding was agreed to by labor and management as a result of the Meet and Confer process and ultimately approved by City Council.

Negotiations with a labor organization can take a lot of effort, and this article provides some tips and advice on reaching the finish line – walking away with an agreement.

Background

Collective bargaining[4], which generally governs labor agreement negotiations, has existed in the private sector for 90 years[5], but was not required in the public sector until 1962, when Wisconsin enacted legislation authorizing public sector collective bargaining.[6] Since then, numerous states have enacted legislation allowing state and municipal employers to participate in some form of collective bargaining.[7] In Texas, for example, collective bargaining is authorized for police and firefighters[8], while Minnesota has authorized collective bargaining for all public employees.[9] Most state laws fall into three different models: 1) collective bargaining; 2) "pure meet and confer," and 3) "modified meet and confer."[10] Knowing the laws that govern labor negotiations in your state is imperative before starting the process. Collective bargaining and modified meet and confer include a duty to bargain, which means the parties must bargain in good faith or risk committing an unfair labor practice.[11] In contrast, under pure meet and confer (the process required of the City of Arlington with its firefighters, there is not a specific duty to bargain and there does not have to be an agreement. Regardless of the model used, the following tips can be utilized to help the parties reach an agreement both sides can be happy with.

Tip No. 1 -Prepare. Prepare. Prepare.
It may seem like a cliché, but preparation is a major key to achieving a labor agreement. In order to prepare effectively, you have to understand the goals of each side, meet with top management and important personnel who are the decision-makers in your organization to ensure you lay out what to expect throughout the process, determine a strategy, and conduct any necessary research.

A. Begin with the "Finish" in Mind-
To get to the finish line, you must know what that finish line is. In other words, before you begin negotiating, you need to know what you want –your ultimate objective.[12] One of the first items that should be on the list is meeting with management to determine management's goals for the negotiations. Do they want labor's buy-in for a particular new policy or procedure? Have there been any issues or concerns with current practices or policies that management would like to address? Knowing what goals management has helps

you see what the desired finish line is.

In addition, it is important to gather information on the priorities and goals of the labor organization. Is there a particular process labor would like to see occur? Are there additional benefits labor will ask for? Take note of the issues and concerns both sides could potentially bring to the negotiating table. Understanding the goals of your organization, but also how those goals complement and/or conflict with the labor organization is crucial to effective preparation. When you have done this, it makes it easier to define any alternatives that exist.

In the book *Negotiating to Yes* by Fisher and Ury of the Harvard Negotiation Project, developing alternatives was characterized as finding your "BATNA."[13] What does that stand for? It is an acronym for: "Best Alternative to Negotiated Agreement".[14] According to the book, defining specific alternatives helps in preparation so that there are plans for what will occur if management does not get exactly what they want. In some instances, the BATNA could be agreeing to something the labor organization wants in order to garner support for management proposals, but it could also mean management deciding that it will be fine with no agreement at all. Whatever the alternatives are, having a handle on how the organization will proceed should the best case scenario not happen is crucial.

B. Conduct Research

As discussed above, labor negotiations are governed by various federal, state, and local laws. Understanding what laws govern your jurisdiction is imperative. The worst thing that you do not want to happen is to think you are ready for negotiations and realize at the last moment there is some provision of the law that you have failed to follow. For example, in Texas, Meet and Confer meetings are considered open meetings and subject to the Texas Open Meetings Act.[15] As such as such, a meeting notice has to be drafted and published before the meeting takes place.

If you know that one of the issues for labor will be benefits, you may want to conduct market research to gauge what the relevant market is paying in terms of salary and benefits. You can have this information on hand in order to be prepared for any proposals that may come from labor.

C. Meet with Important Management Stakeholders

If your organization participates in collective bargaining, meeting with management stakeholders is extremely important since the actual negotiation team will be limited to no more than five individuals. In a process such as Meet and Confer, there will be additional opportunities to speak with stakeholders since they will likely be in the negotiating room. This is especially important if you are in a larger organization As the person who is helping to facilitate the agreement, you may not know the specific needs of each of the departments, and you could possibly be dealing with someone new to a role who will now be at the table during negotiations. Understanding the skillset of the team participating in the negotiations is vital. According to Michael H Boldt, everyone negotiates consciously and subconsciously.[16] Meeting with your negotiation team early on will only help to determine if there is any necessary training that must occur, or are there questions that members of the team may have that can be answered prior to the start of negotiations.

Tip No. 2-Learn the art of Negotiation.

If you are participating in collective bargaining, you may very well have only a handful of people in the room. However, if you are participating in a process such as Meet and Confer, you could have as many as fifteen people in the room. In order to be an effective negotiator, you must have an understanding that everyone involved will have different personalities, different values, and even different strengths.

A. Establish Ground Rules

The first negotiation meeting should include introductions of the negotiating teams for both management and labor, as well as establishing some ground rules. This may also be at time where knowing the laws that govern your state will be helpful because there may be questions from both sides regarding how negotiations are to take place, the number of representatives allowed per team, and the particular location and length of time for the meeting.. Usually the union presents its proposals at the first meeting. You want the labor group to proceed first with proposals because they can set the tone for the meetings and it can be determined whether you have a labor team that is willing to be reasonable and moderate – or not.

When it is management's turn to talk, only your chief spokesperson (which may be you) should speak, except when it has been pre-arranged that another member of the team will speak to a particular topic. Reveal-

Continued on page 28

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ing information out of sequence or when the other side is not ready to receive the input can confuse them or send the wrong message, causing their expectations to get distorted. The chief spokesperson should explain management's position regarding each issue as clearly and completely as possible, then explain why management takes that position, and which of management's basic interests is involved.

Questions should be encouraged and answered thoroughly as soon as possible (sometimes more research is necessary to get the answer to a question). When firmness is in order, be firm. It is unproductive to waffle or say "maybe" when the only answer you'll ever be able to give is "no." Remember that it is virtually always necessary that a union be told "no" sometime during the negotiations. If you cannot do that, don't be involved.[17]

B. Remain Neutral

You are not the enemy, and neither is the other side.. While you may represent management, understand that you are in a position to also help facilitate the parties reaching an agreement. Remaining neutral helps you to maintain your trust and integrity, and you must keep that while negotiations are taking place. It will also help you to foster an environment of trust, honesty, and transparency. It may be difficult especially if the relationship between management and the labor union is contentious, but maintaining neutrality as best you can will help with furthering discission, especially if there is a stalemate.

Tip No. 3-Reassess and Follow Up

So, you've gotten the agreement. While you can pat yourself and your team on the back, the work is not done. Once you have the fully executed agreement in place, you must ensure that any new benefit terms, policies, or procedures are implemented and properly documented.

A. Implementation

Oftentimes, a new negotiated labor agreement will include a new benefit or could potentially require personnel policy revisions or changes to standard operating procedures for the department. For example, if you negotiate an agreement that has altered benefits granted by a governmental body, you may need to ensure ordinances are revised. While the legal team may not be the sole individuals responsible for drafting all the required policy changes, you do want to make sure to assist in facilitating the necessary amendments. Organization is key, and calling a meeting with the necessary stakeholders such as department managers or Human Resources representatives is important to cover all bases.

B. Maintaining Records

In the public sector, most meetings like labor negotiations are public. Although you may maintain records pursuant to specific state laws on retention, it is also important to have good notes and records yourself. You want to make sure you keep detailed records of all negotiations, agreements, and even communications. This will help not only in documenting what occurred for this round of labor negotiations, but it will also be important for future rounds.

Conclusion

Negotiating with labor organizations can be very challenging. However, properly preparing, understanding the legal and political landscape, and maintaining a commitment to being transparent and keeping communication open can help you achieve a fair and sustainable labor agreement that can meet the needs of the workforce, the organization, and the community.

1. ABC13 Home page https://abc13.com/post/houston-city-council-1-billion-firefighter-backpay-deal-hfd-raises/14970281/ (last visited Jun 20, 2024).
2. Edward Montague v. City of Arlington, Cause No. 096-297772-18, 2021 WL 4205012 (Tex.App—Forth Worth), no pet.; *see also* Dallas News https://www.dallasnews.com/news/2018/02/07/arlington-firefighters-sue-city-over-civil-service- conflicts/; https://www.nbcdfw.com/news/local/arlington-firefighters-sue-city-chief-alleging- retaliation/259604/ (last visited Jun 19, 2024).
3. CBS News https://www.cbsnews.com/texas/news/arlington-firefighters-union-morale/ (last visited Jun19, 2024).
4. For the purposes of this article, unless specifically stated, collective bargaining also includes the Meet and Confer process.
5. Congress initially passed the National Labor Relations Act in 1935. The Act excluded public sector employees.
6. NPELRA – The Foundation of Labor Relations - 2011
7. *Id.*
8. Texas 174.00
9. NPELRA – The Foundation of Labor Relations - 2011
10. *Id.*
11. *Id.*
12 Fisher and Ury, The Harvard Negotiation Project (2007).
13. *Id.*
14. *Id.*
15. *see* Texas Local Government Code 142.063.
16. Collective Bargaining and Guide and Legal analysis, Michael H. Boldt, 2016 Ice Miller LLP and The Mechanical Contractors Association of America.
17. *Id.*

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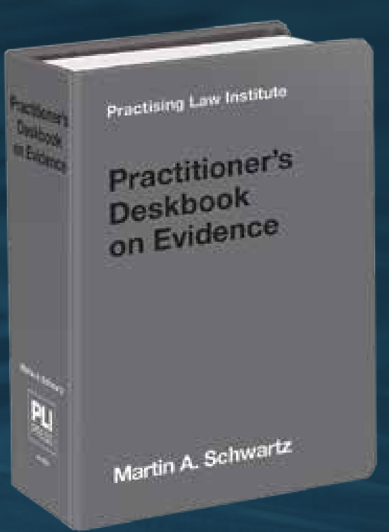

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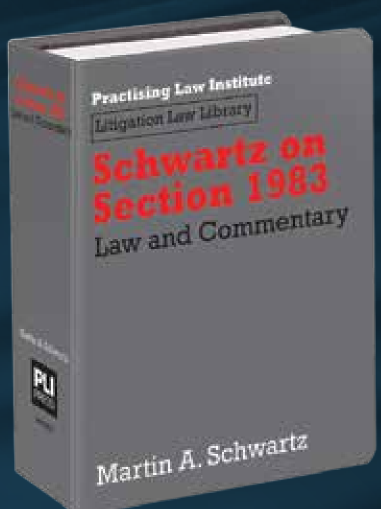

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Inside Canada *cont'd from page 19*

process of accommodating her disabilities resulted in stress from co-workers' questions about her modified duties which constituted discrimination. The Complainant followed the City's process and filed a complaint with the Director of the Commission ("Director"). The Director found that the Complainant had physical and mental disabilities that required an accommodation, but dismissed the complaint, finding that the City had reasonably accommodated the disabilities in both a temporary and permanent capacity. The Complainant requested a review of the finding.

HELD: Decision to dismiss complaint upheld.

DISCUSSION: The Human Rights Tribunal of Alberta ("Tribunal") reviewed the Director's findings and determined that the City had fulfilled its duty to accommodate, both on a temporary and permanent basis and further found the Complainant's dissatisfaction with the accommodations, which included her preference for a particular modification, did not rise to the level of discrimination. Notably, the Tribunal emphasized the Complainant's responsibility to engage in the accommodation process, noting that delays in submitting her resume and other information hindered its timely resolution. The Tribunal also found that the Complainant's arguments did not demonstrate a breach of her dignity or substantiate her claims of financial loss. The Tribunal concluded that the complaint lacked merit and was unlikely to succeed at a hearing. Furthermore, the Tribunal noted that such issues might be more appropriately addressed through grievance arbitration in a unionized workplace, although this point was not fully explored in this decision. Consequently, the decision to dismiss the complaint was upheld. ML

Amicus *cont'd from page 23*

actions with respect to [the inmate] were undoubtedly within the scope of activities for which he was to set policy."[19]

The Tenth Circuit majority found support in a Texas decision where a county sheriff raped an attempted murder suspect after an interrogation at her home. There, although the County argued that "the Sheriff's actions did not constitute a policy of the County . . . because they violated well-established County policy,"[20] the Fifth Circuit found to the contrary, holding that the Sheriff's actions were "those of the County" because "the County Sheriff is the County's final policymaker in the area of law enforcement."[21]

A dissent in *Sedgwick County* rejected the proposition that Sheriff Hanna's actions were those of the County:

> Hanna advanced a purely personal agenda in committing the sexual assault and acted outside his authorized law-enforcement 'realm' of setting policy for the transportation of prisoners . . . the majority opinion goes too far for me in approving as municipal policy a rogue sheriff's one-time, *secret* action that is unquestionably outside of the sheriff's realm and legitimate policymaking authority.[22]

Importantly, the dissent argued that characterizing the Sheriff's acts as those of the County in this circumstance amounts to *respondeat superior*—a principle clearly disqualified by the Supreme Court in *Monell*, where the Court held that:

> Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.[23]

Sedgwick County was settled before petitioning for Supreme Court review. As such, the Tenth Circuit holding, as well as the Fifth Circuit opinion and others cited by the majority, stand to encourage additional litigation arising out of unauthorized, rogue--and even criminal--acts by "final policymakers," significantly challenging *Monell's* admonition against *respondeat superior* liability for state and local governments.

***Trumbull County v. Purdue Pharma, LP*: Public Nuisance Abrogated by Product Liability Statute (Ohio Supreme Court)**

In August 2022, Ohio's Trumbull and Lake Counties were awarded $650 million in abatement funds by District Court Judge Dan Aaron Polster after a federal jury found that three pharmacies--Walgreens, CVS, and Walmart—had contributed to the opioid crisis due to irresponsible filling of illegitimate opioid prescriptions, failure to maintain accurate dispensing records, and other shortcomings.[24] That setback for the defendants was among the more recent outcomes arising from hundreds of local government cases consolidated in the multidistrict litigation before Judge Polster in Ohio's Northern District: *In re National Prescription Opiate Litigation*, no. 17-MD-2804 (N.D. Ohio).

Central to the *Trumbull* and *Lake* wins was a cause of action widely deployed by governmental plaintiffs against the opioid manufacturers, distributors, prescribers, and retailers: common law public nuisance, defined in the Restatement of Torts as "an unreasonable interference with a right common to the general public."[25] While public nuisance has been held to be inextricably limited to real property-related actions in some jurisdictions, including Oklahoma and North Dakota, it has been widely effective in many opioid cases, helping to force opioid defendants to sign settlements yielding more than $60 billion in abatement funding, increments of which are already being disbursed to communities around the nation.

The pharmacy defendants in *Trumbull* and *Lake* moved to dismiss based on the Ohio Product Liability Act (OPLA), which was "intended to abrogate all common law product-liability claims or causes of action."[25] The Ohio legislature amend-

ed the initial codification to provide that "'Product liability claim' also includes any public nuisance claim or cause of action at common law in which it is alleged that [the sale, marketing, etc.] of a product unreasonably interferes with a right common to the general public."[27] But a separate section of the OPLA further states that a "'product liability claim' means a claim or cause of action that . . . seeks to recover compensatory damages from a manufacturer or supplier . . ."[28] Noting that the Counties were seeking funds solely for abatement, Judge Polster denied the defendants' motions, concluding that the OPLA does not abrogate absolute public-nuisance claims which seek relief other than compensatory damages.

The pharmacies appealed to the Sixth Circuit, which sought further clarity from Ohio's Supreme Court on the interplay between the OPLA, public nuisance, and abatement, certifying the following question:

> Whether the [OPLA] abrogates a common law claim of absolute public nuisance resulting from the sale of a product in commerce in which the plaintiffs seek equitable abatement, including both monetary and injunctive remedies?[29]

On December 10, 2024, the Ohio Supreme Court answered the certified question in the affirmative:

> [A]ll public-nuisance claims alleging 'that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public' have been abrogated by the OPLA, including those seeking equitable relief.[30]

The decision deprives the Counties of $650 million in abatement funding and stands to silence plaintiffs intending to launch product-related public nuisance actions in Ohio. It offers a potential roadmap to other legislatures determined to curtail product-based litigation in their states and may be the subject of judicial notice elsewhere.

The Ohio public nuisance inquiry will shortly be followed by a similar analysis in West Virginia, whose common law public nuisance is "an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons." There, Cabell County and the City of Huntington opted out of the statewide distributor opioid settlement and pursued their own public nuisance actions. The Southern District of West Virginia found that public nuisance was inapplicable and granted the defendants' motions to dismiss. On appeal, the Fourth Circuit certified a similar question to the West Virginia Supreme Court of Appeals:

> Under West Virginia's common law, can conditions caused by the distribution of a controlled substance constitute a public nuisance and, if so, what are the elements of such a public nuisance claim?[31]

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Amicus *cont'd from page 31*

The distributor defendants argue that West Virginia's Supreme Court of Appeals has applied the common law of public nuisance only in the context of conduct that interferes with public property such as highways, public grounds, harbors and landings, or shared resources such as clean air and water, and point to Oklahoma's opioid case which limited public nuisance to real property based actions.[32] The localities point out that the Supreme Court of Appeals has applied the common law of public nuisance to "commodities," "the manufacture and distribution of products," and "otherwise-lawful business activities . . . when conducted in a manner that harms the public."[33]

The case will be argued on January 28. Local authorities express optimism over the Fourth Circuit's inquiry after the lower court rejected the plaintiffs' public nuisance cause of action, and much hangs in the balance; estimates are that a negative ruling could cost Huntington and Cabell County up to one billion dollars.[34]

Baker v. City of McKinney: Second Look at Police-Caused Damage to Private Property?

In the past five years, IMLA has provided amicus support in three cases involving Fifth Amendment takings claims against local governments for damage to residences resulting from law enforcement activity.[35] In each, the locality has prevailed: the Fifth, Sixth, and Tenth Circuits have all declined to require governmental compensation to the homeowners. In the Fifth Circuit case, *Baker v. City of McKinney,* the court held that the Takings Clause does not require compensation when it is "objectively necessary" for officers to damage or destroy property in an active emergency to prevent imminent harm to persons.

The *Baker* plaintiff petitioned for Supreme Court review in mid-2024, but certiorari was denied in late November. However, Justice Sotomayor, joined by Justice Gorsuch, authored a statement accompanying the denial, reprising the Court's decades-old instruction that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[36] As she phrased it, "This Court has yet to squarely address whether the government can, pursuant to its police power, require some individuals to bear such a public burden."[37] She expressed sympathy for the Baker plaintiff and inquired whether there is any "objectively necessary" exception to the Takings Clause compensation requirement:

> Whether any such exception exists (and how the Takings Clause applies when the government destroys property pursuant to its police power) is an important and complex question that would benefit from further percolation in the lower courts prior to this Court's intervention.[38]

The full import of the Sotomayor/Gorsuch statement is unclear, but it seems fully plausible that the comment presages a future Supreme Court review, and potential narrowing, of the longstanding principle that governments are not liable for compensating owners whose private property is damaged in the course of legitimate police activity. Such a holding would represent a radical change from traditional latitude afforded law enforcement and emergency response in Takings Clause matters and could subject localities to widespread and costly Takings claims.

Conclusion:

As indicated, on the horizon are various appellate developments that appear disadvantageous for local government. While the outcome of these matters is yet to be seen, local government lawyers should be aware of the challenges ahead. ML

1. 42 U.S.C. § 1997e.
2. Richards v. Perttu, 96 F.4th 911 (6th Cir. 2024).
3. Perttu v. Richards, cert granted, 2024 WL 4394132 (U.S. Oct. 4, 2024)(No. 23-12324).
4. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1558 (2003).
5. 142 Cong. Rec. 8236 (1996) (statement of Sen. Abraham).
6 141 Cong. Rec. 26553 (1995) (statement of Sen. Hatch)
7. 142 Cong. Rec. 8236 (1996) (statement of Sen. Abraham).
8. Margo Schlanger, *Prison and Jail Civil Rights/Conditions Cases: Longitudinal Statistics,* Prison Policy Initiative (April 26, 2021), at Table G, *Change in Prisoner Civil Rights Filings in U.S. District Court and Filing Rates, by State, Fiscal Years 1995 vs. 2012, 2012 vs. 2018, and 1995 vs. 2018*.
9. Wilson v. Yaklich, 148 F.3d 596, 600 (6th Cir. 1997).
10. *Id.*
11. Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res., 532 U.S. 598 (2001).
12. *Id.* at 605.
13. Sole v. Wyner, 557 U.S.74 (2007).
14. Stinnie v. Holcomb, 77 F.4th 200, 210 (4th Cir. 2023).
15. *Id. at 227.*
16. *See e.g.,* Veasey v. Abbott, No. 2:13-CV-193, 2020 WL 9888360 (S.D. Tex. May 27, 2020), aff'd, 13 F.4th 362 (5th Cir. 2021) ($6,790,333.31 fee award); Tennessee State Conference of the N.A.A.C.P. v. Hargett, nos. 3:19-cv00365, 3:19-cv-00385, 2021 WL 4441262 (M.D. Tenn. Sept. 28, 2021), aff'd, 53 F.4th 406 (6th Cir. 2022) ($851,279.44); New York State Rifle & Pistol Assn, Inc. v. Nigrelli, no. 1:18-cv-134, 2023 WL 6200195 (N.D.N.Y. Sept. 22, 2023) ($447,700.82); Chrysafis v. Marks, no. 21-CV-2516, 2023 WL 6158537 (E.D.N.Y. Sept. 21, 2023) ($384,728.86).
17. Whitson v. Bd. of Cnty. Comm'rs, no. 18-CV-02076, 2020 WL 13660757, at *5 (D. Colo. Apr. 17, 2020).
18. Whitson v. Bd. of Cnty. Comm'rs, 106 F.4th 1063 (10th Cir. 2024).

19. *Id*. at 1068.
20. Bennett v. Pippin, 74 F.3d 578, at 583-84 (5th Cir. 1996).
21. *Id*. at 585–86.
22. *Whitson*, *supra* note 18, at 1074.
23. Monell v. Dep't of Soc. Svcs, 436 U.S. 658, 691 (1978).
24. In re National Prescription Opiate Litigation, no. 17-MD-2804 (N.D. Ohio Aug. 22, 2022) "*Track Three*": County of Lake v. Purdue Pharma, L.P. no. 18-op-45032 (N.D. Ohio); County of Trumbull v. Purdue Pharma, L.P. No. 18-op-45079 (N.D. Ohio).
25. 4 Restatement of the Law 2d, Torts, § 821B(1), 87 (1979).
26. Ohio Rev. Code § 2307.71(B).
27. *Id.*
28. *Id.* at § 2307.72(A)–(C).
29. Trumbull County; Lake County; Plaintiff's Executive Committee v. Purdue Pharma, L.P., nos. 22-3750/3751/3753/3841/3843/3844 (6th Cir. Sept. 11, 2023).
30. In re Natl. Prescription Opiate Litigation, Slip Op. No. 2024-Ohio-5744 (Dec. 10, 2024).
31. City of Huntington v. Amerisource Bergin Corp., no. 22-1819 (4th Cir. Mar. 18, 2024).
32. State ex rel. Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2022).
33. Chris Dickerson, *4th Circuit wants state Supreme Court to answer nuisance question in Huntington, Cabell opioid case*, West Virginia Record, Mar. 18, 2024 (https://wvrecord.com/stories/656783579-4th-circuit-wants-state-supreme-court-to-answer-nuisance-question-in-huntington-cabell-opioid-case).
34. *Id.*
35. Lech v. Jackson, 791 Fed. Appx. 711 (10th Cir. 2019); Baker v. City of McKinney, 84 F.4th 378 (5th Cir. 2023); Slaybaugh v. Rutherford County, no. 23-5765 (6th Cir. 2024).
36. Armstrong v. United States, 364 U.S. 40, 49 (1960).
37. Baker v. City of McKinney, no. 23-2363 (denial of certiorari, U.S. Nov. 25, 2024).
38. *Id.*

Show Your Hands *cont'd from page 17*

help.[55] Daniels, believing that Oakes had a gun in the car, calmly asked him to leave the car, but Oakes refused.[56] Officer Wernecke then arrived as backup for Daniels, and both officers talked with Oakes, who still refused to leave the car and refused to let them search it. After several more minutes, feeling they were at an impasse, Daniels radioed for a supervisor.[57]

Sergeant Anderson then arrived, and "he was told that Oakes likely had access to a gun, was depressed and suicidal."[58] Anderson asked Oakes "if the officers could get him help."[59] He also asked Oakes if he was on medication, to which Oakes admitted that he had stopped taking his prescribed medication for depression.[60] Anderson repeatedly asked Oakes to allow them to search the vehicle for a weapon, and Oakes continued to refuse. When Anderson said they would take him out of the car, "Oakes still refused and stated that the officers 'better unsnap.'"[61] Officers Daniels and Wernecke reached for Oakes's arms to bring him out of the car, and "Oakes flailed his hands and repelled the officers' hands."[62] The Eleventh Circuit then describes Oakes's hidden hand movement in a way that is somewhat similar to *Manis* and, later, to *Salazar-Limon*:

> Oakes then reached into the area between the driver's seat and the center console. Oakes's right hand was not within the officers' view. Fearful that Oakes was reaching for his gun, Anderson shouted "gun, gun, gun" to alert the other officers. Anderson did not actually see any gun. He quickly moved to the outside of the open driver's side door and drew his weapon. Daniels and Wernecke also drew their weapons.
>
> **For about thirty seconds**, the officers can be heard on the audio recording repeatedly shouting "**show your hands!**," "**hands up!**," "**one more time, sir hands up!**," and "**let me see your hands now!**" Anderson said he could **see Oakes wiggling his right arm, as if his hand was searching for something** between the seat and console.
>
> At that point, Anderson **saw Oakes jerk his right hand out of the space** between the seat and the console and start to move his arm across his body. From this movement, Anderson thought Oakes had grabbed a gun and was pulling it out. Believing Oakes was "fixing to fire," Anderson shot twice and fatally wounded Oakes. Anderson had not actually seen a gun.[63]

Although Anderson had not seen a gun, it was objectively reasonable in the totality of the circumstances for him to have believed that Oakes had a gun and was reaching for it. Oakes didn't have the gun in his hand when Anderson fired. The gun was found, however, in the place where Oakes had been reaching his hand.[64] The district court granted summary judgment on qualified immunity grounds and the Eleventh Circuit affirmed.[65]

CONCLUSION:

The *Oakes v. Anderson* opinion's concluding paragraph contains an acknowledgment that we who defend officers should never forget: "The events of that day were undoubtedly tragic. One life ended, and many other lives will never be the same."[66] The work of those we defend is very serious, and qualified immunity can protect them from the distractions and pressures of going through a lawsuit. But qualified immunity cannot protect them from the impact of the decision to use deadly force. Officers protect and serve our communities. And we protect and serve our officers. The cases sampled here are just a few of the many that explore the interplay of qualified immunity and visible or hidden hands. The better we understand that interplay, the better we can help to protect those who protect us. **ML**

Show Your Hands *cont'd from page 33*

1. 490 U.S. 386 (1989).
2. *Id*. at 388, 395-97.
3. 471 U.S. 1 (1985).
4. 471 U.S. at 8-9 (cleaned up).
5. 490 U.S. at 396.
6. *Id*. at 396-97.
7. 475 U.S. 335 (1986).
8. *Id*. at 341.
9. 577 U.S. 7, 11 (2015) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)) (cleaned up).
10. *See*, *e.g*., Buehler v. Dear, 27 F.4th 969, 982 (5 th Cir. 2022).
11. *Id*.
12. https://leb.fbi.gov/bulletin-highlights/unusual-weapons
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. https://leb.fbi.gov/bulletin-highlights/unusual-weapons/unusual-weapons-flashlight-gun-pen-gun-and-bolt-gun
20. *Id*.
21. *Id*.
22. Carroll v. Ellington, 800 F.3d 154, 165 (5th Cir. 2015).
23. Lozano v. State, 860 S.W.2d 152 (Tex. App.—Austin 1993, pet. ref'd).
24. Garza v. State, 695 S.W.2d 726 (Tex. App.—Dallas 1985), aff'd, 725 S.W.2d 256 (Tex. Crim. App. 1987).
25. Clay v. Wilkinson, No. 07-CV-0730, 2007 WL 5147091 at * 4 (W. D. La. Dec. 10, 2007).
26. *Id*.
27. 585 F.3d 839, 842 (5th Cir. 2009).
28. 826 F.3d 272, 275 (5th Cir. 2016).
29. Chuck Remsberg, *New Force Science Study Results: Prone Suspects With Hidden Hands More Dangerous Than Imagined*, Force Science News, Dec 3, 2010. https://www.forcescience.com/2010/12/new-force-science-study-results-prone-suspects-with-hidden-hands-more-dangerous-than-imagined/

826 F.3d 272 (5th Cir. 2016).

31. *Id*. at 275.
32. *Id*.
33. *Id*.
34. *Id*. (internal footnotes omitted; bold print added).
35. *Id*. at 279-80.
36. 826 F.3d at 279 (internal footnotes omitted; bold print added).
37. *Id*. at n. 6 (citing *Manis*, 585 F.3d at 844).
38. 585 F.3d 839 (5th Cir. 2009).
39. *Id*. at 841-42.
40. *Id*.
41. *Id*. at 842 (bold print added).
42. *Id*. (bold print added).
43. What it means to say that a suspect is armed or unarmed, and the legal significance of that evaluation, is a fitting topic for another article.
44. 967 F.3d 1049, 1054 (10th Cir. 2020).
45. *Id*. at 1056-57 (bold print added).
46. *Id*.
47. *Id*. at 1062.
48. *Id*.
49. *Id*. (bold print added).
50. *Id*. (bold print added).
51. *Id*. at 1068.
52. 494 Fed. App'x 35, 36-37 (11th Cir. 2012).
53. *Id*.
54. *Id*. at 36.
55. *Id*.
56. *Id*.
57. *Id*. at 36-37.
58. *Id*. at 37.
59. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*. at 37-38 (internal footnote omitted; bold print added).
65. *Id*. at 38..
66. *Id*. at 40.

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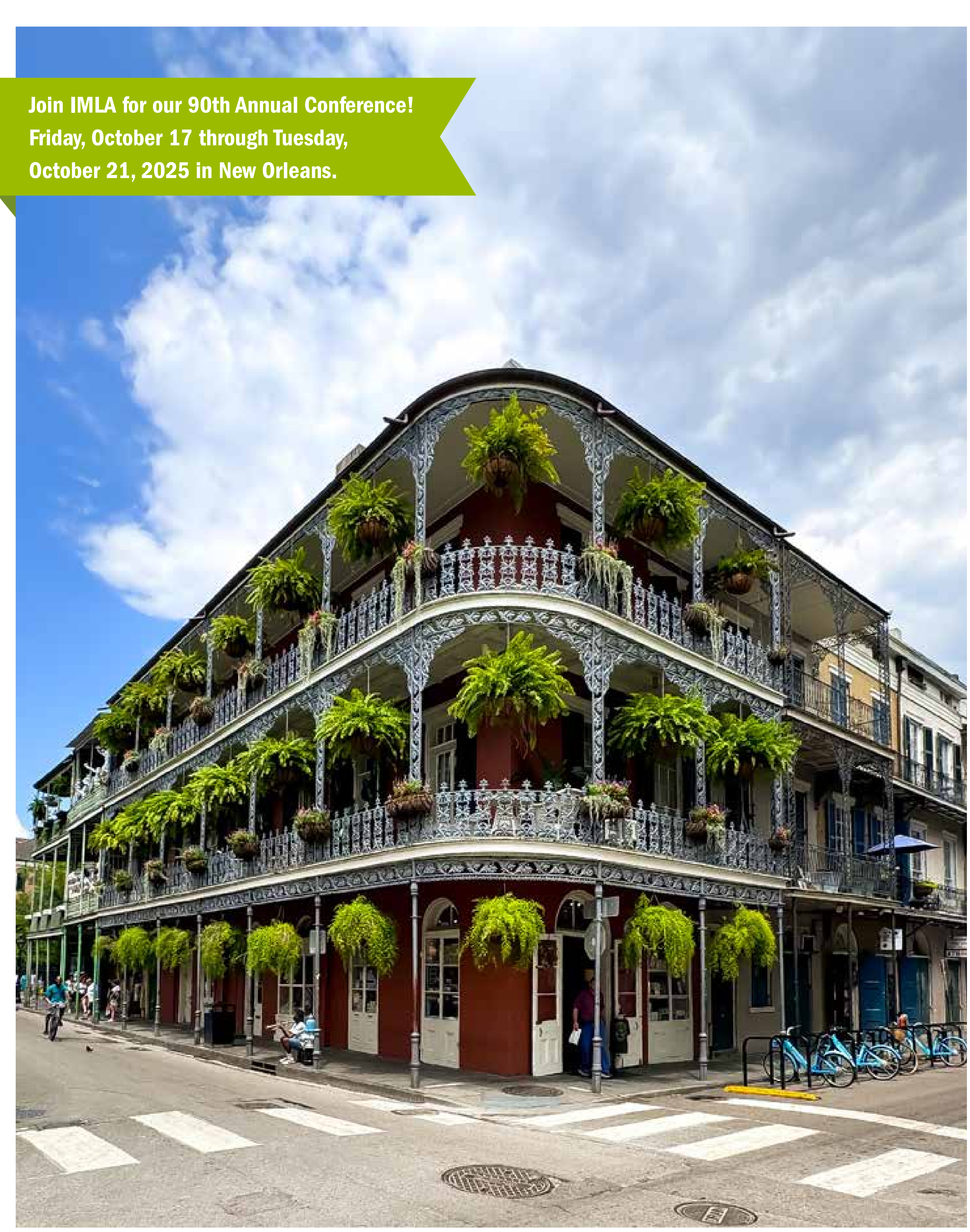
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