Municipal Tort and Civil Rights Litigation Update

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Neil Okazaki, Senior Deputy City Attorney and Constitutional Policing Advisor, Corona
Alana Rotter, Appellate Lawyer, Greines, Martin, Stein & Richland LLP

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MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

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Alana H. Rotter

Partner
Greines, Martin, Stein & Richland
Los Angeles, California
(310) 859-7811
arotter@gmsr.com

Neil D. Okazaki

Senior Deputy City Attorney /
Constitutional Policing Advisor
City of Corona
(951) 739-4987
neil.okazaki@coronaca.gov

I. CIVIL RIGHTS – LAW ENFORCEMENT LIABILITY

A. *Snitko v. United States,* 90 F.4th 1250 (9th Cir. 2024)

- **Warrantless searches and seizure of anonymous safe deposit boxes violate the Fourth Amendment absent probable cause, and cannot be justified as an inventory search.**

US Private Vaults (USPV) in Beverly Hills operated as a safe deposit box rental business without requiring customers to provide identification. Following suspicions of money laundering and other illicit activities, the FBI investigated USPV. Subsequently, the government obtained a warrant to search and seize USPV's facilities, including its safe deposit boxes, as part of the probe into potential criminal activities. The warrant expressly prohibited a criminal search or seizure of box contents. It mandated that agents adhere to established protocols for inventorying items and notifying box owners to claim their property post-search. Nonetheless, agents searched safe deposit boxes, used drug-sniffing dogs on cash contained within the boxes, and made copies of documents. The DOJ then filed administrative forfeiture claims attempting to take more than $100 million in cash and other valuables without charging any individual box owner with a crime.

Despite Plaintiffs' claims for the return of their seized property filed with the FBI after the raid on USPV, the government failed to return the property. Instead, it intended to initiate civil forfeiture proceedings for boxes meeting a monetary threshold of $5,000.

In Part I of the decision, the panel concluded that the inventory search doctrine, an exception to the warrant requirement permitting authorities to search items within their lawful custody, did not apply. The panel determined that the Supplemental Instructions deviated from the scope of a typical "inventory" procedure. When the government introduces a series of "customized" instructions to a "standardized" inventory policy, the search ceases to be conducted in accordance with a "standardized" policy. The explicit creation of the

Supplemental Instructions specifically for the USPV search distinguished this case from a standardized "inventory" procedure.

In Part II of the decision, the panel held that the government exceeded the warrant's scope. To make that determination, the panel compared the terms of the warrant to the search actually conducted. In this case, the warrant did not authorize a criminal search or seizure of the contents of the safe deposit boxes. The government expected, or even hoped, to find criminal evidence during its inventory. The instructions required agents to summarize the items found in the safe deposit boxes, tag items with forfeiture numbers, send them to "evidence control," and preserve "drug evidence" for fingerprints.

Significance: Police departments must follow their standardized inventory procedure when doing an inventory search.

B. *Miller v. City of Scottsdale*, 88 F.4th 800 (9th Cir. 2023)

- **Summary judgment upheld in favor of a Scottsdale Police Officer and the City of Scottsdale in an action alleging constitutional violations arising from a restaurant owner's arrest and citation for violating a Covid-19 emergency executive order, which prohibited on-site dining.**

On March 19, 2020, Arizona Governor Douglas Ducey issued an executive order prohibiting on-site dining. On March 23, 2020, an executive order included restaurants on a list of "essential functions" that could remain open during the pandemic to prepare and serve food for consumption off-premises. Issued on March 30, 2020, a new executive order set forth a physical distancing policy with a notice requirement that prior to any enforcement action, a person would be given notice and an opportunity to comply

Scottsdale police officers visited Randon Miller, the owner of Sushi Brokers, on March 27 and 28, 2020 in response to complaints that Sushi Brokers was violating the state's Covid-19 emergency order prohibiting on-site dining. On April 10, 2020, Scottsdale police received a tip about people dining inside Sushi Brokers. An officer went to Sushi Brokers that evening

and saw about ten people inside the establishment, of whom four left without to-go food bags. The next day, April 11, 2020, Officer Christian Bailey and six other officers visited Sushi Brokers to serve Miller with a citation for violating the emergency executive orders. Miller shouted obscenities at Officer Bailey, who eventually managed to serve the citation. When Officer Bailey began to leave, Miller shouted at the other six officers. This led Officer Bailey to arrest Miller for violation of a COVID-19 executive order as well as disorderly conduct. These charges were later dismissed.

Miller sued Bailey and the City for a violation of Section 1983 asserting claims of (1) retaliatory arrest, in violation of the First Amendment; (2) false arrest, in violation of the Fourth Amendment; and (3) Monell liability against the City of Scottsdale.

Judge Gould's Opinion: To prevail on any of his claims, Miller needed to demonstrate that Baileu lacked probable cause to arrest him. The probable cause inquiry turned not on whether there was a violation but on whether a reasonable officer would conclude that there was a fair probability of a violation. Here, given that officers had observed on-site dining at the restaurant and there were prior calls reporting violations, Bailey had probable cause to arrest Plaintiff.

Miller also argued that he did not violate the Executive Order issued on March 30, 2020, because he did not receive notice and an opportunity to comply before the arrest. He argued that the earlier warnings do not count because they came before the Executive Order was issued. The panel, however, determined that the newer executive order did not invalidate any prior warnings.

Judge Hurwitz's Concurrence: Judge Hurwitz concurred, stating that Officer Bailey could not be faulted for concluding he could arrest Miller. The officer's belief that there was probable cause to cite and arrest Miller for violating the executive order was reasonable, which is all the law requires. The probable cause inquiry turns not on whether there was a violation

but on whether a reasonable officer would conclude that there was a fair probability of a violation.

Miller contended that the first executive order applied to businesses, not individuals. Judge Hurwitz rejected this argument and stated it "should not matter that Miller owned the restaurant through a limited liability corporation if he was serving in-person diners." Miller's other contention was that he did not receive notice and an opportunity to comply before the issuance of the citation. Judge Hurwitz also rejected this contention, finding that Miller had two warnings before April 11 that he was violating the ban on in-person dining. Even if the latest order somehow established an entirely new offense, the executive order did not invalidate any prior warnings.

Judge Bumatay's Dissent: Judge Bumatay stated: "Given the dizzying speed of all these orders, confusion was bound to happen." Judge Bumatay noted that the earlier executive orders applied only to "restaurants" or "businesses"—not persons. While Miller received warnings on March 27 and 28, those warnings came before most recent executive order went into effect. Indeed, the order required notice and opportunity to comply with "this order"—meaning that only warnings made after the order's March 31 effective date should count. Judge Bumatay asserted that prosecution would "unreasonably implicate the prohibition on ex post facto laws."

Significance: This legal debate in the Ninth Circuit could have been avoided had the executive order's language been clearer regarding (1) whether individuals fall within the statute prohibiting restaurants from having on-site dining and (2) whether warnings before the issuance of the order were valid. However, to avoid this contention, an agency is best counseled to issue the requisite warnings after issuing the order (or effective date of legislation) when the law requires such notice.

C. *Waid v. County of Lyon,* 87 F.4th 383 (9th Cir. 2023)

- **Officers are entitled to qualified immunity for shooting and killing a suspect in a domestic call where the suspect used aggressive language, ignored an order from officers, and rushed toward officers in a small and confined space.**

Police received a 911 call seeking help with a domestic violence incident. The caller did not request emergency medical care or report any weapon. At the residence, two minor children, both distressed, told a police officer that their parents were fighting and that their mother needed an ambulance. One stated that there were no weapons in the house other than a BB gun. Medics were called.

The officers then entered the home. As they entered the kitchen, Decedent, out of view, shouted, “Fuck you, punks.” An officer, with his gun drawn, saw Anderson at the other end of the hallway and told him to get on the ground. The other officer also drew and pointed his gun in front of him.

Anderson ignored the commands and ran down the short hallway toward the officers. Officer Willey fired three shots in quick succession at Anderson as Anderson crossed the threshold between the short hallway and the kitchen. Officer Wright fired his weapon twice. Anderson fell to the ground and began to bleed from his chest as Willey continued to shout at him, “Get on the ground!” Willey reported the shots and that the suspect was down. Anderson, who was shot five times, died from his injuries. A federal civil rights lawsuit ensued, and the officers filed a motion for summary judgment asserting qualified immunity.

Panel Opinion: Qualified immunity protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this case, the facts did not show that officers’ use of force clearly violated Anderson’s constitutional rights, even when viewed in the plaintiffs’ favor.

Anderson used aggressive language with the officers, ignored their orders, and rushed towards them in a small, confined space. Additionally, the officers were responding to an active domestic violence situation and needed to make split-second decisions when Anderson charged at them. This factual scenario was very different from other cases with facts extreme enough to deem that the constitutional violation was obvious (such as chaining a person shirtless to a hitching post in the hot sun with limited water and no bathroom breaks; detaining mere witnesses to a crime for five hours; and shooting a person holding a baseball bat who was not threatening anyone else).

Additionally, the Ninth Circuit found that Plaintiff failed to show that the existing body of caselaw would have placed a reasonable officer on notice that the conduct was unconstitutional in violation of the Fourth Amendment. The children had advised officers of a physical altercation and did not know the status of her welfare. Officers faced Anderson in a narrow hall with no barriers, meaning retreat was not viable and may have left Anderson's wife alone and allowed Anderson time to obtain a weapon. Anderson was upright and moving when he was shot. Anderson also ignored commands, was rapidly advancing on the officers, and could access their weapons if he was not stopped. None of the cases relied on by Plaintiffs were sufficiently analogous to put a reasonable officer on notice that the use of deadly force would be unconstitutional.

Finally, the Ninth Circuit agreed the officers did not violate Anderson's Fourteenth Amendment substantive due process rights. Children of a decedent have the right to assert substantive due process claims. However, only official conduct that "shocks the conscience" is cognizable as a due process violation. Where deliberation is not practical and officers make "a snap judgment because of an escalating situation," liability is only found to shock the conscience if the officer acts with a purpose to harm unrelated to legitimate law enforcement objectives. That was not present in this case.

Judge Berzon's Partial Concurrence and Partial Dissent: Judge Berzon dissented. While agreeing that the officers were properly granted qualified immunity on the Fourteenth

Amendment familial interference claim, she asserted that the officers' use of force was unconstitutionally excessive and the officers are not entitled to qualified immunity on the Fourth Amendment claim. The dissent pointed to *A.K.H. ex rel. Landeros v. City of Tustin* to assert that an officer may not shoot an unarmed suspect several times—in rapid succession and without warning—when the suspect is not reaching for a gun, even if the suspect is involved in a domestic violence incident, is noncompliant with an order to get down, and is quickly moving toward the officer.

Significance: To show that an allegedly violated right was clearly established for the qualified immunity analysis, plaintiffs must show why their case is obvious under existing general principles or show specific cases that control or reflect a consensus of non-binding authorities in similar situations. This case reinforces the importance of an officer's ability to make split-second decisions.

D. *Smith v. Agdeppa,* 81 F.4th 994 (9th Cir. 2023)

- **The Ninth Circuit changes its prior ruling and finds the officers are entitled qualified immunity for fatally shooting a violent subject.**

In the men's locker room of a Hollywood gym, Albert Dorsey was shot and killed during an encounter with Los Angeles Police Department Officers Edward Agdeppa and Perla Rodriguez. The officers had responded to a call regarding a trespasser refusing to leave a gym, after threatening and assaulting other gym members and staff. When they arrived at the gym, they found Dorsey naked and dancing to music. Dorsey was 6'1'' and about 280 pounds. Officers Agdeppa and Rodriguez were 5'1" and 5'5" respectively, and weighed approximately 145 pounds each.

Dorsey ignored orders to get dressed and leave. The officers made unsuccessful attempts to handcuff Dorsey. Agdeppa managed to place one handcuff onto Dorsey's right wrist, but for roughly a minute and twenty seconds, Dorsey used his size to thwart the smaller officers' attempts to handcuff him. After a continued struggle, Rodriguez deployed her taser.

Both officers attested that they used their tasers in "stun" mode several times as Dorsey became increasingly aggressive. The officers indicated that Dorsey did not attempt to flee but instead advanced towards them, punching at their heads and faces while the handcuff attached to his wrist also swung around and struck them. The officers stated that Dorsey struck Rodriguez, knocked her to the ground, allegedly straddled her, and began repeatedly striking her with his fists. Fearing for his partner's life, Agdeppa allegedly warned Dorsey to stop before shooting him five times and killing him. Agdeppa said he was six to eight feet away from Dorsey when he fired the shots.

Eyewitness accounts and audio recordings from body worn cameras conflicted with this account of events. Witnesses said Agdeppa was within arm's length of Dorsey and was holding Dorsey's arm. Also, the deputies could not be heard issuing a warning to Dorsey before the shooting. Photographs showed Rodriguez to be "unscathed," and the officers' medical records reflected only minor injuries.

Agdeppa moved for summary judgment, relying on qualified immunity. The trial court initially denied the motion and the Ninth Circuit affirmed, stating that the "pervasive disputes of material fact make this case a textbook example of an instance in which summary judgment was improper." The panel majority concluded that "a jury could find that a reasonable officer in Agdeppa's position would not have believed that Rodriguez or anyone else was in imminent danger and, thus, would have understood that his use of deadly force violated plaintiff's Fourth Amendment rights." They also found "a reasonable factfinder could decide that Agdeppa's characterization of the events in the locker room was contradicted by other evidence in the record. A reasonable jury could also conclude that Agdeppa had an opportunity to warn Dorsey and did not do so. The Ninth Circuit found these as valid grounds for the district court to deny qualified immunity. (See *Smith v. Agdeppa,* 56 F.4th 1193 (9th Cir. 2022), r*eh'g granted, opinion withdrawn*, 66 F.4th 1199 (9th Cir. 2023). Judge Daniel Bress dissented.

However, United States District Judge Gary Feinerman, sitting by designation, resigned from judicial service and Judge Consuelo Callahan was named the replacement judge. Judge

Callahan and Judge Bress voted in favor of rehearing, and Judge Christen voted against rehearing. Upon rehearing, the result was very different.

The Ninth Circuit focused its opinion on the second prong set of qualified immunity- whether the alleged constitutional violation was "clearly established" at the time of the incident in question. Judge Bress, now writing for the majority, stated that it was "undisputed that the officers were placed in a high-stress, rapidly developing situation involving a person who had reportedly assaulted a gym security officer and threatened others, and who was violently resisting the officers and assaulting them in an enclosed area." The Court also noted the size difference between Dorsey and the officers, and that "[j]ust before the fatal shots were fired, the officers can be heard crying out in pain as crashing and thrashing noises intensify." With this in mind, it could not be said that the officers were violating clearly established law.

Plaintiff also argued that even if the degree of force here was permissible based on the threat the officers faced, Agdeppa was constitutionally required to warn Dorsey before using such deadly force. Although no warning was given, the law only requires warnings "whenever practical;" however this warning principle "is not a one-size-fits-all proposition that applies in every case or context." The Ninth Circuit states that the "absence of a warning does not necessarily mean that [an officer's] use of deadly force was unreasonable. In this case, the Ninth Circuit held that Plaintiff did not identify any controlling case or robust consensus of cases that clearly established that such a warning was required in this case.

Significance: This case is unique procedurally, as a new judge joined the dissenting judge from the original opinion to issue a new decision granting qualified immunity to the officers. The Court decision recognizes the unpredictability of policing in rapidly evolving circumstances. However, four judges considered this matter, and there was an even split on the issue as to whether qualified immunity applied to the facts.

This case is a good reminder that officers, when feasible, should issue a warning before employing deadly force. However, general statements in prior cases about an officer providing a "warning," when practicable, before using lethal force do not satisfy plaintiff's burden.

E. *Sabbe v. Washington County Board of Commissioners*, 84 F.4th 807 (9th Cir. 2023)

- **Ninth Circuit affirms qualified immunity based on a lack of clearly-established law involving use of armored vehicles for pursuit intervention technique maneuvers, while announcing new law that will govern the use of such maneuvers going forward.**

The Washington County Sheriff's Office received a report that Remi Sabbe was driving erratically on a rural field he owned, that Sabbe was drunk and belligerent, and that there may have been a gunshot on the property. Thirty law enforcement officers responded, in marked cars with overhead lights on to make their presence known. An hour later, two Sheriff's Department armored vehicles entered the field. One was an unmarked Commando V150 personnel carrier. The V150 executed two pursuit intervention technique ("PIT") maneuvers, in which officers deliberately collide their vehicle into the back half of the side of a target vehicle, hoping to cause the target vehicle's engine to stall. The maneuvers crushed Sabbe's pickup. Minutes later, officers heard a gunshot, and they opened fire. Sabbe was shot eighteen times and died at the scene.

Sabbe's widow sued the officers and the County, alleging—among other things—42 U.S.C. § 1983 claims that defendants violated her husband's Fourth and Fourteenth Amendment rights by entering the family's private property, ramming his pickup with the V150, and shooting him. The district court granted summary judgment, holding that the officers' conduct neither violated Sabbe's constitutional rights nor

exceeded the scope of their qualified immunity. The Ninth Circuit affirmed in a divided opinion.

Majority: The majority (Judges Christen and Tallman) held that the illegal entry claim failed because even if the entry violated the Fourth Amendment, it was not the proximate cause of Sabbe's death—rather, based on evidence that two officers perceived that Sabbe rammed the V150 and pointed a rifle after the PIT maneuvers, the majority concluded that Sabbe's response to the warrantless entry was a superseding cause of his death. On the excessive force claim based on the PIT maneuver, the majority held that a jury could decide that the force was excessive, but that the officers were entitled to qualified immunity because no existing precedent clearly established that the PIT maneuver was unconstitutionally excessive under these circumstances. On the excessive force claim based on the shooting, the majority concluded that the officers reasonably perceived Sabbe as an immediate threat that justified responding with deadly force. On the *Monell* claim against the County for failure to train officers on the use of the V150, the majority held that plaintiff could not establish the standard for public entity liability—namely, that the need "for more or different action is so obvious, and the inadequacy of existing practice is likely to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need." Specifically, the majority pointed to the County deponent's testimony that the County did not have a policy because using an armored vehicle for this purpose was "not something we ever thought of." In light of that testimony, "the record does not give rise to a genuine dispute that the County's failure to establish guidelines for using the V150 to execute PIT maneuvers rose to the level of deliberate indifference."

Concurrence/dissent: Judge Berzon disagreed with some, but not all, of the majority opinion. On the Fourth Amendment claim, she would have held that defendants' entry onto Sabbe's property violated his clearly established rights and that Sabbe's conduct was not a superseding cause of his death. On the claim based on the

PIT maneuver, she agreed that the force was excessive, but would also have held that it violated clearly-established law despite the lack of precedent because it was so obviously excessive. On the shooting claim, she concluded that a jury could have found the force was excessive. On the *Monell* claim, she agreed that testimony that the department had never heard of using an armored vehicle to carry out a PIT maneuver weighs against a finding that the failure to train officers on such a use of the vehicle amounted to deliberate indifference.

Significance: *Sabbe* is significant for a number of reasons. The opinion notes that it has become common for law enforcement agencies to use armored vehicles. Going forward, *Sabbe* clearly establishes that using a large armored vehicle to execute a PIT maneuver may be excessive force. And in light of that holding, law enforcement departments that have V150s or similar vehicles may need to develop policies and training on using them in this type of encounter, to avoid potential *Monell* liability for deliberate indifference. The decision also highlights how dependent the outcome of federal cases are on which judges decide them: Between the district court and the split panel opinion, there are three different views on whether the various uses of force were excessive and violated clearly established law.

F. *Martinez v. High*, 91 F.4th 1022 (9th Cir. 2024)

- **Ninth Circuit affirms qualified immunity for an officer who disclosed reported abuse to the abuser, based on lack of clearly-established law at the time of the incident (but established post-incident).**

Desiree Martinez reported to City of Clovis police that her boyfriend, a Clovis police officer, was abusing her. Another officer, Officer High, told Martinez's boyfriend that Martinez had reported the abuse. That information provoked Martinez's boyfriend to further abuse her, until he was eventually arrested. Martinez sued Officer High, and other officers who, among other things, failed to arrest the abuser earlier in response to Martinez's 911 calls.

The district court granted summary judgment for everyone other than Officer High on qualified immunity grounds. But as to Officer High, the court found that it was clearly established at the time of the 2013 incident that sharing a domestic violence victim's confidential information with the alleged abuser violates the victim's substantive due process rights. Martinez appealed as to the grant of judgment for the other officers; Officer High did not appeal.

In the first appeal *("Martinez I")*, the Ninth Circuit held that another officer who had also told the abuser about Martinez's reports had violated her due process rights but that the violation was not clearly established at the time the conduct occurred. On remand, the district court allowed Officer High to file—and then granted—a new summary judgment motion based on *Martinez I*'s qualified immunity reasoning. Martinez appealed again.

Majority: In the second appeal ("*Martinez II"*), the Ninth Circuit affirmed the grant of qualified immunity for Officer High. Although police officers generally are not liable under the Due Process Clause for failing to prevent private parties' act (here, the abuse), there is an exception when an officer affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger. The majority ruled that Officer High's telling Martinez's abuser about her report met the elements of this "state-created danger" exception, because (1) Officer High's conduct foreseeably put Martinez at risk of violent retaliation by her abuser, and (2) Officer High was deliberately indifferent toward the risk of future abuse, given that she knew that the abuser was violent, understood that confidential abuse reports should not be disclosed to the abuser, and knew that Martinez was in the room with the abuser when she told the abuser about Martinez's report. But the majority held that Officer High nonetheless was entitled to qualified immunity because it was not clearly established at the time of the 2013 incident that relaying a confidential abuse report to the abuser violated the victim's due process rights—it became clearly established only when *Martinez I* was decided in 2019.

Concurrence: Judge Bumatay concurred in the judgment but not the full opinion. He would not have reached prong one of qualified immunity, whether Officer High violated Martinez's rights, because he believes that the entire state-created-danger doctrine is misguided and should be pruned back. Instead, he would have affirmed based solely on qualified immunity's "clearly established" prong, because "everyone agrees that no clearly established law existed at the time of the incident . . . ."

Significance: *Martinez II* highlights that qualified immunity's clearly-established prong looks at the law as it existed at the time of the incident—so even if post-incident precedent clearly establishes that conduct is unconstitutional, qualified immunity will still be available for events occurring before that precedent was issued. The opinion also reiterates an appellate procedure point when it comes to qualified immunity appeals: Although a defendant can take an interlocutory appeal from the denial of qualified immunity, such an appeal is not required—the defendant can wait until the end of the case. (Here, Martinez argued that Officer High waived her qualified immunity defense by not appealing after the district court judge denied her first summary judgment motion. The Ninth Circuit rejected that argument, stressing that "'the rule permitting a defendant to take an interlocutory appeal after a denial of a motion based on qualified immunity is not a rule *requiring* the defendant to take that appeal.'"

G. *Moore v. Garnand*, 83 F.4th 743 (9th Cir. 2023)

- **Ninth Circuit affirms grant of qualified immunity in First Amendment retaliation case, based on lack of clearly-established law.**

Police from the City of Tucson sought to interview Greg Moore, who was responsible for a building destroyed by arson. Moore invoked his right to remain silent. Officers later searched Moore's house, and caused the police department to open a criminal financial investigation against Moore and his wife. The investigation was closed when subpoenas did not yield any evidence of a crime. The Moores then sued one of the officers for Fourth Amendment violations relating to the search, and allegedly in retaliation, the officers reopened

the criminal investigation and tried to induce the IRS to open an investigation as well. Plaintiffs then filed another suit, alleging that the officers violated Moore's First Amendment right to remain silent and that they retaliated against him for exercising that right. When the defendants moved for summary judgment, plaintiffs moved for a stay under FRCP 56(d) on the ground that they needed additional discovery. The district court agreed, and denied summary judgment without prejudice to re-filing after the completion of discovery. Defendants appealed.

The Ninth Circuit reversed, directing the entry of summary judgment for defendants. It held that it had jurisdiction to consider the interlocutory appeal, despite the fact that the district court had denied summary judgment to allow discovery rather than on the merits. It framed the question as whether, accepting plaintiffs' version of the facts, defendants had violated clearly-established rights. The court answered that question "no," holding that no precedent clearly establishes a *First Amendment* right to remain silent when questioned by police or that a retaliatory investigation per se violates the First Amendment.

Significance: *Moore* is a helpful case for public entities asserting qualified immunity defenses, as it rigorously applies the Supreme Court's guidance not to define rights at a high level of generality for purposes of the "clearly established" analysis. The Moores relied on the Supreme Court case of *Wooley v. Maynard*, which held that the First Amendment bars compelling plaintiffs to display a state motto on a license plate. In reaching its holding, *Wooley* stated generally that the "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." The Ninth Circuit, however, said that *Wooley* did not clearly establish anything about First Amendment rights during *police questioning*, and distinguished two prior Ninth Circuit decisions involving retaliatory investigations as involving fact patterns.

H. *Hernandez v. City of Los Angeles*, 96 F.4th 1209 (9th Cir. 2024)

- **Ninth Circuit grants qualified immunity on excessive force claim despite finding a triable issue as to reasonableness of the force, based on lack of clearly-established law.**

Los Angeles Police Department officers came upon a multi-vehicle accident. Bystanders reported that the person who caused the accident had a knife and wanted to hurt himself, and was inside a smashed pickup truck. The officers saw a man (later identified as Daniel Hernandez) start to climb out of the truck and told him to raise his hands. Hernandez emerged holding a weapon. Officer Toni McBride ordered Hernandez to stay where he was and to drop the knife, but Hernandez instead advanced toward McBride, yelling. McBride again told Hernandez to drop the knife, but he continued to yell and advance toward her. McBride fired an initial volley of two shots, causing Hernandez to fall to the ground with his weapon still in his hand. Hernandez started to get up; McBride yelled "Drop it!" and fired two more shots, causing Hernandez to fall on his back. Hernandez began to roll over, at which point McBride fired a fifth shot. Hernandez continued to roll over, put his knee and elbow in position to push himself upwards, and then started to collapse to the ground. As he did so, McBride fired a sixth shot. Hernandez then lay still; he died from his injuries. Only twenty seconds elapsed between Hernandez exiting the truck and his collapse; the six shots were fired within eight seconds. The weapon in Hernandez's hand turned out to be a box cutter.

Hernandez's family sued the City of Los Angeles, the police department, and McBride under 42 U.S.C. § 1983 for excessive force, interference with familial relations, and *Monell* public entity liability. They also asserted related state law claims. The district court granted summary judgment for defendants. The Ninth Circuit affirmed in part and reversed in part.

On the excessive force claim, the Ninth Circuit held that McBride's first four shots were reasonable as a matter of law, but that the reasonableness of the fifth and sixth shots was "a much closer question" to be decided by a trier of fact. The panel nonetheless affirmed

summary judgment for McBride based on qualified immunity's "clearly established" prong. It reasoned that although a prior Ninth Circuit decision *could* support a finding that the fifth and sixth shots were excessive, that decision did not "place[] the outcome of this case 'beyond debate,'" nor is excessiveness so obvious as to excuse the requirement of a prior decision squarely governing the facts at issue. On the interference with familial relations claim, the panel affirmed because there was no evidence that McBride acted with deliberate indifference; the panel emphasized how quickly the events took place, and that McBride acted for a legitimate law enforcement objective, i.e., stopping a dangerous suspect. On the *Monell* claim, where plaintiffs' only argument was that they should have been given additional time for discovery, the panel affirmed summary judgment because "although the district court's ruling [denying a continuance] may have been harsh, we cannot say that the court abused its discretion in concluding that [plaintiffs] had not shown sufficient diligence and that an extension of the discovery cut-off was unwarranted." On the state law claims, the panel reversed because the district court's summary judgment had rested entirely on its finding that the force was reasonable as a matter of law—a finding with which the panel disagreed.

Significance**:** *Hernandez* is another helpful citation for defendants, in that it strictly applies the Supreme Court's rule that overcoming qualified immunity requires the plaintiff to identify very factually-similar precedent. Affirmance of judgment for the City on the *Monell* claim despite the district court's "harsh" denial of a continuance also illustrates that the abuse-of-discretion standard of review does not allow the reviewing court to substitute its judgment for that of the district court—it will affirm unless the district court's ruling was beyond all bounds of reason.

II. CIVIL RIGHTS – NON-POLICING CONTEXTS

A. *Tucson v. Seattle,* 91 F.4th 1318 (9th Cir. 2024)

- **Ninth Circuit reverses preliminary injunction that prohibited enforcement of ordinance criminalizing writing on buildings and other property.**

Plaintiffs were arrested for writing political messages on a wall outside the Seattle Police Department's East Precinct. Their documented offense was violating Seattle Municipal Code § 12A.08.020, which criminalizes writing on buildings or other property without express permission. After they were released from jail, they sued the City and its officers under 42 U.S.C. § 1983. Their theories included, among other things, that § 12A.08.020 is substantially overbroad in violation of the First Amendment, and facially vague in violation of the Fourteenth Amendment such that it can never be enforced. Agreeing that plaintiffs were likely to succeed on their overbreadth and vagueness challenges, the district court preliminarily enjoined the City from enforcing the ordinance.

The Ninth Circuit reversed the preliminary injunction. As to overbreadth, it held that the district court erred in failing to consider applications of the ordinance that would not implicate any protected speech. Without that consideration, the district court could not undertake the requisite analysis—namely, whether the number of unconstitutional applications was substantially disproportionate to the ordinance's lawful sweep. As to vagueness, the district court erred in speculating about vagueness in "hypothetical and fanciful situations not before the court," instead of examining whether the ordinance is vague in most of its intended applications. Moreover, the mere fact that a public entity and its officers have discretion to enforce an ordinance in some circumstances and not others does not establish that an ordinance is wholly vague such that it can never be enforced.

Significance: *Tucson* provides a good overview of the analysis courts must undertake when considering a facial overbreadth or vagueness challenge to a statute—and, by extension, guidance on how to evaluate draft legislation for constitutionality.

B. *Camenzind v. California Exposition & State Fair*, 84 F.4th 1102 (9th Cir. 2023)

- **The Ninth Circuit rejects a leafletter's challenge to free-speech guidelines at the Cal Expo fairgrounds.**

Plaintiff visited the Hmong New Year Festival, a privately organized event at the state-owned California Exposition and State Fair ("Cal Expo") fairgrounds, hoping to distribute religious tokens to attendees. These tokens bore biblical verses and other religious messages. Cal Expo's Free Speech Activities Guidelines govern all fairgrounds events and prohibit attendees from leafletting, picketing, or gathering signatures within the enclosed portion of the fairgrounds. Police officers told Plaintiff he could instead distribute his tokens in designated Free Speech Zones outside the entry gates. Plaintiff instead purchased a ticket, entered the festival, and began handing out the tokens. He claims his removal by police from the fairgrounds violated the First Amendment of the United States Constitution and the Speech Clause of the California Constitution.

Plaintiff argued that the Cal Expo fairgrounds, in their entirety, constitute a "public forum," entitling his speech to the greatest protection under the federal and state constitutions. He also argued that the Free Expression Zones outside the entry gates impermissibly limited his ability to interact with fairgoers. The Court determined that the areas within and outside the fairgrounds – separated by a physical barrier and governed by different policies – require a distinct analysis. When determining whether a location is a traditional public forum for First Amendment purposes, courts are to consider: (1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area; (2) the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area; and (3) traditional or historic use of both the property in

question and other similar properties. (*Wright v. Incline Vill. Gen. Improvement Dist*., 665 F.3d 1128, 1135 (9th Cir. 2011.)

The Court determined that none of the factors weighed in favor of treating the enclosed portion of the fairgrounds as a traditional public forum. First, the space does not serve as a public thoroughfare, and Cal Expo does not permit free public access to it. Second, the surrounding fencing marked the space's boundaries. Third, no evidence suggested that all who sought to distribute material were granted access. In fact, the policy designated free speech expression zones for demonstrations for free speech activity.

The exterior portion of the fairgrounds presented the judges with a closer question as to whether it is a public forum under the First Amendment. However, the Court avoided the constitutional issue because it found that the exterior portion was a public forum under the California Speech Clause. The public's interest in engaging in expressive activity in the exterior portion was strong due to the significant volume of pedestrian traffic at the 2018 Hmong New Year Festival, which attracted nearly 30,000 attendees. Meanwhile, the plaintiff handing out tokens was not likely to interfere with the use of the property. However, designating a Free Speech Zone was a valid regulation of speech. The regulation was content-neutral because Cal Expo allocated space in the zone on a first-come, first-served basis. Also, the regulation served the significant governmental interest of preventing congestion. Additionally, the zones did not "burden substantially more speech than is necessary to achieve the government's public-safety interest."

Dissent: Dissenting in part, Judge VanDyke felt case should be remanded because he did not feel the court of appeal had "enough information to properly evaluate whether Cal Expo is a public forum during the Hmong New Year Festival under the California Speech Clause."

Significance: The state prevailed in part because Cal Expo (1) has a clear non-discriminatory policy; (2) enclosed the event space; (3) leased the space (it was not free) for

the privilege of using it; (4) ensures that the space is not continually open to the public and remains locked and inaccessible until leased by a private party; and (5) designate a free speech zone outside of the event space.

III. MUNICIPAL TORT LIABILITY

A. *City of Norwalk v. City of Cerritos,* 99 Cal.App.5th 977 (2024), *as modified on denial of reh'g* (Feb. 22, 2024)*, review filed* (Mar. 12, 2024)

- **A city is immune from liability to a neighboring city for diverting traffic onto its streets.**

The decision begins in a Dickensian manner: "This is a tale of two cities." In 1974, the City of Cerritos enacted an ordinance limiting "any commercial vehicle or any vehicle exceeding six thousand pounds" to certain major arteries. Subsequent amendments removed one of those arteries.

The neighboring City of Norwalk sued, claiming that the ordinance's restrictions substantially increased heavy truck traffic through Norwalk streets, severely impacting Norwalk residents, businesses, and property. Norwalk asserted that the ordinance caused "adverse effects" accompanying heavier traffic flow. Cerritos demurred, arguing that a city is immune from public nuisance liability under Civil Code Section 3482 for any acts "done or maintained under the express authority of a statute" and two sections of the Vehicle Code explicitly authorize cities to regulate the use of their streets by commercial or heavy vehicles.

The question framed by the Second District Court of Appeal was as follows: "Is the alleged nuisance an inexorable and inescapable consequence that necessarily flows from the statutorily authorized act, such that the statutorily authorized act and the alleged nuisance are flip sides of the same coin?" The Court of Appeal answered in the affirmative:

> Is Cerritos immune from liability for the public nuisance of diverting traffic into Norwalk? Yes, because the immunity conferred by Civil Code section 3482 applies not only to the specific act expressly authorized by statute (namely, enacting an ordinance designating routes for commercial vehicles and those

> exceeding weight limits), but also to the inexorable and inescapable consequences that necessarily flow from that act (namely, that drivers unable to use those routes will take different routes, thereby causing adverse effects of heavier traffic on those other routes). Where, as here, the authorized act and its consequence are flip sides of the same coin, immunity applies to both, and a public nuisance claim fails as a matter of law.

Although the state has generally preempted the field of motor vehicle traffic regulation, the state has nevertheless delegated to local governments the authority "to regulate traffic within their jurisdictions by specified means." The state authorized Cerritos to enact their ordinance. Although the ordinance may shift vehicle traffic to Norwalk, Section 3482 immunity "reaches beyond the act specifically authorized to the consequences inexorably flowing from that act." The Court of Appeal stated: "The closure of one artery to through traffic necessarily diverts that traffic to a different artery. When one channel of a river is blocked, the water necessarily finds a different channel. Life finds a way; so does traffic."

Significance: Section 3482 immunity applies where an alleged nuisance inexorably and inescapably flows from the statutorily authorized act.

B. *Stufkosky v. California Dep't of Transportation*, 97 Cal.App.5th 492 (2023), *as modified* (Nov. 28, 2023)

- **A failure to warn claim was barred by design immunity where warnings were addressed by plans.**

SR-154 is a state-owned highway built in 1934. At postmile 9.62, a four-foot-wide painted median separates traffic at a roadway portion of a state highway that had a 55-mile-per-hour speed limit. A vehicle struck a deer at that location, sending it into the opposing lane, where it struck an oncoming SUV. The SUV lost control and collided with a vehicle driven by plaintiffs' decedent.

Six deer warning signs appear along the 15-mile roadway segment where the accident occurred. The plaintiffs sued the state for maintaining a dangerous condition of public

property, alleging the roadway's design, lack of deer crossing signs, and high speed limit created a substantial risk of injury to motorists. The state asserted design immunity.

There are three elements of design immunity: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design.

First, the state met the causal relation prong by showing that the complaint alleged the required causal connection. The complaint alleged that Caltrans was aware of the deer crossing and yet filed to warn of the danger adequately. In other words, plaintiffs alleged that the state designed the roadway without certain safety features they contend would have made it safer.

Next, the state fulfilled the discretionary approval requirement by presenting comprehensive plans for the section of the roadway where the accident occurred. Additionally, the state provided testimony from a traffic engineer confirming adherence to relevant design standards and detailing Caltrans' measures to mitigate risks associated with deer entering traffic and vehicles crossing the median. The court of appeal noted that a public entity is not required to introduce evidence that it considered a particular design feature but decided against including it. Such a requirement would impose an unrealistic burden on public entities to address every possible design aspect during the approval process.

Lastly, Caltrans produced substantial evidence that the design was reasonable. The plaintiffs did not dispute that the plans were properly approved and complied with prevailing design standards. Nor did they dispute that Caltrans placed deer warning signs east and west of the accident site. These facts alone showed that the approved design plans were reasonable. But other facts were submitted, such as over 40 million vehicles had traveled through the accident site in eight years and no accidents involved a deer crossing or head-on collision.

Plaintiffs' expert expert opined that considering a larger area would have revealed a far greater number of collisions involving wildlife and centerline crossings during the same period. The Court of Appeal addressed this:

> 'Generally, a civil engineer's opinion regarding reasonableness is substantial evidence sufficient to satisfy this element. Approval of the plan by competent professionals can, in and of itself, constitute substantial evidence of reasonableness.' 'We are not concerned with whether the evidence of reasonableness is undisputed; the statute provides immunity when there is substantial evidence of reasonableness, even if contradicted.' That a plaintiff's expert may disagree does not create a triable issue of fact.'

Stufkovsky, 97 Cal.App.5th at 500 (quoting *Grenier v. City of Irwindale*, 57 Cal.App.4th 931, (1997)) (citations omitted.)

The Court of Appeal then addressed whether design immunity protected Caltrans from liability for failure to warn motorists of that condition in light of the state supreme court's 2023 decision in *Tansavatdi v. City of Rancho Palos Verdes* (2023) 14 Cal.5th 639. *Tansavatdi* stands for the principle that design immunity does not permit it to remain silent when it has notice that an element of the road design presents a concealed danger. However, the California Supreme Court declined to decide whether design immunity affected a failure to warn claim when a public entity produces evidence that it considered whether to provide a warning. Because Caltrans produced evidence that its design plans specified the quantity and placement of deer crossing signs, the Court of Appeal upheld the lower court ruling in favor of the state.

Significance: For design immunity, it is not necessary to expressly consider each possible alternative design that a plaintiff claims would have been more protective of the driving public. Additionally, where a public entity warns motorists of a danger according to design plans, a cause of action will not survive for merely asserting that the motorist warning was inadequate.

C. *Summerfield v. City of Inglewood,* 96 Cal.App.5th 983 (2023)

- **A dangerous condition is not created from a lack of a security in a public park.**

Plaintiffs' decedent drove to Darby Park in the City of Inglewood to play basketball. While in his vehicle in the parking lot, he was shot and killed. Plaintiffs filed a wrongful death action against the City, alleging that there were no cameras in the parking lot and a lack of adequate precautions such as "control measures and/or security." They also alleged two other parking shootings in the past 23 years showed that the lack of security attracted criminal activity to ongoing criminal activity. As such, Plaintiffs alleged the existence of a dangerous condition.

The Second District Court of Appeal noted that a dangerous condition exists when public property "is physically damaged, deteriorated, or defective in such a way as to endanger those using the property itself foreseeably or possesses physical characteristics in its design, location, features or relationship to its surroundings that endanger user" (citing *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148-149). The Court of Appeal noted that the presence or absence of security guards is not a physical characteristic of public property. Therefore, such a theory is not legally cognizable.

The Court of Appeal also rejected the theory that the City's alleged notice of "ongoing shootings" triggered a duty to install security cameras as a crime deterrent. The Court of Appeal found two crimes throughout a 23-year span, which does not constitute ongoing criminal activity. The complaint did not sufficiently allege with the requisite particularity that the absence of surveillance cameras in the parking lot facilitated decedent's shooting, such that it was a defective or dangerous condition. The absence of security cameras did not create a substantial risk of being shot.

Lastly, as to a theory of failing to warn, a public entity has no duty to warn against criminal conduct.

Significance: This case provides helpful guidance for municipal park operators with regard to security measures. A contrary ruling would presumably have created a duty for every California public entity to install and maintain security cameras at municipal parks.

D. *Carr v. City of Newport Beach*, 94 Cal.App.5th 1199 (2023)

- **Court of Appeal broadly interprets hazardous recreational immunity relating to diving injuries, over a dissent.**

After drinking a few beers while kayaking in Newport Bay, plaintiff walked onto a 20-inch-wide seawall and dove into the water headfirst. His head hit the ocean floor, causing a spinal cord injury that left him a quadriplegic. He sued the City of Newport Beach for an alleged dangerous condition of public property.

The trial court granted summary judgment for the City based on Government Code section 831.7, subdivision (b)(2), which immunizes public entities from liability to participants in a "hazardous recreational activity" including "[a]ny form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning thereof has been given." The Court of Appeal affirmed summary judgment in a split opinion that turns largely on interpretation of section 831.7's diving provision.

Majority: The majority held that because section 831.7's diving provision uses a disjunctive "or", its immunity applies if the plaintiff either (1) dove from any location other than a diving board or diving platform, or (2) dove from any place where diving is prohibited and a reasonable warning is given. Under this interpretation, immunity applies even absent a prohibition and warning, if the diver dove from a location other than a diving board or diving platform. The seawall here was not a diving board or platform – it was built to protect adjacent property from erosion damage. Accordingly, in the majority's view, immunity applies. The majority further held that this case does not fall within section 831.7's exception for gross negligence, because "[g]ross negligence does not lie in the failure to protect against, or warn

about, an inherent risk of a hazardous recreational activity," and California law recognizes that diving headfirst into water inherently risks being injured by hitting the bottom. The majority further observed that plaintiff's theory that lifeguards should have warned him that the City Code prohibited diving also fails under Government Code section 818.2, which immunizes public entities from liability for injuries arising from a failure to enforce the law.

Dissent: Justice Moore would have interpreted section 831.7's diving provision differently. She does not see diving from a location other than a diving board or platform as an independent basis for immunity. Rather, in her view, immunity applies only where a public entity prohibits diving and reasonably warns of the prohibition—a warning that she concluded could easily have been given here but wasn't. Justice Moore also concluded that there was a triable issue of fact as to whether the seawall presented a dangerous condition. The majority had not reached that question.

Significance: The majority's broad interpretation of section 831.7 diving immunity benefits public entities. But in the California court system, although a published decision binds all superior courts statewide, it does not bind any appellate court (including the court that issued the decision). Justice Moore's dissent shows that some appellate justices view section 831.7 diving-related immunity more narrowly, creating a risk that a similar case before a different appellate panel might come out differently. To guard against that risk, it may be prudent to ensure that warnings are clearly displayed in areas where diving is prohibited.

E. *Whitehead v. City of Oakland*, 99 Cal.App.5th 775 (2024)

- **Court of Appeal affirms validity of release of prospective negligence liability relating to fundraiser bike ride.**

Plaintiff was injured when his bicycle hit a pothole on a City of Oakland road during a training ride for the AIDS LifeCycle fundraiser. He sued the City on a dangerous condition theory (Gov. Code, § 835 et seq.). The City moved for summary judgment based on plaintiff having signed an agreement before the ride releasing the "owners/lessors of the course or

facilities used in the Event" from future liability. Plaintiff cross-moved for summary adjudication of the City's waiver and assumption-of-risk defenses; he argued that the release was void under *Tunkl v. Regents of University of Cal.*, 60 Cal.2d 92 (1963) because it affected a matter of public interest, i.e., the maintenance of safe public roads, and that primary assumption of risk did not apply because the dangerous condition affected all road users, not just recreational cyclists.

The trial court found that the release was valid and, on that basis, denied plaintiff's motion and granted summary judgment for the City. The Court of Appeal affirmed the summary judgment.

Under *Tunkl*, a release from liability for future negligence is valid if it does not involve a transaction implicating the public interest. Courts consider six factors in determining whether a transaction implicates the public interest: whether (1) the type of business is thought suitable for public regulation, (2) the service is of practical necessity for members of the public, (3) the service is available to all who seek it, (4) the releasor and releasee have unequal bargaining power, (5) the contract is one of adhesion, and (6) the transaction places the releasor under control of the releasee.

Applying the *Tunkl* factors, the Court of Appeal concluded that the training ride did not implicate the public interest, and the release therefore was not void as against public policy. The court rejected plaintiff's argument that it should analyze whether the road where he fell implicated the public interest; it explained that under well-settled case law, the focus is on the transaction for which the release is given—here, training rides for a recreational fundraiser.

The Court of Appeal also rejected plaintiff's theory that the release did not apply because it did not cover gross negligence, and the City's road maintenance was grossly negligent. It reasoned that plaintiff's evidence would not support a finding that the City's conduct marked an extreme departure from the ordinary standard of conduct.

Significance: *Whitehead* provides a comprehensive summary of when advance releases for possible negligence are, and aren't enforceable.

F. *Miller v. Pacific Gas and Electric Co.*, 97 Cal.App.5th 1161 (2023)

- **Court of Appeal affirms summary judgment for defendants in sidewalk defect case.**

Plaintiff injured her ankle when she tripped on a vertical misalignment between the sidewalk and a utility plate covering a Pacific Gas & Electric Co. underground vault in San Francisco. She sued PG&E and the owner of the property adjacent to the sidewalk. The trial court granted summary judgment for both defendants under the trivial defect doctrine. That well-settled doctrine provides that landowners do not have a duty to protect pedestrians from every sidewalk defect, just those that create a substantial risk of injury.

The Court of Appeal affirmed summary judgment for defendants. It held that they met their initial burden of presenting evidence (including photographs) that the vertical misalignment was trivial, because (1) it was less than one inch with no jagged edges, (2) the sidewalk was sufficiently illuminated to ensure visibility, and (3) there was no evidence of anyone else having tripped on the misalignment. That showing was not undermined by City guidelines that require repairing sidewalk differentials one-half inch or greater, and a City inspector's order that the misalignment be repaired: There was no evidence that the City's standard has been accepted ats the statewide standard for safe sidewalks, or that the City's repair order was based on a finding that the misalignment was a hazardous condition. Plaintiff failed to raise a triable issue of material fact overcoming defendants' prima facie showing—for example, there was no photographic evidence drawing into question defendants' visibility showing. And plaintiff forfeited a new negligence per se theory raised for the first time in her reply brief by failing to raise it in the trial court or her opening brief.

***Significance*:** *Miller* illustrates the type of sidewalk defect case that is amenable to summary judgment—namely, where the defendant makes a robust prima facie showing of triviality, and the plaintiff's response is contrastingly weak.