Municipal Tort and Civil Rights Litigation Update

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MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

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I. CIVIL RIGHTS—LAW ENFORCEMENT LIABILITY

A. *Vega v. Tekoh*, __U.S.__, 141 S.Ct. 2095 (2021)

- **Officer's failure to give Miranda warning in and of itself does not give rise to a constitutional claim and hence cannot serve as a basis for a section 1983 suit.**

In *Vega v. Tekoh*, __U.S.__, 141 S.Ct. 2095 (2022), the defendant, a deputy sheriff, procured an incriminating statement from the plaintiff without providing him with a *Miranda* warning. The statement was used against plaintiff in a criminal trial, but he was acquitted. He then sued the officer under section 1983, arguing that the failure to provide him with the *Miranda* warning in and of itself violated the Fifth Amendment. The district court rejected the theory, and instructed the jury that there could only be liability if they found the statement was coerced. The Ninth Circuit reversed, holding that failure to provide a *Miranda* warning and subsequent use of any statement could support a claim under section 1983.

The Supreme Court reversed, 6-3. Writing for the majority, Justice Alito emphasized that the *Miranda* rule was strictly prophylactic, and was not itself a rule of constitutional stature. He noted that there were numerous decisions where the Court had found a technical violation of *Miranda*, but nonetheless allowed use of the evidence as a basis for conviction. The key is whether a statement was improperly compelled in violation of the Fifth Amendment itself, as opposed to whether the *Miranda* rules have been violated. In so holding, Justice Alito distinguished the Court's prior decision in *Dickerson v. United States*, 530 U.S. 428 (2000) which had held that Congress could not eliminate the *Miranda* rule by statute and make the admissibility of a statement given during custodial interrogation turn solely on whether it was made voluntarily. In

Dickerson, the Court had merely recognized that Miranda was a constitutionally based rule, but not itself a constitutional right.

Vega is a very helpful decision for law enforcement officers and the public entities that employ them as it effectively eliminates civil rights claims based on *Miranda* violations standing alone, and requires a finding of coercion under the Fifth Amendment in order to establish liability for procuring an involuntary statement from a suspect.

B. *Nance v. Ward*, __U.S.__, 141 S.Ct. 2214 (2022)

- **Where success on a civil rights claim would not alter a prisoner's sentence, the action may proceed under *Heck v. Humphrey*.**

In *Heck v. Humphrey*, 512 U.S. 477 (1994) the Supreme Court held that where success on a civil rights claim would necessarily imply that the plaintiff's criminal conviction was invalid, no section 1983 claim could be filed unless and until the conviction was reversed. In so holding, the court noted that habeas corpus relief or direct review of a state conviction, was the sole means by which a prisoner could obtain federal review of state court criminal proceedings.

The question in *Nance v. Ward*, __U.S.__, 141 S.Ct. ___ (2022) was whether *Heck* barred a prisoner from challenging the method of execution to be used to carry out his death sentence. In *Nelson v. Campbell*, 541 U. S. 637 the Court had held that a prisoner who challenges a State's proposed method of execution under the Eighth Amendment must identify a readily available alternative method that would significantly reduce the risk of severe pain. If the prisoner proposes a method already authorized under state law, then the claim can go forward under 42 U. S. C. §1983, rather than in habeas. However, in *Bucklew v. Precythe*, __ U. S. ___, 139 S. Ct. 1112 (2019) the Court held that a prisoner is not confined to proposing a method already authorized under state law; he

may ask for a method used in other States. The issue presented in *Ward* was whether a Georgia prisoner who did so could still proceed under §1983.

In a 5-4 decision authored by Justice Kagan, the Court held that *Heck* did not bar the claim. The Court reasoned that success on plaintiff's claim would not impact the validity of his sentence, only the manner of carrying it out. This was true, even though Georgia law did not allow for the method of execution plaintiff proposed –death by firing squad– and it would require action by the Georgia legislature in order to authorize that method of execution.

Nance is a reminder that the manner in which the Court applies *Heck* is often difficult to predict. As the dissent points out, unless the legislature changes the statute, the net result is that the plaintiff has obtained an injunction that bars carrying out the sentence that was imposed on him, which is something the *Heck* doctrine was expressly designed to foreclose. Outside the capital sentence context, *Nance*'s major impact is a reaffirmation of the need to show a concrete impact on the validity of the underlying conviction before the *Heck* bar can be applied.

C. *Andrews v. City of Henderson,* 35 F.4th 710 (9th Cir. 2022)

- **Officers not entitled to qualified immunity for use of "significant force" against a compliant, unarmed suspect, and appellate court had no jurisdiction to address City's appeal from denial of summary judgment on *Monell* claim.**

Andrews v. City of Henderson, 35 F.4th 710 (9th Cir. 2022) arose from the denial of the defendant officers' motion for summary judgment based on qualified immunity, as well as the denial of the employer city's motion for summary judgment on a *Monell* claim. The officers had been following the plaintiff in order to arrest him for armed robbery. They followed him as he went into a courthouse, and planned to arrest him

immediately after he exited, because they could assume he was unarmed, having just passed through the courthouse metal detector. As plaintiff left the courthouse, one defendant tackled him, and the two others piled on top as he was handcuffed.

The plaintiff suffered a broken hip and sued the officers and the city, asserting a section 1983 claim for excessive force. The trial court found that a jury could find that the force was excessive, and rejected qualified immunity for the officers because it is clearly established that officers cannot use a severe level of force against a compliant suspect. The court also denied the city's motion for summary judgment, concluding that there were issues of fact concerning possible ratification of the officers' conduct sufficient to support *Monell* liability.

The Ninth Circuit affirmed the denial of summary judgment to the officers, and dismissed the city's appeal for lack of jurisdiction. The court found that the officers were not entitled to qualified immunity, because the force could be deemed excessive, given that plaintiff was not resisting arrest when he was tackled, and the officers had no reason to believe he was armed or dangerous. The court emphasized that the officers gave no warning, and made no attempt to subdue the plaintiff with a less intrusive level of force. The court cited *Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007) as clearly establishing that an officer violates the Fourth Amendment by tackling and piling on top of a relatively calm, non-resisting suspect who posed little threat, without any prior warning and without attempting a less violent means of effecting an arrest.

The court dismissed the appeal on the *Monell* claim, noting that orders denying summary judgment are not ordinarily appealable, and while the court had jurisdiction to rule on the officers' appeal from the denial of qualified immunity, the city's argument on *Monell* liability was not inextricably intertwined with qualified immunity issue so as to support pendent appellate jurisdiction.

Andrews appears to reach the correct result, as tackling, and then piling on an unarmed suspect would seem to make out a colorable claim of excessive force. However, the opinion has troubling language on requiring officers to use the least intrusive level of force possible, which is contrary to Supreme Court precedent. The decision also provides helpful clarification on when a municipality can appeal the denial of summary judgment on a *Monell* claim as part of any appeal of the denial of qualified immunity by officers.

D. *David v. Kaulukukui*, 38 F.4th 792 (9th Cir. 2022)

- **Officer not entitled to qualified immunity where complaint alleges officer deliberately omitted material information from child custody petition and subsequently seized child from custodial parent without court order or exigent circumstances.**

In *David v. Kaulukukui*, 38 F.4th 792 (9th Cir. 2022) a mother and daughter sued a police officer and various child welfare officials after the child was improperly seized at school and separated from her mother for 21 days. The mother had sole legal custody of the child per a stipulated court order, which also precluded the father from seeing the mother. After the father confronted the mother in a public place, and she subsequently got into a verbal altercation with him at his place of work, the father had his friend, a police officer, help him to apply for a temporary restraining order preventing the mother from seeing the child. The petition recounted the altercation, but did not mention that the mother had sole legal custody of the child per the prior court order. The police officer and the father, along with social services workers, then seized the child at school. The child was placed in her father's custody, and then in foster care for 21 days, before social service workers realized the mistake and returned the child to her mother.

The mother and daughter asserted claims for violation of Due Process, alleging interference with their right to familial relationships, and the daughter also asserted a Fourth Amendment claim based on her having been improperly seized at school. The

police officer moved to dismiss the action based on qualified immunity and the district court denied the motion, noting that the allegations of the complaint, taken as true, amply supported liability.

The Ninth Circuit affirmed. The court observed that the law was clearly established that an officer making material omissions in an application concerning child custody could be liable under the Fourteenth and Fourth Amendment for any resulting seizure of a child. The court noted that it was similarly well established that a child could not be seized without formal court order or exigent circumstances, and neither were present here.

Kaulukukui is a good example of why it is often not a good idea to raise qualified immunity at the pleading stage, or to appeal an adverse ruling at that stage. Since the allegations of the complaint must be accepted as true, you invariably end up litigating the qualified immunity issue on the worst set of facts conceivable. Given the allegations in this case, it is difficult to understand why the defendant officer thought there could be a valid qualified immunity defense at this point in the case. *Kaulukukui* is helpful in one respect: It underscores the point that there are no special rules applicable to seizing children in the context of a child abuse investigation. As with any other seizure, officers need probable cause, and a court order or exigent circumstances, in order to take a child into custody.

E. *Seidner v. DeVries*, 39 F.4th 591 (9th Cir. 2022)

- **Officer entitled to qualified immunity for creating roadblock with his vehicle to halt suspect fleeing on bicycle.**

The defendant officer in *Seidner v. DeVries*, 39 F.4th 591 (9th Cir. 2022) saw the plaintiff riding his bike at night without a headlight in violation of state law. The officer activated his lights and attempted to effectuate a traffic stop, but as the office got out of

his car the plaintiff sped past him on his bike. The officer then pulled ahead of the bike and parked his car across the roadway. As the officer attempted to get out of the car plaintiff's bike –which had no brakes– slammed into the side of the car, and plaintiff was injured. Plaintiff sued for excessive force, and the trial court denied the officer's motion for summary judgment, concluding that there were triable issues of fact as to whether the roadblock constituted excessive force, and that the law was clearly established that a dangerous roadblock could not be used to stop a suspect who had committed only a minor offense. The officer appealed.

The Ninth Circuit reversed. The court concluded that there were triable issues of fact as to whether use of the car as a roadblock to stop a fleeing bicyclist constituted excessive force. Even though the offense for which the officer was attempting to stop the plaintiff was minor, if the officer parked his vehicle far enough up the road to afford the suspect a chance to stop without colliding with the vehicle, then a jury could view deployment of the roadblock to be reasonable. On the other hand, if the officer gave the suspect little or no opportunity to stop short of a collision, the roadblock could be deemed unreasonable and hence constitute excessive force. However, the court concluded that in any event the officer was entitled to qualified immunity because no existing case law would have put the officer on notice that use of his vehicle as a roadblock to stop a fleeing bicyclist could constitute excessive force.

Seidner is a helpful case, as it reaffirms a strict interpretation of what constitutes clearly established law for purposes of qualified immunity. It also has an in depth discussion of Fourth Amendment issues arising from use of roadblocks and provides useful guidance for such cases.

F. *Demarest v. City of Vallejo*, __ F.4th __, 2022 WL 3365834 (9th Cir. 2022)

- **Requiring plaintiff to produce license at sobriety checkpoint, and subsequent arrest and minimal use of force based on failure to do so, reasonable as a matter of law under Fourth Amendment.**

Demarest v. City of Vallejo, __ F.4th __, 2022 WL 3365834 (9th Cir. 2022) arose from plaintiff's detention at a sobriety checkpoint. At the checkpoint, an officer requested the plaintiff to produce his license. The plaintiff refused, stating that the officer did not have probable cause to demand to see his license. The officer believed that the plaintiff had violated Vehicle Code provisions requiring possession of a license when driving and display of a license when directed by a law enforcement officer. The officer announced the arrest, opened the car door and pulled plaintiff out of the car, grabbing his wrist and handcuffing him, a process that took approximately two seconds. Officers searching plaintiff at the jail found a concealed knife, and plaintiff was ultimately charged with unlawful possession of a concealed dirk or dagger, as well as interfering with a police officer. The charges were eventually dropped.

Plaintiff sued the officer and the city, asserting that the license check, subsequent arrest and use of force violated the Fourth Amendment. The district court granted the defendants motion for summary judgment on the ground that the undisputed evidence established that the officer's conduct was reasonable as a matter of law.

The Ninth Circuit affirmed. The court noted that the Supreme Court has upheld traffic checkpoints, so long as the purpose of a checkpoint is traffic safety, and not general law enforcement, and had indicated that both sobriety and license checkpoints were reasonable. Even though the purpose of this particular checkpoint was to remove intoxicated drivers from the road, the license check remained reasonable. The court noted

that any intrusion caused by the requirement that a license be produced was minimal, and that once plaintiff refused to produce a license the officer had reasonable cause to believe that plaintiff did not have one. The court also observed that the use of force was minimal, and while plaintiff argued that a pre-existing back injury caused him to suffer a severe injury notwithstanding the minor nature of the force, the officer had no way of knowing of the pre-existing injury, and the force was reasonable based on what the officer knew.

Demarest has a thorough discussion on the law governing traffic checkpoints and provides helpful guidance on their use. The decision also has helpful language on the standards governing use of force, particularly in the context of claims where the use of force is minimal, but the plaintiff nonetheless suffers severe injury.

G. *Richards v. County of San Bernardino*, 39 F.4th 562 (9th Cir. 2022)

- **Plaintiff asserting evidence fabrication claim does not need to show that but for the fabricated evidence he would not have been convicted, but only that the fabricated evidence could have affected the jury.**

In *Richards v. County of San Bernardino*, 39 F.4th 562 (9th Cir. 2022) the plaintiff had been convicted of murdering his wife, but he was subsequently exonerated. He then sued, among others, the County of San Bernardino and a County investigator, asserting that the officer had fabricated evidence by placing fibers from a shirt similar to one owned by plaintiff under the fingernails of his wife's body following an autopsy. The district court granted summary judgment to the officer and the County, concluding that plaintiff failed to show that the officer had any motive to fabricate evidence, and that in any event the court believed it more likely that other evidence in the criminal trial prompted his conviction. Plaintiff appealed.

The Ninth Circuit reversed. The court held that where, as here, plaintiff had direct evidence of fabrication, there was no requirement that plaintiff prove the defendant had any motive to convict him. The court observed that the fibers were not noted in the autopsy report, nor did they appear in autopsy photos of the decedent's fingers, and only appeared after the investigator had sole access to the fingers. The court also held that the district court applied an improper causation standard, effectively requiring plaintiff to prove that but for the fabricated evidence, he would not have been convicted. The court held that for purposes of a due process claim based on fabrication of evidence, the plaintiff need only show that the fabricated evidence could have impacted the jury's decision.

The court also reversed the judgment on the *Monell* claim against the County, noting that the district court had failed to address various theories of liability the plaintiff had asserted.

Richards is helpful in that it clarifies the elements of a due process claim for fabrication of evidence, including the standard of causation, which is arguably lax given that most torts require a plaintiff to show that but for the defendant's actions, plaintiff would not have been injured.

H. *Lemos v. County of Sonoma,* 40 F.4th 1002, (9th Cir. 2022)

- **State court jury conviction of plaintiff for interfering with an officer under Penal Code Section 148 based on multiple acts of resistance does not bar subsequent federal civil rights claim under *Heck. v. Humphrey.***

Lemos v. County of Sonoma, 40 F.4th 1002, (9th Cir. 2022) addresses the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994) holding that a plaintiff cannot pursue a federal civil rights claim where success on that claim would necessarily

imply the invalidity of a state court conviction. In *Lemos*, the plaintiff was involved in a verbal and physical altercation with police officers which resulted in her being tried and convicted of interfering with a police officer in violation of Penal Code section 148. During the criminal trial the jury was specifically instructed that in order for plaintiff to be convicted they would have to find that the officer was lawfully performing his duties. When plaintiff attempted to pursue a federal civil rights excessive force claim following her conviction, the district court dismissed the action as barred by *Heck*.

The Ninth Circuit initially affirmed in a 2-1 decision. The panel majority emphasized that the state court jury was specifically directed to consider the lawfulness of the officer's conduct, and hence, if plaintiff were to succeed on her excessive force claim in federal court it would undermine the legitimacy of the state court conviction in violation of *Heck*. The court acknowledged that plaintiff had engaged in various acts of resistance that could have formed the basis of her conviction, but noted that for purposes of *Heck* it need not be determined exactly which act prompted the conviction.

The court granted en banc review, and in a 9-2 decision, reversed the panel opinion and held that *Heck* did not bar the action. Writing for the en banc majority, Judge Miller noted that because the plaintiff had engaged in multiple acts of resistance, and the jury was not required to specify which particular act or acts was the basis for its decision, success on the excessive force claim would not *necessarily* imply the conviction was invalid.

Lemos is consistent with prior Ninth Circuit decisions declining to apply *Heck* where the underlying conviction was based on a plea bargain where several acts of resistance would support the Penal Code section148 charge, precisely because without knowing the specific act on which conviction was based, it could not be determined that success on the federal claim would *necessarily* imply the invalidity of the state court conviction. Incidents frequently spawn both Penal Code section 148 charges and

subsequent excessive force claims, and *Lemos* makes it almost impossible to apply the *Heck* bar to such claims absent a jury making specific factual findings in the underlying criminal proceeding, which is something that is unlikely to happen.

I. *Allen v. Santa Clara County Correctional Peace Officers Association*, 38 F.4th 68 (9th Cir. 2022)

- **Municipality entitled to assert good faith defense to *Monell* claim under section 1983.**

Allen v. Santa Clara County Correctional Peace Officers Association, 38 F.4th 68 (9th Cir. 2022), arose from the Supreme Court's decision in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, __ U.S.__, 138 S. Ct. 2448 (2018). In *Janus*, the Supreme Court overruled its own precedent on the free speech rights of public-sector employees. Overturning more than forty years of caselaw, the Court held that public-sector unions may not collect compulsory "agency fees" from non-union public employees because the practice violates the employees' First Amendment rights. In *Danielson v. Inslee*, 945 F.3d 1096, 1097 (9th Cir. 2019) the plaintiff union members sought a refund of agency fees that had been collected by their union prior to *Janus*, but the Ninth Circuit held that the union could assert a defense of good faith reliance on prior authority, which barred the refund claim. In *Allen*, the plaintiff union members sought to collect refunds from a municipality that had withheld agency fees. The district court dismissed the action, concluding the municipality, like the union, had acted in good faith.

The Ninth Circuit affirmed. The court acknowledged that the Supreme Court had held that municipalities, unlike individual defendants, could not invoke qualified immunity. However, the general rule is that a municipality may assert any defense that a private corporation could assert, and since the court had held in *Danielson* that a private

corporate entity –a union– could assert a defense of good faith reliance on state law and prior binding Supreme Court precedent, a municipality could assert the defense as well.

Allen is a major decision. First, it shields municipalities from potentially massive refund liability. Second, it is the first time the Ninth Circuit has recognized that a municipality may assert a good faith defense in a *Monell* suit. Whether the Ninth Circuit will limit application of the defense to the unique circumstance of agency fee refunds remains to be seen, but the defense should be given serious consideration any time a municipality faces a *Monell* claim.

J. *Senn v. Smith*, 35 F.4th 1223 (9th Cir. 2022)

- **Merely defeating a quailed immunity claim on summary judgment does not make a plaintiff a prevailing party for purposes of a fee award under 42 U.S.C. section 1988.**

In *Senn v. Smith,* 35 F.4th 1223 (9th Cir. 2022) the plaintiff sued the defendant officer for excessive force, and the district court denied the officer's motion for summary judgment based on qualified immunity. The officer appealed and the Ninth Circuit affirmed in an unpublished memorandum. The plaintiff then filed a motion for attorney fees on appeal as a prevailing party under 42 U.S.C. section 1988.

The Ninth Circuit denied the fee motion. Citing prior Supreme Court and Ninth Circuit authority, the court reaffirmed that merely defeating a qualified immunity claim at the motion stage does not make a plaintiff a prevailing party for purposes of a fee award. A plaintiff is a prevailing party for a fee award only where plaintiff receives some relief from the defendant. Defeating a motion for qualified immunity simply allows a plaintiff's suit to proceed to trial, and grants no meaningful substantive relief on the plaintiff's claim.

Senn is helpful in reiterating the need for a plaintiff to obtain some relief on the merits before qualifying for a fee award under section 1988, and allows public entities to assess their exposure to fee claims at various stages of litigation.

II. FIRST AMENDMENT

A. *Kennedy v. Bremerton School District,* __ U.S __, 142 S.Ct. 2407 (2022)

- **School District violated football coach's Free Exercise and Free Speech rights by terminating him for praying on the field after games, while allowing employees to otherwise engage in secular expression while at work.**

In Kennedy v. Bremerton School District, __ U.S __, 142 S.Ct. 2407 (2022) the plaintiff lost his job as a high school football coach in the Bremerton School District after he knelt at midfield after games to offer a quiet personal prayer. The plaintiff sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. He also moved for a preliminary injunction requiring the District to reinstate him. The district court denied that motion, and the Ninth Circuit affirmed. The parties subsequently filed cross-motions for summary judgment. The district court found that the "`sole reason'" for the District's decision to suspend Mr. Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" of praying at the 50 yard line at the conclusion of three games in October 2015. The district court granted summary judgment to the District and the Ninth Circuit affirmed. The Ninth Circuit denied a petition to rehear the case en banc over the dissents of 11 judges. The Supreme Court granted certiorari.

The Court reversed, 6-3. Authoring the majority opinion, Justice Gorsuch noted that plaintiff raised two distinct constitutional claims. First, plaintiff asserted his termination for religious expression violated the Free Exercise Clause of the First Amendment. Second, plaintiff argued that his termination for engaging in religious speech violated the Free Speech Clause of the First Amendment.

As to the Free Exercise claim, the Court held that the District had improperly infringed on the plaintiff's right to engage in religious expression. The court noted that the District allowed employees to engage in non-job related secular speech and actions while on the job, and had improperly singled out plaintiff's religious actions for reprisal. The Districts action was subject to strict scrutiny, and given the absence of any evidence that any students were coerced into religious observance as a result of plaintiff's action, the District had no justification for its actions. In so holding, the Court chided the District for fearing potential Establishment Clause liability under the test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), noting that the Court had not applied the *Lemon* test in recent years, but had instead focused on reference to historical practices and understandings of the Establishment Clause and the likelihood of coercion as a result of the alleged religious practices.

The Court also found that plaintiff had properly asserted a Free Speech claim. The Court noted that plaintiff had engaged in purely private expression that did not relate to his work duties, and since there was no evidence that his speech would impair the District's operation, i.e. by leaving it vulnerable to an Establishment Clause claim, the District could not establish that the balance would tip in favor of disallowing the speech under *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968).

Kennedy signals a major change in First Amendment jurisprudence for the Court. After more than 50 years of chipping away at the decision, a majority of the Court finally

disclaimed the *Lemon* test. It also questions several related offshoots from *Lemon*, including the Establishment Clause test as to whether a reasonable person might perceive the action in question as government support for religion –a test the Court applied only a little more than a month earlier in upholding a Free Speech Claim in *Shurtleff v. City of Boston*, __U.S.__, 142 S.Ct. (2022). Under *Kennedy*, to the extent a government employer allows employees to engage in secular activities during the workday, it must permit religious activities and actions as well, or face a strict scrutiny test that it is unlikely to survive, unless it can show some historical basis for prohibiting the activity, or some evidence that the employee's conduct can be viewed as coercing others into religious activity.

Kennedy similarly erodes the ability of government employers to restrict religious speech in the workplace, and suggests there are few, if any instances, in which restriction of religious expression in the workplace would survive *Pickering* balancing. Indeed, several concurring opinions leave open the question whether *Pickering* balancing can even apply to religious speech cases.

One thing is certain, following *Kennedy*, municipalities need to carefully review rules and practices concerning religious expression and activities by employees during the workday.

B. *Sabra v. Maricopa Community College District,* __ F.4th__, 2022 WL 3222451 (9th Cir. 2022)

- **College instructor entitled to qualified immunity, and no *Monell* claim established, in student's section 1983 action alleging that class materials denigrating Islamic beliefs violated Establishment Clause and Free Exercise Clause of the First Amendment.**

Sabra v. Maricopa Community College District, __ F.4th__, 2022 WL 3222451 (9th Cir. 2022) is the First Ninth Circuit decision to discuss the Supreme Court's decision in *Kennedy*. In *Sabra*, an Islamic student was offended by online teaching and test materials addressing terrorism, which portrayed Islam as a whole in an extremely negative light. Joined by an organization concerned by the widespread use of such materials, the student filed a section 1983 action against the instructor and the community college district, asserting violations of the Free Exercise and Establishment Clauses. The defendants moved to dismiss the action under FRCP 12(b)(6), and the district court granted the motion. Plaintiffs appealed.

In a 2-1 decision, the Ninth Circuit affirmed. The majority found that the instructor was entitled to qualified immunity, because no clearly established law would have put him on notice that use of offensive course materials could give rise to either a Free Exercise, or Establishment Clause claim by a student. The court noted that *Kennedy* had upended existing First Amendment jurisprudence by overruling *Lemon*, and as a result it was difficult to characterize any law in the area as clearly established. But the court noted that in any event, plaintiff could not point to any even remotely similar case imposing liability on an instructor for such actions. The majority rejected plaintiffs' argument that a State Department document characterizing such instruction as improper

could render the law clearly established, noting that the qualified immunity inquiry concerns existing case law, not external material.

The majority also affirmed the dismissal of the *Monell* claim, holding that plaintiffs had waived the claim by failing to argue it on appeal, and that in any event it failed on the merits. The court noted that plaintiff had alleged no facts indicating that the instructor could be deemed a policymaker under *Monell*, or that any other such material had been presented previously at the college.

Sabra is an extremely helpful case. The decision strongly reaffirms the principle that absent an obvious constitutional violation, a plaintiff must identify existing case law with closely analogous facts in order to overcome qualified immunity. The case is especially helpful in the context of Free Exercise and Establishment Clause claims, as it underscores how uncertain the law has been in that area, especially in light of *Kennedy*. The opinion also reaffirms strict application of the standards for imposing *Monell* liability. Finally, the opinion has a good discussion of the use of material incorporated by reference in a complaint as a basis for moving to dismiss under FRCP 12(b)(6) based on qualified immunity.

C. *Garnier v. O'Connor-Ratcliff,* 41 F.4th 1158 (9th Cir. 2022)

- **Members of school district board of trustees violated parents' speech rights by blocking their comments on trustees' social media pages, but individual defendants entitled to qualified immunity because law concerning blocking social media posts not clearly established.**

In *Garnier v. O'Connor-Ratcliff,* 41 F.4th 1158 (9th Cir. 2022) parents filed a section 1983 action alleging that members of school district board of trustees violated

their First Amendment and state constitutional rights by blocking them from commenting on their public social media pages. The trial court granted summary judgment on qualified immunity grounds in trustees' favor as to the parents' damages claim, but after a bench trial concluded that blocking the comments violated the First Amendment.

The Ninth Circuit affirmed. The court found that the public social media pages of members of school district board of trustees were designated public fora for Free Speech Clause purposes. This was because despite the trustees' contention that they intended their social media pages to be a one-way channel of communication, the pages were open and available to public without any restriction on form or content of comments, and trustees occasionally solicited feedback from constituents through their posts and responded to individuals who left comments. In addition, the trustees never adopted any formal rules of decorum or etiquette for their pages that would be sufficiently definite and objective to prevent arbitrary or discriminatory enforcement, and hence engaged in viewpoint discrimination. However, because it was not clearly established when the conduct occurred that members of public had First Amendment free speech right to post comments on a public official's social media page, the members of the school district board of trustees were entitled to qualified immunity from liability for monetary damages.

Garnier is a reminder that municipalities and their elected officials must be very careful in managing social media accounts used for official communications, and guard against rules that might allow display of comments to be governed by viewpoint based standards, as opposed to neutral rules of general applicability.

D. *Los Angeles Police Protective League v. City of Los Angeles*, 78 Cal.App.5th 1081 (2022)

- **Penal Code section 148.6 which makes it a crime to file a knowingly false allegation of misconduct against a peace officer, does not violate the First Amendment, and municipalities must enforce its provisions, even though the Ninth Circuit has held that the provision is an unconstitutional content based restriction on speech.**

Los Angeles Police Protective League v. City of Los Angeles, 78 Cal.App.5th 1081 (2022) is a textbook example of a municipality being placed between a rock and a hard place. Penal Code section 148.6, subdivision (a)(1), makes it a crime to file a knowingly false allegation of misconduct against a peace officer. Section 148.6, subdivision (a)(2), in turn, requires law enforcement agencies, before accepting a complaint alleging misconduct by a peace officer, to require the complainant to sign an advisory informing the complainant that filing a knowingly false complaint may result in criminal prosecution. In *People v. Stanistreet* (2002) 29 Cal.4th 497, the California Supreme Court held that section 148.6 was not an improper, content based restriction under the First Amendment and was therefore constitutional. Three years later, in *Chaker v. Crogan*, 428 F.3d 1215 (9th Cir. 2005) a panel of the United States Court of Appeals for the Ninth Circuit reached a different conclusion. The Ninth Circuit held that section 148.6 was an impermissible viewpoint-based speech restriction under the First Amendment because the statute criminalized false statements that accused a peace officer of misconduct, but not false statements made by the officer or a witness during the investigation, that supported the officer.

In light of facing potential liability under *Chaker*, the City of Los Angeles declined to enforce section 148.6's requirement that a complainant sign an

acknowledgment of potential criminal liability for making a false statement. The police officers' union sought an injunction directing the City to enforce the provision, and the trial issued an injunction, finding that it was bound by *Stainstreet*.

The Court of Appeal affirmed. It concluded that it was bound by *Stainstreet* and that the California Supreme Court had already rejected the reasoning of *Chaker* and the arguments raised by the City in the decision.

The clear conflict between *Chaker* and *Stainstreet* puts municipalities in a no-win situation of "choose your lawsuit," which is untenable. A petition for review is pending, and hopefully the state Supreme Court will provide some guidance on how to reconcile the conflicting cases, and if relief is not available there, then the United States Supreme Court might ultimately have to resolve the issue.

E. *Hernandez v. City of Phoenix*, __ F.4th __, 2022 WL 3132422 (9th Cir. 2022)

- **_Pickering_ balancing test applies to disciplinary action taken against employee for social media posts that violated municipality's rules.**

In *Hernandez v. City of Phoenix*, __ F.4th __, 2022 WL 3132422 (9th Cir. 2022), the City of Phoenix's Police Department adopted a new policy governing its employees' use of social media. Among other things, the policy prohibits employees from engaging in speech on social media that would be "detrimental to the mission and functions of the Department," "undermine respect or public confidence in the Department," or "impair working relationships" of the Department. In 2019, the Department concluded that Sergeant Juan Hernandez violated the policy by posting content to his personal Facebook profile that denigrated Muslims and Islam. When the Department took steps to discipline

Hernandez, he sued, alleging that the Department was retaliating against him for exercising his First Amendment right to freedom of speech.

In granting a motion to dismiss, the district court rejected Hernandez's First Amendment retaliation claim on the ground that his speech did not address matters of public concern and was therefore not entitled to constitutional protection under the balancing test established in *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563 (1968). The district court also rejected Hernandez's claim that certain provisions of the Department's social media policy were facially invalid. Hernandez appealed.

The Ninth Circuit reversed in part, and affirmed in part. Reviewing the content, form (time, place, and manner) and context of Hernandez's posts, the panel concluded that the posts qualified as speech on matters of public concern. Although Hernandez's posts expressed hostility toward, and sought to denigrate or mock, a major religious faith and its adherents, the panel noted that the Supreme Court has made clear that the inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern. Since Hernandez's post were on a matter of public concern, the district court should have applied the *Pickering* balancing test and determined whether potential disruption of police operations outweighed Hernandez's right to speak on the matters of public concern. While it seemed likely that Hernandez's posts could impede the performance of his job duties and interfere with the Department's ability to effectively carry out its mission, no evidence of actual or potential disruptive impact caused by Hernandez's posts was properly before the panel at this stage of the proceedings, and hence the district court order had to be reversed.

The panel held that the district court correctly concluded that the City's restrictions on social media posts that are "detrimental to the mission and functions of the Department" or which "undermine the goals and mission of the Department or City,"

were not overbroad, as these were exactly the interests the Supreme Court held were proper considerations in the context of *Pickering* balancing. However, the court held that the restrictions on speech that would "cause embarrassment to" or "discredit" the Department, were facially overbroad, as they prohibited speech in circumstances where it might have no impact on the ability of the police department to do its job. The same was true of a rule prohibiting employees from divulging " any information gained while in the performance of their official duties." The court observed that public employees are uniquely positioned to expose wrongdoing or corruption within their agencies precisely because they acquire information while on the job to which the public otherwise lacks access. A policy that prohibits public employees from divulging *any* information acquired while on the job would silence speech that warrants the strongest First Amendment protection in this context. While the panel left open the possibility that the City might produce evidence at a later stage to show that the overbroad provisions were subject to a narrowing construction in practice, no such evidence was before it, and hence the provisions were facially invalid.

Hernandez underscores the need to take special care in drafting internal policies concerning employee speech in general, and social media posting in particular. Municipalities should review current employee speech restrictions to see if they run afoul of the standards set out in *Hernandez*.

III. MUNICIPAL TORT LIABILITY

A. *Nunez v. City of Redondo Beach*, 81 Cal.App.5th 749 (2022)

- **Raised sidewalk displacement of slightly less than three quarters of an inch constitutes a trivial defect and is not a dangerous condition of public property.**

The plaintiff in *Nunez v. City of Redondo Beach*, 81 Cal.App.5th 749 (2022) was injured when she tripped and fell as a result of a raised portion of the sidewalk. The defendant moved for summary judgment, arguing that the raised portion of the sidewalk was between one half and three quarters of an inch, and was a trivial defect as a matter of law. Plaintiff opposed the motion, arguing, among other points, that expert testimony indicated that any rise over a half inch created a tripping hazard, and that the defendant's own policy was to grind down any portion of the sidewalk it determined to be over half an inch above the sidewalk surface. The trial court granted the motion and the plaintiff appealed.

The Court of Appeal affirmed. The court noted that numerous cases had held that sidewalk displacements of no more than three quarters of an inch were trivial defects as a matter of law and hence did not give rise to dangerous condition liability. It further observed that plaintiff could not point to any surrounding conditions that made the sidewalk defect more hazardous. It rejected plaintiff's contention that the continuity in surface color made the defect difficult to discern, noting that the nature of concrete made color continuity a foregone conclusion. It also rejected plaintiff's argument that shadows cast on the defect made it difficult to discern, observing that sunlight was a natural condition, and shadows moved throughout the day, so the city could not be expected to correct every trivial sidewalk defect just because a shadow might fall on it. In addition, plaintiff testified that she was looking straight ahead and not at the ground when she tripped, so the shadow would not have made a difference in any event. Finally, the court

rejected plaintiff's contention that the city's policy of repairing any sidewalk with a half inch displacement indicated the defect was not trivial. That the city elected to take extra precautions to guard against tripping did not mean that any displacement over half an inch was generally hazardous.

Nunez is an extremely helpful case. It has a clear discussion of the trivial defect doctrine in the context of sidewalk accidents and allows municipalities to undertake proactive sidewalk maintenance and repair activities without fear that such actions will be viewed as a concession as to a dangerous condition.

B. *Brennon B. v. Superior Court*, __ Cal.5th __, (2022), 2022 WL 3096272

- **Public entities are not "business establishments" under the Unruh Act, Civil Code section 51.**

The Supreme Court in *Brennon B. v. Superior Court*, __ Cal.5th __ (2022), 2022 WL 3096272, resolved an issue that had divided the lower appellate courts: Whether a public school was a "business establishment" for purposes of the Unruh Act, Civil Code section 51. The plaintiff, who suffered from a disability, alleged he had been sexually assaulted at school on multiple occasions. He sued the school district and various individuals, asserting, among other claims, that their actions violated Civil Code section 51, the Unruh Act, thus entitling him to minimum statutory damages, treble damages, and attorney fees. The school demurred to the Unruh Act claim, asserting that as a public entity it was not a business establishment covered by the statute. The trial court agreed and dismissed the claim. The plaintiff sought writ relief in the Court of Appeal, which ultimately denied the writ and the plaintiff successfully petitioned the Supreme Court for review.

The Supreme Court affirmed in a unanimous decision. Writing for the Court, Justice Groban noted the plain meaning of business establishment involved engaging in

private commercial conduct, not the provision of government services. He also noted that when the legislature intends to include public entities within the scope of a statute, it specifically says so, as in F.E.H.A. and other statutes. "In the context of the Unruh Civil Rights Act, however, 'the statutory list of [covered entities] contains no words or phrases most commonly used to signify public school districts, or, for that matter, any other public entities or governmental agencies.'"

Although specifically addressing whether a public school constitutes a business establishment under section 51, the Court in *Brennon B.* went out of its way to emphasize that public entities as a class are not covered by the Unruh Act. The Court's conclusion in this regard calls into question some case law that suggested that a public entity might be characterized as a business establishment when operates in a non-governmental role more akin to a private commercial activity, such as running a fair for example. *Brennon B.* is a very helpful case that clarifies the scope of liability under the Unruh Act, and eliminates public entity exposure to such claims.