MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

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Civil Rights Law Enforcement Liability

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Vega v. Tekoh, __U.S.__, 141 S.Ct. 2095 (2022)

Vega v. Tekoh– Facts

- Defendant Deputy Sheriff procures incriminating statement from plaintiff without a *Miranda* warning
- Statement is used against plaintiff in criminal trial, but he is acquitted.
- Sues the Deputy: Failure to provide *Miranda* warning in and of itself violates the Fifth Amendment.
- District court rejects plaintiff's theory: Plaintiff must prove coercion under Fifth Amendment. Jury verdict for defendant.
- Ninth Circuit reverses: *Miranda* violation is a constitutional claim standing alone.

Vega v. Tekoh Supreme Court Decision

- Reversed, 6-3.
- *Miranda* rule strictly prophylactic, and not itself a rule of constitutional stature.
- Numerous decisions where there was a technical violation of *Miranda*, but Court nonetheless allowed use of the evidence as a basis for conviction.
- Key is whether statement improperly compelled in violation of the Fifth Amendment itself, as opposed to mere violation of *Miranda* rules.

Vega v. Tekoh– Impact

- Very helpful decision for law enforcement officers and municipalities.
- Effectively eliminates civil rights claims based on *Miranda* violations standing alone.
- Requires a finding of coercion under the Fifth Amendment to establish liability for procuring an involuntary statement from a suspect.

Nance v. Ward, __U.S__, 141 S.Ct. 2214 (2022)

Nance v. Ward– Facts

- Prisoner files section 1983 action challenging method of execution.
- Supreme Court previously held that prisoner could seek such relief via section 1983, and not habeas, where prisoner could identify acceptable alternative method under state law.
- Prisoner cites recent Supreme Court case that allows prisoner to challenge method of execution by identifying any other acceptable method –even if not used in his state.
- Eleventh Circuit dismisses under *Heck v. Humphrey* rule that a section 1983 suit cannot challenge a valid conviction: This is an improper habeas petition, because state only allows lethal injection, and absent change of law, sentence cannot be carried out.

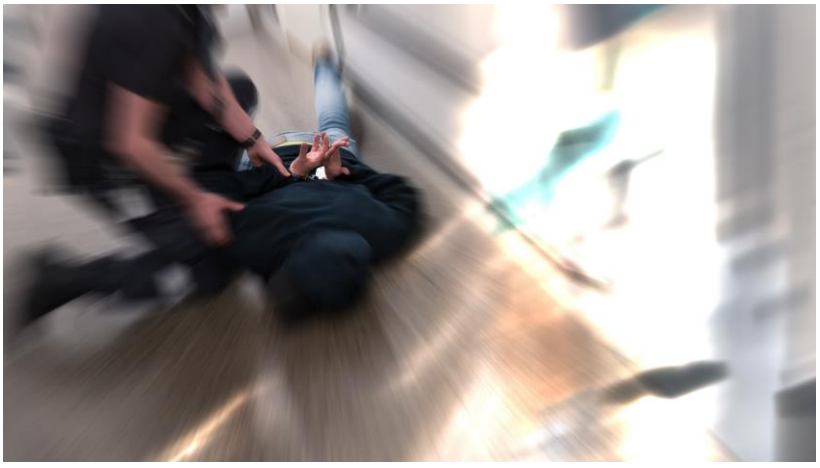
Nance v. Ward Supreme Court Decision

- Reversed and remanded.
- *Heck* does not bar the section 1983 suit.
- Success on plaintiff's claim would not impact the validity of his sentence, only the manner of carrying it out.
- This is 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 v. Ward– Impact

- Reminder of how unpredictable the Court can be on *Heck* issues.
- As dissent notes, if legislature does not change the statute, the net result is that the plaintiff has obtained an injunction that bars carrying out the sentence that was imposed on him-- exactly what the *Heck* doctrine was designed to foreclose.
- Reaffirms need to show a concrete impact on the validity of the underlying conviction before the *Heck* bar can be applied.

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



Andrews v. City of Henderson– Facts

- Plainclothes officers have arrest warrant for plaintiff.
- Follow plaintiff to courthouse. Will arrest when he comes out, as metal detector at door means he won't be armed.
- Plaintiff exits courthouse, officers gang tackle him without warning, breaking his hip.
- Suit for excessive force.
- District court denies motion for summary judgment by officers and City: Jury could find excessive force, and no basis for qualified immunity.

Andrews v. City of Henderson – Ninth Circuit

- Affirms order as to officers, dismisses City Appeal.
- Force could be deemed excessive: Plaintiff not resisting arrest, and no reason to believe he was armed or dangerous.
- Officers gave no warning, and no attempt to use less intrusive level of force.
- No qualified immunity: Law clearly established that officer violates Fourth Amendment by tackling and piling on top of a relatively calm, non-resisting suspect.
- City appeal dismissed for lack of jurisdiction, as not inextricably intertwined with qualified immunity appeal.

Andrews v. City of Henderson– Impact

- Correct decision on bad facts.
- Troubling language on requiring officers to use the least intrusive level of force possible, which is contrary to Supreme Court precedent.
- 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.

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

David v. Kaulukukui– Facts

- Plaintiff mother had sole legal custody of child per stipulated court order.
- After a verbal altercation with the mother, father had his friend, a police officer, help him apply for a temporary restraining order preventing the mother from seeing the child.
- Petition recounted altercation, but omits prior court order.
- Police officer and father, along with social services workers, seize child at school.
- Child placed in father's custody, and then in foster care for 21 days, before social service workers realize mistake and return child to mother.
- Mother and child sue for violation of due process, and child also asserts improper Fourth Amendment seizure. District court denies officer's motion to dismiss based on quailed immunity.

David v. Kaulukukui– Ninth Circuit

- Affirms.
- Law clearly established that 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.
- Also well established that a child could not be seized without formal court order or exigent circumstances, and neither were present here.

David v. Kaulukukui– Impact

- Correct, if bad decision.
- Example of why it may not be good to raise qualified immunity on the pleadings, or to appeal an adverse ruling at that stage: Issue is litigated on the worst set of facts conceivable.
- Helpful as a reminder 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.

Seidner v. DeVRies, 39 F.4th 591 (9th Cir. 2022)

Seidner v. DeVries– Facts

- Officer sees plaintiff riding bike at night without a headlight in violation of state law.
- Attempts traffic stop, but plaintiff speeds away.
- Officer drives ahead of plaintiff and stops car across roadway.
- Plaintiff's bike, lacking brakes, rams into car door as officer is exiting.
- Plaintiff sues for excessive force.
- MSJ on qualified immunity denied: Law clearly established that a dangerous roadblock could not be used to stop a suspect who had committed only a minor offense.

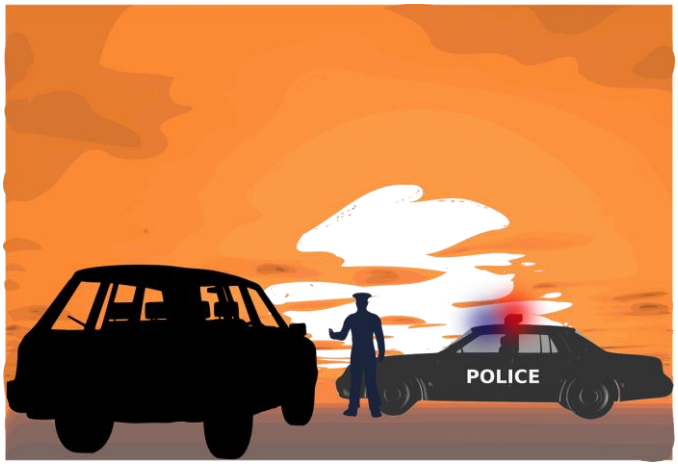
Seidner v. DeVries– Ninth Circuit

- Ninth Circuit reverses. Officer entitled to qualified immunity.
- Use of car roadblock here could constitute excessive force.
- No existing case law would put the officer on notice that use of his vehicle as a roadblock to stop a fleeing bicyclist could constitute excessive force.

Seidner v. DeVries– Impact

- Extremely helpful decision on qualified immunity.
- Strongly reaffirms and stringently applies the clearly established law test for qualified immunity.
- In depth discussion of Fourth Amendment issues arising from use of roadblocks provides useful guidance for such cases.

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



Demarest v. City of Vallejo– Facts

- Officer stops plaintiff at sobriety checkpoint, asks to see license.
- Plaintiff refuses: No probable cause to see his license.
- Officer believes plaintiff violated Vehicle Code provisions requiring possession of a license and display of a license on demand by law officer.
- Officer announces arrest, opens car door and pulls plaintiff out, grabbing his wrist and handcuffing him in approximately two seconds.
- Plaintiff found to be carrying concealed knife. Charged with unlawful possession of a concealed dirk or dagger, and interfering with officer. Charges dropped.
- Plaintiff sues: License check, arrest and use of force violated the Fourth Amendment.
- District court grants defendants summary judgment: Officer's conduct reasonable as a matter of law.

Demarest v. City of Vallejo– Ninth Circuit

- Affirms.
- Supreme Court has upheld traffic checkpoints, so long as the purpose of a checkpoint is traffic safety, and not general law enforcement, and 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.
- Any intrusion caused by demanding license was minimal, and once plaintiff refused to produce a license officer had reasonable cause to believe that plaintiff did not have one.
- Use of force was minimal, and fact that pre-existing back injury caused plaintiff to suffer a severe injury irrelevant, as the officer had no way of knowing of the pre-existing injury, and force was reasonable based on what the officer knew.

Demarest v. City of Vallejo– Impact

- Very helpful discussion on the law governing traffic checkpoints and provides helpful guidance on their use.
- 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.

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

Lemos v. County of Sonoma– Facts

- Plaintiff was involved in a verbal and physical altercation with police officer and convicted for violation of PC section 148.
- Jury specifically instructed that for conviction they would have to find that the officer was lawfully performing his duties.
- Plaintiff files a federal civil rights excessive force claim.
- District court dismissed the action as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).
- A plaintiff cannot pursue a federal civil rights claim where success on that claim would necessarily imply the invalidity of a state court conviction.

Lemos v. County of Sonoma– Ninth Circuit

- Affirms 2-1.
- State court jury specifically directed to consider the lawfulness of the officer's conduct.
- 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 acknowledges that plaintiff engaged in various acts of resistance that could have formed the basis of her conviction, but for purposes of *Heck* it need not be determined exactly which act prompted the conviction.

Lemos v. County of Sonoma– *En Banc* Opinion

- Reverses panel decision, 9-2: Excessive force claim not barred by *Heck*.
- Court has previously held *Heck* does not apply to a conviction based on a plea bargain where several acts of resistance would support the PC section148 charge, because without knowing the specific act, cannot determine that success on the federal claim would *necessarily* imply the invalidity of the state court conviction.
- Same rule must be applied where jury verdict could be premised on any one of multiple acts.

Lemos v. County of Sonoma – Impact

- Very stringent application of "necessarily implies" standard, though consistent with prior Ninth Circuit case law.
- Because PC 148 cases typically involve multiple acts of interference, extremely unlikely that section 1983 defendant will be able to show that a conviction is based on any particular act for purposes of *Heck*.

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

Richards v. County of San Bernardino– Facts

- Plaintiff convicted of murdering his wife, but subsequently exonerated.
- Sues, among others, the County of San Bernardino and a County investigator, asserting the officer had fabricated evidence by placing fibers from a shirt similar to one owned by plaintiff under the fingernails of the wife's body following an autopsy.
- District court grants summary judgment to officer and the County: Plaintiff failed to show officer had any motive to fabricate evidence, and court believed it more likely that other evidence in the criminal trial prompted plaintiff's conviction.

Richards v. County of San Bernardino Ninth Circuit

- Reverses.
- Where, as here, a plaintiff has direct evidence of fabrication, there is no requirement that plaintiff prove the defendant had any motive to convict him.
- District court applied improper causation standard by requiring plaintiff to prove that but for the fabricated evidence, he would not have been convicted.
- For purposes of a due process claim based on fabrication of evidence, plaintiff need only show that the fabricated evidence ***could*** have impacted the jury's decision.

Richards v. County of San Bernardino– Impact

- Clarifies elements of due process claim for fabrication of evidence.
- Standard of causation, arguably lax given that most torts require a plaintiff to show that but for the defendant's actions, plaintiff would not have been injured.

Allen v. Santa Clara Cnty Corr.Peace Off.Assn., 38 F.4th 68 (9th Cir. 2022)

Allen v. SCCCPA— Facts

- In *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, __ U.S.__, 138 S. Ct. 2448 (2018) Supreme Court overruled prior precedent: Public-sector unions may not collect compulsory "agency fees" from non-union public employees because it violates the employees' First Amendment rights.
- In *Danielson v. Inslee*, 945 F.3d 1096, 1097 (9th Cir. 2019) plaintiff union members sought refund of agency fees that had been collected by their union prior to *Janus*, but Ninth Circuit held the union could assert a defense of good faith reliance on prior authority, which barred the refund claim.
- In *Allen*, union members sought 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.

Allen v. SCCCPA– Ninth Circuit

- Affirms.
- Acknowledges that Supreme Court has held that municipalities, unlike individual defendants, cannot invoke qualified immunity.
- However, a municipality may assert any defense that a private corporation could assert, and since *Danielson* held that a private corporate entity –a union– could assert a defense of good faith reliance on existing law, a municipality could assert the defense as well.

Allen v. SCCCPA– Impact

- Major decision.
- Shields municipalities from potentially massive refund liability.
- First time Ninth Circuit has recognized that a municipality may assert a good faith defense in a *Monell* suit.
- Unknown whether Ninth Circuit will limit application of the defense to the unique circumstance of agency fee refunds.
- Good faith defense should be given serious consideration any time a municipality faces a *Monell* claim.

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

Senn v. Smith– Facts

- Plaintiff sued the defendant officer for excessive force, and the district court denied the officer's motion for summary judgment based on qualified immunity.
- Officer appealed and the Ninth Circuit affirmed in an unpublished memorandum.
- Plaintiff files a motion for attorney fees on appeal as a prevailing party under 42 U.S.C. section 1988.

Senn v. Smith– Ninth Circuit

- Motion for fees on appeal denied.
- Merely defeating a qualified immunity claim at the motion stage does not make a plaintiff a prevailing party for purposes of a fee award.
- 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 to plaintiff.

Senn v. Smith– Impact

- Helpful in reaffirming need for a plaintiff to obtain some relief on the merits before qualifying for a fee award under section 1988.
- Provides guidance to public entities in assessing exposure to fee claims at various stages of litigation.

Civil Rights
First Amendment

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

Kennedy v. Bremerton School Dist.– Facts

- High school football coach was fired after he repeatedly knelt at midfield after games to offer a quiet personal prayer.
- Sues school district, asserting termination violated the First Amendment's Free Speech and Free Exercise Clauses.
- District court grants summary judgment to the district: Coach's actions could expose district to Establishment Clause violation.
- Ninth Circuit affirms. Eleven Judges dissent from denial of en banc review.

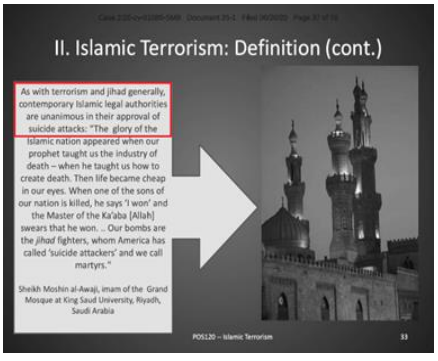
Kennedy v. Bremerton School Dist. Supreme Court

- Reverses, 6-3: Plaintiff has valid Free Exercise and Free Speech claims.
- Free Exercise claim: District improperly infringed on the plaintiff's right to engage in religious expression.
- District allowed employees to engage in non-job related secular speech and actions while on the job, and improperly singled out plaintiff's religious actions for reprisal.
- District's action was subject to strict scrutiny, and given absence of evidence that any students were coerced into religious observance as a result of plaintiff's action, district had no justification for its actions.
- Free Speech claim: Plaintiff engaged in private speech, and no evidence that prayer disrupted school function, hence plaintiff prevails on balancing under *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968)

Kennedy v. Bremerton School Dist.– Impact

- Major change in First Amendment law.
- Expressly overrules *Lemon* test as a means of analyzing Establishment Clause claims.
- Instead, courts must look at historical practice, and whether government conduct is coercing religious practice.
- Narrows ability of municipalities to regulate religious expression of employees.
- Likely expands the amount of religious expression that may take place on public property, as also calls into question the reasonable observer test.

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



Sabra v. Maricopa Comm. Coll. Dist.– Facts

- Islamic student offended by online teaching and test materials addressing terrorism, which portrayed Islam as a whole in an extremely negative light.
- Student, joined by an organization concerned by the widespread use of such materials, files a section 1983 action against the instructor and the community college district, asserting violations of the Free Exercise and Establishment Clauses.
- District court grants motion to dismiss.

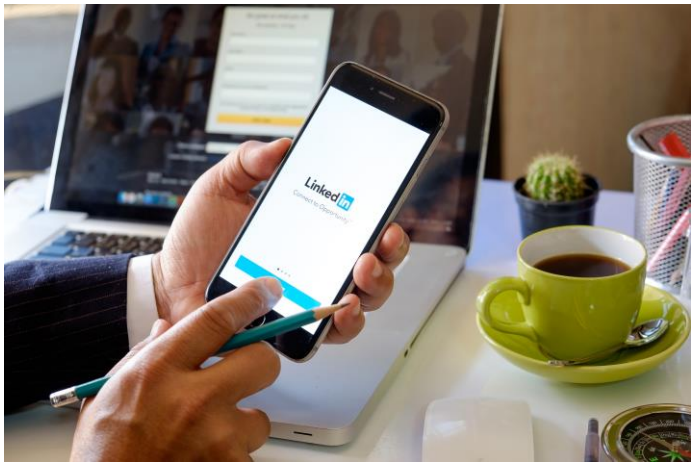
Sabra v. Maricopa Comm. Coll. Dist. Ninth Circuit

- Affirms, 2-1.
- Instructor 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.
- Supreme Court's decision in *Kennedy* underscores how unsettled the law is as to Establishment and Free Exercise Clauses.
- Plaintiff waived *Monell* argument, but in any event, failed to allege facts showing that instructor was a policymaker under *Monell*, or that similar material had been presented previously at the college.

Sabra v. Maricopa Comm. Coll. Dist.– Impact

- Helpful case on qualified immunity: Strongly reaffirms the principle that absent an obvious constitutional violation, plaintiff must identify existing case law with closely analogous facts in order to overcome qualified immunity.
- Particularly helpful on Free Exercise and Establishment Clause claims, as it underscores how uncertain the law has been in that area, especially in light of *Kennedy*.
- Reaffirms strict application of the standards for imposing *Monell* liability.
- 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.

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



Garnier v. O'Connor-Ratcliff– Facts

- Parents file 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 trustees' public social media pages.
- The trial court grants summary judgment on qualified immunity grounds to trustees, but after a bench trial finds that blocking the comments violated the First Amendment.

Garnier v. O'Connor-Ratcliff– Ninth Circuit

- Affirms.
- Public social media pages of trustees were designated public fora for Free Speech Clause purposes.
- 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.
- Trustees never adopted any formal rules of decorum or etiquette that would be sufficiently definite and objective to prevent arbitrary or discriminatory enforcement, and engaged in viewpoint discrimination.
- Trustees entitled to qualified immunity because not clearly established that members of public had First Amendment free speech right to post comments on a public official's social media page.

Garnier v. O'Connor-Ratcliff– Impact

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

Municipal Tort Liability

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

Nunez v. City of Redondo Beach–Facts

- Plaintiff tripped and fell as a result of a raised portion of the sidewalk.
- Defendant moves for summary judgment: Raised portion of sidewalk between one half and three quarters of an inch, trivial defect as a matter of law.
- Plaintiff opposes: Expert opines any rise over a half inch created a tripping hazard, and defendant's own policy was to grind down any portion of the sidewalk over half an inch above the sidewalk surface.
- Trial court grants motion.

Nunez v. City of Redondo Beach Court of Appeal

- Affirms.
- Numerous cases hold that sidewalk displacements of no more than three quarters of an inch were trivial defects as a matter of law, hence no dangerous condition liability.
- No surrounding conditions made the sidewalk defect more hazardous.
- Rejects argument that shadows cast on the defect made it difficult to discern: Sunlight is a natural condition, with shadows moving throughout the day, and city cannot correct every trivial sidewalk defect just because a shadow might fall on it.
- City repair policy irrelevant: Just because city takes extra precautions to guard against tripping did not mean that any displacement over half an inch was generally hazardous.

Nunez v. City of Redondo Beach–Impact

- Very helpful decision .
- Clear discussion of trivial defect doctrine in the context of sidewalk accidents.
- Allows municipalities to undertake proactive sidewalk maintenance and repair activities without fear that such actions will be viewed as a concession of a dangerous condition.

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

Brennon B. v. Superior Court-Facts

- Minor plaintiff, who suffered from a disability, alleges he was sexually assaulted at school on multiple occasions.
- Sues school district and various individuals, asserting, among other claims, violation of Civil Code section 51, the Unruh Act, thus entitling him to minimum statutory damages, treble damages, and attorney fees.
- School successfully demurrers to the Unruh Act claim: As a public entity it is not a business establishment covered by the statute. The trial court agreed and dismissed the claim.
- Court of Appeal denies plaintiff's writ, and Supreme Court grants review.

Brennon B. v. Superior Court California Supreme Court

- Affirms.
- Plain meaning of business establishment requires engaging in private commercial conduct, not provision of government services.
- 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.

Brennon B. v. Superior Court-Impact

- Clarifies the scope of liability under the Unruh Act.
- Eliminates public entity exposure to such claims.
- Calls into question case law suggesting 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

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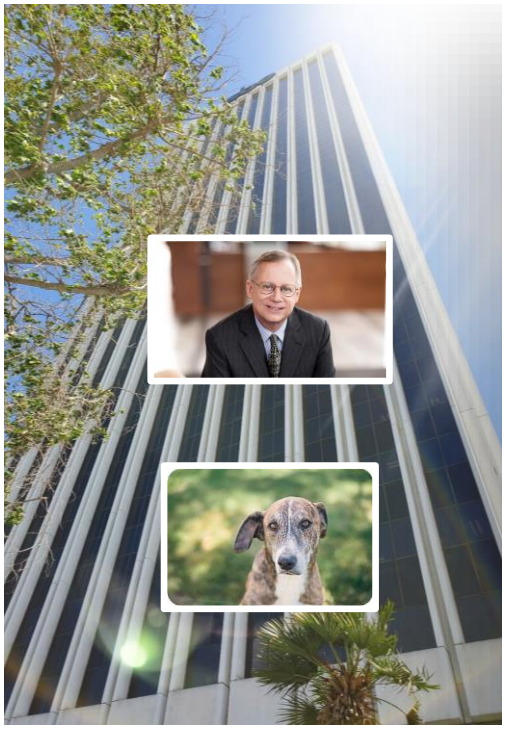

THANK YOU !

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