



Municipal Tort and Civil Rights Litigation Update

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I. CIVIL RIGHTS-LAW ENFORCEMENT LIABILITY

A. *Hart v. Redwood City*, 99 F.4th 543 (9th Cir. 2024)

- **Officer's use of deadly force against armed and non-responsive individual did not violate individual's Fourth Amendment rights**

Officers Gomez and Velez responded to a call involving a man attempting suicide with a knife in his backyard. When they arrived, they found the man's wife covered in blood and frantically pleading for help. The man had been actively cutting his arms and neck with the knife prior to the arrival of the officers. At her urging, the officers went to the backyard, where they found Hart holding a knife. They told him to drop the knife, but instead of doing so he began moving towards them while raising the knife. As Hart neared the officers, Officer Velez deployed her taser, but it was ineffective. With Hart approaching closely and wielding a knife, Officer Gomez took action to protect himself and his partner, shooting Hart. Medical assistance was called for Hart, but he ultimately passed away in the emergency room. Hart's family brought suit alleging that Gomez, Velez, and the City of Redwood City violated their and Hart's constitutional and state law rights. The parties filed cross-motions for summary judgment, and as relevant here, the district court found that Officer Gomez was not entitled to qualified immunity.

The district court found that facts were in dispute regarding whether the Officers' conduct was objectively unreasonable. "Hart had committed no offense, was suicidal, was not a flight risk, did not pose a threat to others, and a dispute exists regarding whether an adequate warning that force would be used by the officers was given."

Upon review, the appellate court examined whether Officer Gomez' conduct was objectively reasonable. To assess the reasonableness of a particular use of force, the court balances the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interests at stake. Use of deadly force is the ultimate intrusion, and the court thus would examine whether the state interest was sufficient to justify the use of force.

The Supreme Court has provided three factors for determining the strength of the government's interest: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Conner*, 490 U.S. at 386, 396 (1989). The "most important" of these factors is "whether the suspect posed an immediate threat to the safety of the officers or others." *Lal v. California*, 746 F.3d 1112, 1117 (9th Cir. 2014).

Here, the Court found that Hart posed an immediate threat to Officer Gomez. Although there were some disputed facts as to where exactly Hart was located in the yard at the time of the Officers' arrival and how he was holding the knife at that time, the Court found these disputes to be immaterial. The material facts were undisputed: Plaintiff was holding the

knife and advanced toward the Officers wielding the knife and refused to comply with commands to drop the knife.

Plaintiffs also argued that because Hart had already harmed himself when the officers arrived, he presented less of a threat. Plaintiffs cited *Tan Lam v. City of Los Banos* for the proposition that one who is wounded may no longer present an immediate threat. 976 F.3d 986, 999 (9th Cir. 2020). In *Tan Lam*, the individual stabbed an officer with scissors. *Id.* The officer then shot the individual. *Id.* This court found that first shot to be an objectively reasonable use of force. *Id.* But then, after the individual “was injured and was [no longer] approaching [the officer] with scissors,” the officer shot him again. *Id.* (emphasis added). At that point, the court determined that the individual was no longer an immediate threat. *Id.* Perhaps if Hart's injuries had made it so he could no longer approach the officers with the knife, then as in *Tan Lam*, Hart would not have been an immediate threat. But it was uncontroverted that Hart was able to approach at least at a brisk walk, while wielding the knife in front of him.

Regarding the Officers’ pre-shooting conduct, the Court noted that California state law does factor pre-shooting conduct into whether an officer acts “reasonably when using deadly force,” *Hayes v. County of San Diego*, 736 F. 3d 1223 (9th Cir. 2013), “[t]he Fourth Amendment is narrower and places less emphasis on pre[-]shooting conduct,” *Vos v. City of Newport Beach*, 892 F. 3d 1024, 1037 (9th Cir. 2018).

Finally, the Court held that Hart’s mental illness did not change the outcome. While “whether the suspect has exhibited signs of mental illness is one of the factors the court will consider,” this court has “refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.”

Ultimately, the Court held that there was no constitutional violation and even if there were, Officer Gomez would have been entitled to qualified immunity as he did not violate clearly established law.

Significance: The idea that subjects undergoing a mental health crisis should be treated differently when use of force is at issue has become relatively ubiquitous. This case is significant in establishing that a subject can and should be considered an immediate threat notwithstanding the appearance of mental illness.

B. *Scott v. Smith*, 109 F. 4th 1215 (9th Cir. 2024)

- **Officers were not entitled to qualified immunity when placing a bodyweight restraint on an unarmed and cooperative subject who lost consciousness and died as a result of the restraint**

On March 3, 2019, Roy Scott called the police for help claiming that assailants were trying to enter his home with a saw to harm him. Las Vegas Metropolitan Police Department Officers Kyle Smith and Theodore Huntsman came to the scene. Scott was unarmed and in mental distress. Though he complied with the officers' orders and was not suspected of a

crime, Smith and Huntsman initiated physical contact, forced Scott to the ground, and used bodyweight force to restrain him. Shortly after, Scott lost consciousness and he was later pronounced dead. Scott's daughter and a representative of Scott's estate sued the officers and the Department for violating their constitutional rights, including the Fourth Amendment right to be free from excessive force and the Fourteenth Amendment right to familial association. The trial court denied the Officers' motion for summary judgment on grounds of qualified immunity and the Officers appealed.

When the Officers arrived at Scott's apartment and Scott came to the door, he was holding a metal pipe. He was ordered to drop the pipe, which he did. The Officers ordered Scott to stand by a near by wall. Scott also complied with this order. He was asked if he had any other weapons, at which time he pulled a knife from his pocket and handed to the Officers. The Officers were shining a flashlight at Scott who asked them to turn off the light and acknowledged that he had paranoid schizophrenia.

The Officers grabbed Scott's arms and took him to the ground. Initially, Scott was on his back with his arms at his side. For over two minutes, Scott screamed and begged the Officers to leave him alone. The Officers turned Scott to his stomach with his hands restrained behind his back. Officer Huntsman then placed his body weight on Scott's back for one to two minutes. During this time, Scott became more incoherent and his breathing more labored. Scott was then handcuffed and rolled to his side. His face was bloodied from contact with the ground, and he then essentially stopped moving. He was pronounced dead shortly thereafter.

In reviewing the trial court's denial of the Officers' motion for summary judgment, the Court analyzed the reasonableness of the Officers' conduct. First, the body weight restraint was considered to be deadly force. In analyzing the second prong, the government's interest in the force used, the Court did consider Scott's apparent mental illness and the fact that he had not committed any crime. The Court suggested that further de-escalation should have been considered by the Officers. Scott was not an immediate threat as he had relinquished both the knife and the pipe on the command of the Officers.

As to the third prong, a balance between the gravity of the intrusion on the individual and the government's need for that intrusion, the Court found that deadly force was completely unnecessary under the circumstances. Thus, under the *Graham* reasonableness test, the force used was not reasonable and Scott's Fourth Amendment rights were violated by the Officers.

The Court then examined whether Scott's Fourth Amendment rights were clearly established. In determining that said rights were clearly established, the Court leaned heavily on the case of *Drummond ex rel. Drummond v. City of Anaheim*, 343 F. 3d 1052 (9th Cir. 2003). In *Drummond*, officers "pressed their weight against [an individual's] torso and neck, crushing him against the ground." They "maintained that pressure for a significant period of time" while the suspect was prone, handcuffed, "offered no resistance," and "repeatedly told the officers that he could not breathe and that they were choking him." The Court found that

Officers were not entitled to qualified immunity and that ruling clearly established the unconstitutionality of the of the Officers in this matter.

Next, the Court reviewed Scott's 14th Amendment claim. To show a violation of the right to familial association under the Fourteenth Amendment based on an officer's use of force, a plaintiff must establish that an officer's conduct "shocks the conscience."

Two tests govern whether an officer's conduct "shocks the conscience." *Ochoa v. City of Mesa*, 26 F.4th 1050, 1056 (9th Cir. 2022). "Which test applies turns on whether the officers had time to deliberate their conduct." *Id.* The "deliberate-indifference test" applies when a situation "evolve[s] in a time frame that permits the officer to deliberate before acting." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). The more demanding "purpose-to-harm test" applies when a situation " 'escalate[s] so quickly that the officer must make a snap judgment.' " Here, the Court found that the Officers had time to deliberate and that the deliberate indifference standard would apply. The Court found that the Officers violated Plaintiff's 14th Amendment rights.

However, the Court could not point to an analogous prior appellate case that would have clearly established this violation of Plaintiff's 14th Amendment rights. On those grounds, the Court reversed the trial court's denial of qualified immunity as to the 14th Amendment claim.

Significance: Be very wary of your department's use of body weight restraints on prone individuals, particularly to those subjects who are already restrained. Also, this case has clearly established a 14th Amendment violation regarding the Officers' conduct.

***C. Rosenbaum v. City of San Jose*, 107 F. 4th 919 (9th Cir. 2024)**

- **Officers not entitled to qualified immunity when a police K9 was deployed on Plaintiff and continued to bite him for nearly 20 seconds after surrendering and laying prone on his stomach**

On September 10, 2019, five SJPd Officers responded to a domestic violence call. One of the Officers was K9 handler with his police K9 "Kurt." When the officers arrived at the subject home, they observed Plaintiff standing on a landing on the second floor. For approximately six minutes, they engaged in a dialogue with Plaintiff wherein they repeatedly ordered him to come down the stairs. Plaintiff refused to comply and come down the stairs. An officer advised him that if he did not come down, the K9 would be deployed to apprehend him and that he would be bitten.

Approximately nine minutes after entering the home, Kurt was deployed up the stairs to apprehend Plaintiff. When the officers reached the second story, they found the unarmed Plaintiff seated with his back against a wall while Kurt was biting his right forearm. Plaintiff was offering no resistance. Kurt then dragged Plaintiff onto his stomach. One of the officers had his gun pointed at Plaintiff, another was standing on his legs, while another was pulling his left arm behind his back. At this time, Kurt was still biting Plaintiff's right arm. Body

camera footage captured the incident and confirmed that Kurt continued biting Plaintiff for approximately twenty seconds after he had clearly surrendered before Kurt was ordered to release his hold. Plaintiff sustained severe and permanent injuries to his right arm because of the incident.

In reviewing the trial court's denial of qualified immunity, the Court noted that it has been clearly established that when an officer allows a police dog to continue biting a suspect who has fully surrendered and is under officer control, it is a violation of Plaintiff's 4th Amendment rights. In some cases, such as this one, the conduct is so clearly a violation, that on-point appellate authority is not even necessary. This case was distinguishable from others where qualified immunity was granted but in those cases, the K9 was released as soon as it was determined that the subject was not armed. Here, it was clear that Plaintiff was unarmed and had surrendered, however, Kurt stayed on the bite for another twenty seconds before he was ordered to release.

The officers argued that it was not clear that Plaintiff had surrendered. However, the body camera footage supported Plaintiff's version of the events and whether surrender was clear is a factual issue to be decided by the jury.

Significance: This case exemplifies that the Court will occasionally find some conduct so egregious that the typical qualified immunity two-step analysis is rendered to be unnecessary.

D. Chinarian v. City of Los Angeles, 113 F.4th 888 (9th Cir. 2024)

- **It is clearly established that reasonable suspicion by police officers that a vehicle is stolen does not justify a high-risk, 24-minute traffic stop during which the plaintiff was asked to exit the car at gunpoint in front of her passenger and teenage daughter and asked to lay flat on her stomach on the ground**

Plaintiff was driving home from a family celebration with her teenage daughter and a friend when an LAPD police officer saw her and mistakenly suspected that she was driving a stolen vehicle. The mix-up was due to several unfortunate coincidences, including an error by the Department of Motor Vehicles, which had issued the wrong license plates. Although Plaintiff drove normally and in compliance with all traffic laws while being followed by a police car for more than ten minutes, officers from LAPD decided to conduct a "high-risk" felony stop involving about a dozen officers and a helicopter unit. The officers ordered Chinarian out of the vehicle at gunpoint and commanded her to lie prone on the street with her arms outstretched. The officers, again at gunpoint, ordered the passengers out of the vehicle with their hands in the air. All three were handcuffed and seated on the street while the officers investigated. After the officers determined the unfortunate mix-up and that Plaintiff's vehicle was lawfully registered to her husband, Plaintiff and her children were released from detainment. The duration of the entire encounter was approximately 24 minutes.

Plaintiff and her passengers sued the officers, the LAPD, and the City of Los Angeles for illegal seizures, excessive force, and a failure to properly train the officers. The district court granted partial summary judgment in favor of the officers, and a jury subsequently rejected plaintiffs' municipal liability claims against the LAPD and the City. Plaintiffs appealed the trial court's granting of summary judgment.

In review of Plaintiffs' Fourth Amendment claim, the Court recognized that the degree of intrusiveness was severe. Plaintiff was ordered out of the car at gunpoint, forced to prone herself on the ground, and was handcuffed. Although vehicle theft can be considered a "severe" crime, the officers had no articulable basis that Plaintiffs posed a threat to them or to anyone else. Plaintiffs were fully cooperative at all times. Furthermore, Plaintiff remained in handcuffs for a period of time even after the officers became aware of the error. The Court held that the officers' reasonable suspicion that plaintiffs had stolen the Suburban, standing alone, was not enough to justify such intrusive tactics.

The Court then examined the second prong of the QI analysis; whether it was clearly established that the officers' tactics violated plaintiffs' Fourth Amendment rights. The Court looked to the case of *Green v. City and County of San Francisco*, 751 F.3d 1039 (9th Cir. 2014). Denise Green, a 47-year-old Black woman with no criminal record, was driving her car when an automated license plate reader misread her license plate number by one digit and erroneously identified the plate as belonging to a stolen vehicle. The officers with the reader were unable to respond, so "they radioed the hit to dispatch" for other officers to follow up. Dispatch determined that the license plate number belonged to a gray GMC truck, whereas Green was observed driving a burgundy Lexus sedan.

A nearby officer who had heard the radio traffic observed Green's vehicle pass him and did not realize that her license plate differed by one digit from the number reported to dispatch. The officer called for backup, and after three to five additional officers arrived, they made a high-risk stop of Green's vehicle. The officers ordered Green out of her car, drew and pointed their weapons at her, ordered her to her knees, and handcuffed her. "Green was wholly compliant and nonresistant for the entirety of the stop and ... there was no indication that she was armed." Officers searched Green's vehicle, performed a pat-down search of her person, and after a record check of her correct plate number revealed they had made a mistake, uncuffed her. The trial court granted the officers' QI motion for summary judgment but the 9th Circuit reversed holding that it was a question for the jury to determine if the tactics used were justified in light of the circumstances.

Relying on *Green*, the Court held that Plaintiff's Fourth Amendment rights were clearly established and the trial court's order granting qualified immunity was reversed.

Significance: Reasonable suspicion of vehicle theft alone is not enough to justify the intrusive tactics used by the officers in this case.

E. *Sanderlin v. Dwyer*, 2024 WL 4033065 (9th Cir. 2024)

- **Officer was denied qualified immunity when he struck Plaintiff in the groin with a deployed foam bullet at a George Floyd protest**

On May 29, 2020, at around 2:00 p.m., a protest started at San Jose City Hall. Police officers patrolling the scene initially reported that the crowd remained peaceful for the first hour or so. The crowd eventually marched from City Hall down Santa Clara Street onto Highway 101, temporarily blocking both northbound and southbound lanes. Additional officers were dispatched to assist in the response, as some members of the crowd began engaging in violent behavior, including smashing vehicles with rocks and throwing objects at officers from an overpass.

Officer Panighetti arrived on the scene at around 3:30 p.m., equipped with a 40mm launcher, capable of firing foam baton rounds. According to then-existing San Jose Police Department (SJPd) policy, SJPd officers had blanket authority to use 40mm foam baton rounds throughout the protests as defensive weapons against “specific individuals who posed a threat of serious injury to the officers or others.”

At about 4:30 p.m., officers issued dispersal orders to the crowd. The crowd then began to make its way back toward City Hall. Officer Panighetti was standing behind a skirmish line when protestors again began to throw objects at the officers. He noticed two subjects who were throwing objects at officers. He observed the subjects pick up what appeared to be paint cans and Officer Panighetti believed that they were preparing to throw the cans at officers. At that point, Plaintiff moved onto the sidewalk between Officer Panighetti and the two subjects holding a sign over his head. Panighetti ordered Plaintiff to move and warned him that he would “hit” him if he did not move. Plaintiff refused to move. Panighetti fired one foam bullet round at Plaintiff striking him in the groin. The injury was severe and required an emergency surgery.

Sanderlin filed suit against Panighetti under 42 U.S.C. § 1983, alleging that Panighetti had used excessive force against him because he was protesting the police and that Panighetti's acts therefore violated his rights under the First and Fourth Amendments of the United States Constitution. Defendants moved for summary judgment on grounds of qualified immunity which the trial court denied.

To establish a claim for retaliatory violation of the First Amendment, Sanderlin must show (1) that he was engaged in a constitutionally protected activity; (2) that Panighetti's actions would “chill a person of ordinary firmness from continuing to engage in the protected activity;” and (3) that “the protected activity was a substantial or motivating factor in [Panighetti's] conduct.” *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827 (9th Cir. 2020).

Panighetti argued that Plaintiff was obstructing him from carrying out his duties, i.e., blocking him from the two subjects he was trying to apprehend, is not a constitutionally protected activity. However, the Court noted that this was a dispute of fact and therefore had

to be rendered in favor of Plaintiff. According to Sanderlin, he was merely standing peacefully on the sidewalk holding the sign. Resolving the disputed facts in Sanderlin's favor, he was engaged in protected First Amendment activity.

The third element turns on the same factual dispute. If a factfinder concludes that there was no legitimate justification for Panighetti's actions, they could reasonably infer that those actions were motivated by retaliatory animus. Thus, when all factual disputes are resolved and all reasonable inferences are drawn in Sanderlin's favor, Panighetti's acts violated clearly established law. It is clearly established that police officers may not use their authority to retaliate against individuals for protected speech.

As to Plaintiff's Fourth Amendment claim, the Court first had to determine whether Plaintiff was "seized" within the meaning of the Fourth Amendment. A Fourth Amendment seizure occurs when there is a governmental termination of freedom of movement through means intentionally applied. The Court found that Panighetti effectuated a seizure of Plaintiff when he fired a foam bullet at him which knocked him to the ground restricting his movement.

Once it was deemed that a seizure of Plaintiff had occurred, the Court next examined if the seizure was unreasonable. The reasonableness of the force used by Panighetti would turn on "how the jury interprets the video footage, and whether the jury credits Panighetti's testimony that Sanderlin was blocking the police from targeting the two individuals." To the extent that the jury discredits Panighetti's account or believes that Panighetti failed to consider other less intrusive tactics, it could determine that the use of force was unreasonable which would be a violation of Plaintiff's rights under the Fourth Amendment.

Going to the second prong of the QI analysis, the Court evaluated whether the right was "clearly established." In stating that right was clearly established, the Court relied on the case of *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012). There, the police ordered a group of students at a large disturbance to disperse, and when the students failed to comply, the police fired pepperball projectiles at them. The Nelson court held that "the firing of a projectile that risked causing serious harm, in the direction of non-threatening individuals who had committed at most minor misdemeanors ... constitute[d] unreasonable force in violation of the Fourth Amendment." *Id.* at 886. Given the factual similarities between *Nelson* and this case, Panighetti was on notice that his use of force was excessive.

Significance: Chaos can occasionally result from protected protest activity. While police engage in tactics to control unruly crowds, they must still be cognizant of the constitutional rights of protestors.

F. *Black Lives Matter Los Angeles v. City of Los Angeles*, 113 F.4th 1249 (9th Cir. 2024)

- **Certification of a putative class requires commonality where issues can be resolved together.**

In the summer of 2020, protests related to the death of George Floyd occurred in Los Angeles for approximately ten consecutive days. Some of these protests were peaceful. Others were not. In response, the Los Angeles Police Department (LAPD) set curfews, declared demonstrations unlawful, used non-lethal force to control crowds, and arrested thousands of people.

About a week after the protests began, the plaintiffs filed this putative class action against the City and then-LAPD Chief Michel Moore, alleging that the LAPD used excessive force, arrested protestors without probable cause, and restricted their First Amendment rights. The trial court granted protestors' motion for certification of three classes seeking damages from city and fourth class seeking injunctive relief against department. City appealed.

FRCP 23 requires that the members of the class have the burden of proving by a preponderance of the evidence that they have common questions that can be resolved together, and these common questions predominate over individual ones. This kind of rigorous analysis is especially important in a case such as this, where classes bring fact-specific constitutional claims challenging a wide variety of LAPD's actions across Los Angeles. The question of whether reasonable force was used on the entire class depended on the facts of many different, individual situations. Thus, the plaintiffs did not adequately prove that they have raised a question which can be solved on a class-wide basis because the different claims arise in various different circumstances of alleged police brutality.

The court vacated and remanded to the trial court, finding that further analysis of commonality and predominance was required before these classes could be certified.

Significance: Protest cases can find “strength in numbers.” We have seen Protest Plaintiffs with very little or no damages attempt to coalesce in the formation of a class action or file with multiple Plaintiffs in a single lawsuit. It gives the appearance that the use of force was pervasive and indiscriminate. This case is helpful in requiring a true commonality of force used and injuries sustained.

II. CIVIL RIGHTS-HOMELESSNESS

A. *City of Grants Pass v. Johnson*, 144 S.Ct. 2202 (2024)

- **The Eighth Amendment’s protections against cruel and unusual punishment does not prohibit local governments from passing or enforcing ordinances banning sleeping or camping on public property.**

In 2019, the Ninth Circuit issued a decision in *Martin v. City of Boise* holding that “the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.” The underlying reasoning was that the Supreme Court had previously ruled in *Robinson v. California* that it violated the Eighth Amendment’s Cruel and Unusual Punishment Clause to criminalize a person’s status, rather than their conduct (in Robinson, the statute criminalize

the status of being a drug addict, not using drugs). The Ninth Circuit concluded that broad prohibitions on sleeping or sitting essentially prohibited unhoused people from merely existing in public spaces (at least at certain hours) if there were no alternative shelters for people to go to, meaning it was their status of homelessness that was being criminalized.

The City of Grants Pass, Oregon, had a series of ordinances on the books that prohibited camping—which it defined as sleeping with any form of protection from the elements—in any public space. A violation of these ordinances resulted in a minimum \$295 fine. Multiple violations of the ordinance could lead to exclusion orders from parks or other public spaces, a violation of which could then result in a criminal trespass charge.

In the wake of *Martin*, several unhoused individuals in Grants Pass filed a class action lawsuit to prevent the City from enforcing these ordinances. At the time, the city’s unhoused population well exceeded the number of available shelter beds. A federal district court enjoined enforcement of these ordinances saying that, under *Martin*, these ordinances effectively criminalized the status of homelessness in violation of the Punishment Clause. The district court also ruled that the fines imposed on homeless people under these ordinances violated the Eighth Amendment’s Excessive Fines Clause.

The City appealed the District Court’s injunction on Punishment Clause grounds to the Ninth Circuit (without addressing the Excessive Clause findings). The Ninth Circuit affirmed the injunction, at which point the City appealed to the U.S. Supreme Court.

The USSC majority took the position that the ordinances at issue in *Grants Pass* were distinguishable from *Robinson* because they criminalized conduct (i.e., sleeping, camping, using a blanket) rather than status (i.e., being homeless). Instead, the majority looked to *Powell v. Texas*, in which the Court found that a law criminalizing public intoxication was not the same as criminalizing someone’s status as an alcoholic. As the *Powell* court reasoned, it was the act of being drunk in public, not the compulsion to drink, that was being criminalized.

In analyzing cases under the Cruel and Unusual Punishment Clause, the majority found that fining people for sleeping in public was neither cruel (because it did not cause “terror, pain, disgrace” or other “atrocious” punishments) nor unusual (in that punishing such behavior was commonplace around the country). Therefore, prohibiting sleeping or camping in public did not violate the Cruel and Unusual Punishment Clause.

The Court reversed the Ninth Circuit ruling on the Cruel and Unusual Punishment Clause and remanded it “for further proceedings consistent with the opinion.”

Significance: Although the case provides no panacea to the issue of homelessness, it does allow municipalities to take a more active approach in removing the unhoused from public spaces.

III. CIVIL RIGHTS-FIRST AMENDMENT

A. *Lindke v. Freed*, 601 U.S. 187 (2024)

- **A public official who prevents someone from commenting on the official's social-media page engages in state action under 42 U.S.C. § 1983 only if the official both (1) possessed actual authority to speak on the state's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts.**

James Freed created a private Facebook profile that was originally intended to connect with family and friends. Eventually, he grew too popular for Facebook's 5,000-friend limit on profiles. So Freed converted his profile to a "page," which has unlimited "followers" instead of friends and is public so that anyone may "follow" it. Freed designated the page category as "public figure."

In 2014, Freed was appointed city manager for Port Huron, Michigan, so he updated his Facebook page to reflect that new title. On his page, he shared both personal updates about himself and his family and professional updates, including directives and policies he initiated in his official capacity.

Kevin Lindke came across Freed's page and did not approve of how Freed was handling the pandemic. He posted criticism of Freed in response to Freed's Facebook page, and Freed deleted the comments and ultimately "blocked" Lindke.

Lindke sued Freed under 42 U.S.C. § 1983 for violating his First Amendment rights by deleting his comments and blocking him. The district court granted summary judgment to Freed, and the U.S. Court of Appeals for the Sixth Circuit affirmed.

In a unanimous opinion, the Court held that for section 1983 to apply to a city manager, the state action doctrine required that the city manager both had actual authority to speak on the behalf of the state, and that he purported to exercise that authority.

"The distinction between private conduct and state action turns on substance, not labels: private parties can act with the authority of the state, and state officials have private lives and their own constitutional rights." *Lindke v. Freed*, 601 U.S. 187, 197 (2024). The fact that Freed's page has government information does not necessarily mean it is an official conduit of state authority. For the actions of a private person to be covered by section 1983, the state has to be responsible for the person's conduct. Because the Sixth Circuit did not apply this test, the Court vacated and remanded.

Significance: While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights, and by excluding from liability acts of officers in the ambit of their personal pursuits, the state-action requirement of § 1983 protects a robust sphere of individual liberty for those who serve as public officials or employees.

B. *Gonzalez v. Trevino*, 602 U.S. 653 (2024)

Sylvia Gonzalez, a resident of Castle Hills, Texas, was elected to the city council in 2019. During her campaign, she learned of widespread dissatisfaction with the current city

manager. After taking office, she organized a nonbinding petition calling for the manager's removal. The petition was presented at a contentious council meeting, after which Mayor Edward Trevino questioned Gonzalez about the petition's location, found in her binder. Two days later, Trevino initiated a criminal complaint against Gonzalez for allegedly stealing the petition. Despite an atypical legal process involving Police Chief John Siemens and special detective Alex Wright, Gonzalez was arrested and spent a night in jail. She is no longer on the council and has refrained from public political activity.

Gonzalez sued Trevino, Siemens, Wright, and the city (collectively, the Defendants) for violating her First and Fourteenth Amendment rights. She argued that the arrest was in retaliation for engaging in conduct protected by the First Amendment, but she conceded that there was probable cause for the arrest. In support of her retaliation claim, she cited a decade-long review of misdemeanor and felony data in Bexar County that showed no similar cases.

The Defendants moved to dismiss her lawsuit on grounds of the independent-intermediary doctrine and qualified immunity, but the district court allowed Gonzalez's claims to proceed. On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed, finding that the outcome was controlled by the U.S. Supreme Court's decision in *Nieves v. Bartlett*, holding that, in general, the existence of probable cause will defeat a retaliatory arrest claim. The Fifth Circuit noted that Gonzalez's facts did not trigger the narrow exception recognized in *Nieves*, under which a plaintiff need not plead lack of probable cause "where officers have probable cause to make arrests, but typically exercise their discretion not to do so."

In its holding, the USSC stated that requiring petitioner Sylvia Gonzalez to provide specific comparator evidence to support her retaliatory arrest claim, the Fifth Circuit did not properly apply the principles of *Nieves v. Bartlett*, 587 U. S. 391 (2019). The only express limit the Court described in *Nieves* was that the evidence a plaintiff presents must be objective.

Justice Samuel Alito concurred with the Court's decision but wrote separately to provide additional guidance on the scope of the *Nieves* exception, emphasizing that it is a narrow exception to the no-probable-cause requirement for retaliatory arrest claims and that the rule applies to all such claims, not just those involving split-second decisions.

Justice Brett Kavanaugh concurred with the per curiam opinion but argued that Gonzalez's case does not actually involve the *Nieves* exception, as her claim is about probable cause regarding her mental state rather than a conduct-based comparison, making the Court's grant of certiorari misplaced.

Justice Ketanji Brown Jackson, joined by Justice Sonia Sotomayor, concurred with the per curiam opinion but emphasized that plaintiffs can use various types of objective evidence beyond surveys to satisfy the *Nieves* exception, including unusual arrest procedures or indications of retaliatory motives in arrest documents.

Justice Clarence Thomas authored a dissenting opinion, arguing that plaintiffs bringing First Amendment retaliatory-arrest claims under § 1983 should be required to prove a lack of probable cause. He asserted that the common-law torts most analogous to retaliatory-

arrest claims (false imprisonment, malicious arrest, and malicious prosecution) all required proving absence of probable cause. Thus he rejects the abuse-of-process analogy and criticized the Court for expanding the Nieves exception, asserting that there is no historical basis for this exception and that the Court should not craft § 1983 rules as a matter of policy.

Significance: The decision means that more plaintiffs may be able to bring a retaliatory arrest claim under the Nieves exception by utilizing any form of objective evidence.

IV. LAND USE

A. *Scheetz v. County of El Dorado*, 601 U.S. 267 (2024)

- **The Fifth Amendment’s takings clause does not distinguish between legislative and administrative land-use permit conditions.**

The County of El Dorado, California, has a Traffic Impact Mitigation (TIM) Fee Program that imposes a traffic-impact fee on any property owner applying for a building permit. The fee consists of two components: the “Highway 50 Component” and the “Local Road Component,” and is determined by the geographic zone in which the project is located and the type of construction proposed. The fee is mandatory regardless of the actual impact the project may have on existing or future roads. The TIM Fee Program stipulates that new developments bear the full cost of road construction and widening, even though these roads are used and benefitted from by existing residents and non-residents alike. In 2012, the County Board passed a resolution establishing new TIM Fee rates, which were subsequently applied to George Sheetz’s project.

Sheetz applied for a building permit in July 2016 to construct a 1,854-square-foot manufactured house for his family. The County required him to pay \$23,420 in traffic-mitigation fees based on the type and location of his project, even though no individualized assessment was made to correlate the fee with the project’s actual impact on local or state roads. Sheetz paid the fee under protest and later filed a legal action against the County, alleging the fee was an unconstitutional condition under the Nollan and Dolan standards and seeking a refund of the fee paid.

Under the unconstitutional-conditions doctrine, “the government may not deny a benefit to a person because he exercises a constitutional right.” The U.S. Supreme Court in *Nollan v. Cal. Coastal Comm’n* (1987) and *Dolan v. City of Tigard* (1994) recognized that land-use permit applicants “are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits.” Under those cases, the government may condition approval of a land-use permit on the owner’s dedication of property to public use if the government can prove that an “essential nexus” and “rough proportionality” exist between the demanded property and the impacts of the owner’s project.

The superior court ruled against Sheetz, concluding that legislative exactions are exempt from Nollan/Dolan review. The California Court of Appeal affirmed.

The Fifth Amendment's Takings Clause does not distinguish between legislative and administrative land-use permit conditions. Justice Amy Coney Barrett authored the opinion for a unanimous Court, holding that the California Court of Appeal erred in holding that the Nollan/Dolan test does not apply to permit conditions imposed by legislatures.

The Takings Clause requires the government to provide just compensation when it takes private property for public use, and this applies equally to all branches of government. Neither the text of the Constitution, the historical understanding of eminent domain (the power of the government to take private property for public use), nor the Court's own precedents support exempting legislatures from the requirements of the *Nollan/Dolan* test. This test, which is based on the unconstitutional conditions doctrine, requires that permit conditions have an "essential nexus" to a legitimate government interest and be "roughly proportional" to the impact of the proposed development. These principles apply consistently across physical takings, regulatory takings, and the unconstitutional conditions doctrine, regardless of whether the condition is imposed by a legislature or an administrative agency.

Justice Sonia Sotomayor authored a concurring opinion, in which Justice Ketanji Brown Jackson joined, pointing out an antecedent question that was not raised in this case: whether the permit condition would be a compensable taking if imposed outside the permitting context.

Justice Neil Gorsuch authored a concurring opinion to argue that the Nollan/Dolan test cannot operate differently when an alleged taking affects a "class of properties" rather than "a particular development."

Justice Brett Kavanaugh authored a concurring opinion, in which Justices Kagan and Jackson joined, clarifying that the Court has not previously decided—and in this case explicitly declined to decide—whether "a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development."

Significance: Legislatively imposed conditions on development are not exempt from scrutiny under the Takings Clause. Following *Sheetz*, it is now clear that legislatively imposed conditions on development must engage in some form of nexus and proportionality analysis under *Nollan* and *Dolan*.

B. Center for Biological Diversity et al. v. County of San Benito, et al. (2024) 104 Cal.App.5th 22

- **The limitations period to initiate a CEQA challenge does not begin until a final Notice of Determination has been issued**

The case involves the proposed development of the Betabel Project by the McDowell Trust, which includes a large commercial roadside attraction in San Benito County. The County's Board of Supervisors certified an Environmental Impact Report (EIR) and approved a conditional use permit for the project. The Center for Biological Diversity and the Amah

Mutsun Tribal Band opposed the project, arguing that the EIR violated the California Environmental Quality Act (CEQA) and that the project approval violated state planning and zoning laws. They filed a petition for a writ of mandate to challenge the project approval.

The San Benito County Planning Commission initially approved the project and filed a Notice of Determination (NOD) on October 14, 2022. The Center and the Amah Mutsun Tribal Band appealed this decision to the County Board of Supervisors, which denied the appeals and filed a second NOD on November 10, 2022. The trial court sustained the McDowell Trust's demurrer, agreeing that the CEQA causes of action were time-barred because the petitions were filed more than 30 days after the first NOD.

The California Court of Appeal, Sixth Appellate District, reviewed the case and concluded that the trial court erred. The appellate court determined that the 30-day limitations period for filing a CEQA challenge began with the second NOD filed on November 10, 2022, following the final decision by the Board of Supervisors. The court emphasized that the Planning Commission's decision was not final due to the timely appeals. Therefore, the writ petitions filed on December 9, 2022, were within the 30-day period. The appellate court reversed the judgments of dismissal and remanded the case to the trial court with directions to overrule the demurrer.

Significance: The limitations period for a CEQA challenge does not begin until a final decision is made by the Planning Commission.

V. UTILITIES

A. *City of Gridley v. Superior Court*

The City of Gridley operates an electric utility and approved reduced electric rates for residential users in September 2020. Plaintiffs, residential ratepayers, challenged these rates, alleging they resulted in charges exceeding the reasonable cost of providing electric service, thus constituting a tax without voter approval in violation of article XIII C of the California Constitution. They also claimed the rates violated the state and federal takings clauses under the unconstitutional conditions doctrine. Plaintiffs sought a writ of mandate and class action complaint, alleging the City set rates higher than necessary and transferred excess revenues to its general fund.

The Superior Court of Butte County denied the City's motion for summary judgment, finding triable issues of fact regarding whether the rates resulted in excessive charges and whether plaintiffs had a property interest in continued electric service. The court rejected the City's argument that article XIII C was inapplicable because the City did not impose, extend, or increase a tax when it approved reduced rates. The court also found that the unconstitutional conditions doctrine could apply to plaintiffs' takings claim.

The California Court of Appeal, Third Appellate District, reviewed the case and concluded that the City was entitled to relief. The court found article XIII C inapplicable

because the City did not impose, extend, or increase any tax by reducing its electric rates. The court also found the unconstitutional conditions doctrine inapplicable, as it applies only in the land-use permitting context, not to user fees like the electric rates in question. Consequently, the court directed the trial court to set aside its order denying the City's motion for summary judgment and to enter a new order granting the motion. The City's motion for summary judgment was granted, and the stay of proceedings in the trial court was vacated.

Significance: A reduction in utility rates do not require voter approval.

VI. EMINENT DOMAIN

A. City of Ontario v. We Buy Houses Any Condition, (2024) 103 Cal.App.5th 1212

- **Under Eminent Domain, a public entity must identify a specific project supporting the condemnation**

The City of Ontario filed an eminent domain action to acquire properties owned by We Buy Houses Any Condition, LLC, located near the Ontario International Airport. The City argued that the properties did not conform to land use requirements and suffered from airport-related impacts and blight. The City held a public hearing and adopted a resolution of necessity to commence eminent domain proceedings, citing the mitigation of airport impacts and elimination of blight as public uses. However, the resolution did not describe any specific proposed project.

The Superior Court of San Bernardino County granted summary judgment in favor of We Buy Houses, finding that the City had not articulated a proposed project as required to exercise its power of eminent domain. The court concluded that the City's resolution of necessity was insufficient because it did not describe a specific project, which is necessary to determine public interest, necessity, and compatibility with the greatest public good and least private injury. The court also granted We Buy Houses's request for attorney fees, making certain reductions to the requested amounts.

The Court of Appeal, Fourth Appellate District, Division One, reviewed the case and affirmed the lower court's decision. The appellate court held that the City failed to identify a proposed project with sufficient specificity in its resolution of necessity, as required by the Eminent Domain Law. The court found the City's arguments unpersuasive and concluded that the trial court properly rejected the City's effort to exercise eminent domain. Additionally, the appellate court found no abuse of discretion in the trial court's award of attorney fees to We Buy Houses, affirming the fee award.

Significance: A public entity must provide specific information as to what it intends to do with condemned property.

VII. MANDATORY DUTY

A. Danielson v. County of Humboldt (2024) 103 Cal.App.5th 1

- **County dog control ordinances did not create mandatory duty and the County and its officer were thereby immune from suit.**

The plaintiff, Candis Danielson, was seriously injured by dogs owned by Donald Mehrstens. She filed a lawsuit against several parties, including Mehrstens and the County of Humboldt. Danielson claimed that the County failed to discharge certain mandatory duties regarding dangerous and unvaccinated dogs under both state law and the Humboldt County Code, which she argued led to her injuries. The trial court sustained the County's demurrer without leave to amend, leading to Danielson's appeal.

The trial court found that the duties Danielson identified were not mandatory within the meaning of Government Code section 815.6, and therefore, the County was immune from liability as a matter of law. The court reasoned that even if the Humboldt County Code had created a mandatory duty to hold a potentially dangerous dog hearing, it was uncertain that the hearing would have resulted in the dog's destruction or quarantine. The court also concluded that the vaccination statutes created a mandatory duty to set up an impoundment system, but did not mandate the impound of any specific, unvaccinated animals.

The Court of Appeal of the State of California First Appellate District Division One affirmed the trial court's decision. The appellate court agreed that the duties identified by Danielson were not mandatory and that the County was immune from liability. The court also found that Danielson failed to identify any statute creating a mandatory duty which was breached by the County, and agreed with the trial court that her claim raised a serious question of causation.

Significance: Public entities are immune from liability for legislative action or discretionary law enforcement activity.