



# MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE



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# Civil Rights Law Enforcement Liability

*Rivas-Villegas v. Cortesluna,*  
\_\_U.S.\_\_, 142 S.Ct. 4 (2021)



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### *Rivas-Villegas* – Facts

- 911 call: Woman and two children barricaded in room fearing the woman's boyfriend (Cortesluna), was going to hurt them with a chain saw.
- Officers command Cortesluna to come out.
- Cortesluna complies, carrying long tool in one hand, large knife in pocket, hands raised.
- Lowers hands towards knife -- officer shoots two beanbag rounds in rapid succession.
- Officer Rivas – Villegas pushes him to ground, places knee on back for 8 seconds while suspect handcuffed.

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## *Rivas-Villegas* – Ninth Circuit

- Cortesluna sues for excessive force based on beanbag rounds and knee to the back. Summary Judgment for officers based on qualified immunity.
- 2-1 panel affirms in part, reverses in part.
- 2 judges: Qualified immunity applies to firing beanbag rounds.
- Different 2 judges: No qualified immunity for knee in the back.
- Dissent: No clearly established law that brief placement of knee against back of unsecured, armed suspect without indication of severe injury, constitutes excessive force.

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## *Rivas-Villegas* – Supreme Court

- Reverses in per curiam opinion.
- Qualified immunity applies because no clearly established law indicated that brief, 8 second placement of knee to the back of an unsecured, armed suspect, could be excessive force.
- Ninth Circuit failed to cite factually analogous case.

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## *Rivas-Villegas* – Impact

- Reaffirms stringent application of clearly established law prong of qualified immunity, despite on-going challenges to qualified immunity.
- First reversal of denial of qualified immunity in over 2 years.
- Helpful authority for minimal use of force and handcuffing cases in particular.

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*City of Tahlequah v. Bond*,  
\_\_ U.S \_\_, 142 S.Ct. 9 (2021)



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## *City of Tahlequah – Facts*

- 911 call: Ex-husband intoxicated and won't leave premises.
- 3 officers speak with agitated ex outside, and he refuses pat down search and walks into garage.
- Officers follow, and he picks up a hammer, turning towards officers.
- Moves to have clear path to one officer and raises hammer as if to throw.
- Officers fire, fatally wounding him.

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## *City of Tahlequah – Tenth Circuit*

- Suit for excessive force.
- District court grants summary judgment: Force reasonable, and qualified immunity because no clearly established law.
- Tenth Circuit reverses: Circuit authority indicated officers could be liable for excessive force by unreasonably creating need to use force.
- Officers created need to use force by following suspect into garage and confronting him.

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## *City of Tahlequah* – Supreme Court

- Reverses in per curiam opinion.
- Officers entitled to qualified immunity because no existing case law dealt with facts similar to those confronting the officers here, i.e. armed suspect reacting to merely being followed at a distance of several feet.

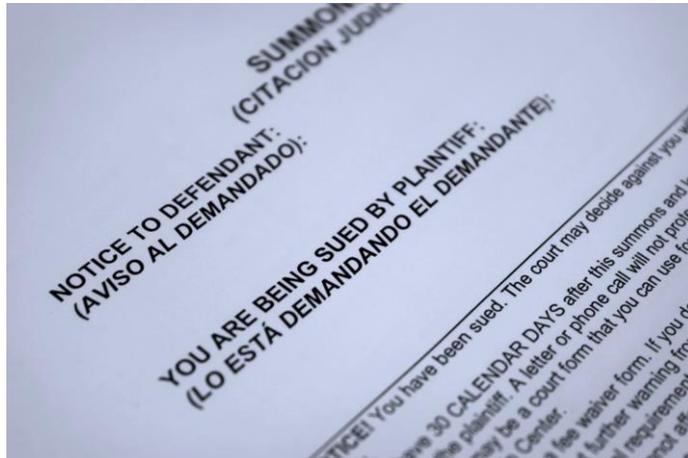
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## *City of Tahlequah* – Impact

- Like *Rivas-Villegas*, clear statement reaffirming clearly established law prong of qualified immunity.
- Very helpful in use of force cases, again emphasizing the fact specific nature of such claims, and need for factually analogous case law to overcome qualified immunity.

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*Thompson v. Clark,*  
 \_\_\_ U.S. \_\_\_, 2022 WL 994329 (2022)



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### *Thompson*– Facts

- Plaintiff accused of child abuse by unstable relative.
- Does not cooperate with officers.
- Examination of child discloses no signs of abuse, but plaintiff arrested, charged with obstruction and detained in custody for two days.
- Charges dropped with no statement by either a prosecutor or judge as to why.

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## *Thompson*– Second Circuit

- Suit for malicious prosecution under the Fourth Amendment dismissed by district court: Second Circuit requires plaintiff to show favorable termination indicating charges were dropped because he was innocent, and no such indication here.
- The Second Circuit affirmed.

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## *Thompson*– Supreme Court

- Reverses, 6-3.
- Agrees with consensus of lower courts that Fourth Amendment encompasses malicious prosecution claim.
- Elements of malicious prosecution as they existed in 1871 when section 1983 was enacted, only required absence of conviction for favorable termination.
- Plaintiff's claim can proceed.

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## *Thompson*– Impact

- Extremely significant case: First time Court has expressly recognized, and articulated a constitutional claim for malicious prosecution.
- No major impact in Circuits that had already recognized such claims.
- As dissent notes, lack of analysis creates confusion.
- Fourth Amendment requires a “seizure.” Is filing a criminal complaint, without an arrest, the equivalent of a seizure?
- Malicious prosecution requires malice, but subjective intent irrelevant to Fourth Amendment seizures.
- Does a constitutional malicious prosecution claim eliminate malice requirement, or is subjective motivation now part of some Fourth Amendment claims?
- *Thompson* will spawn additional litigation to resolve these questions.

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## *Estate of Aguirre v. County of Riverside*, 29 F.4th 624 (9th Cir. 2022)



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## *Estate of Aguirre* – Facts

- Officer receives report of man destroying property with a baseball bat-like object.
- On scene, sees suspect holding baseball bat size stick.
- Suspect refuses to drop stick, pepper spray useless, so officer draws weapon.
- Fearing attack, officer fires from 15 feet away.
- District court denies officer's motion for summary judgment: Factual dispute whether suspect posed a threat.

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## *Estate of Aguirre* – Ninth Circuit

- Affirms.
- Witnesses disagree on whether suspect was swinging stick, or merely holding it.
- Two of six shots were in the back indicating suspect not attacking when shot.
- Constitutional violation "obvious," so no need to identify clearly established law addressing similar facts.
- But existing law did show use of force here could be improper.

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## *Estate of Aguirre* – Impact

- Appears correct result based on fact dispute.
- But holding that violation was “obvious,” is not consistent with Supreme Court case law, and especially unnecessary when court addresses clearly established law anyway.
- Likely to be cited by plaintiffs to get around qualified immunity clearly established law inquiry.

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## *Williamson v. City of National City*, 23 F.4th 1146 (9th Cir. 2022)



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## *Williamson* – Facts

- Protesters disrupt city council meeting and refuse to leave.
- Go limp when officers arrest and attempt to remove them.
- Plaintiff alleges excessive force from officer pulling on her arm.
- District court denies officer's motion for summary judgment based on qualified immunity.

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## *Williamson* – Ninth Circuit

- Reverses: Force reasonable as a matter of law.
- Officers used minimal amount of force necessary to remove plaintiff.
- Plaintiff did not suggest any less intrusive means officers could have used to remove her.
- Severity of injury not dispositive on whether level of force was reasonable.
- “There can be situations in which the risk of harm presented is objectively less significant than the actual harm that results. And if a person reacts more adversely to a use of force than would be expected objectively, that does not itself establish that ‘a reasonable officer on the scene’ failed to appreciate the risks presented and act accordingly.”

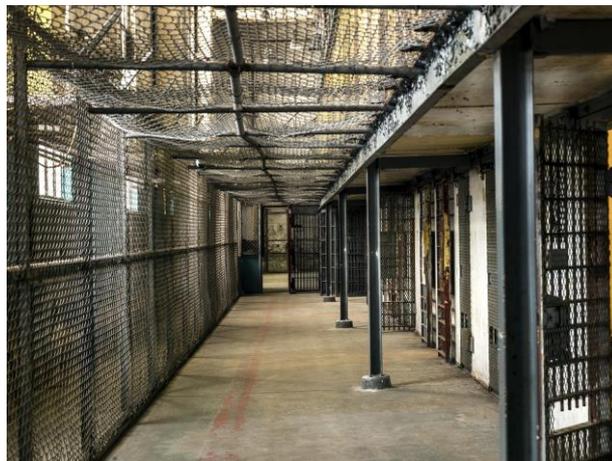
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## *Williamson* – Impact

- Very helpful case.
- Provides thorough analysis of case law on use of force against protestors.
- Clarifies that just because a plaintiff suffers a more severe reaction to the level of force than anticipated, that does not mean that the force is excessive.

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## *Hyde v. City of Wilcox*, 23 F.4th 863 (9th Cir. 2022)



26

## *Hyde* – Facts

- Man suffering from multiple mental health issues arrested for DUI.
- Behaves normally in jail for several hours, but then suddenly attempts to flee, resulting in scum with multiple officers.
- During struggle one officer applies Taser twice, and another delivers short body blows.
- Man is handcuffed and as he is being secured in a chair, officer again applies taser twice, and another officer grabs the man's head roughly.
- Man faints, dies several days later.
- Family sues for excessive force, failure to provide medical care.
- District court denies motion to dismiss based on qualified immunity.

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## *Hyde* – Ninth Circuit

- Affirms in part, reverses in part.
- Use of force before handcuffing was reasonable.
- Use of force while securing man in the chair, could be excessive.
- No specific allegations of failure to provide medical care.
- No specific facts alleged to support *Monell* claim

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## *Hyde* – Impact

- Useful guidance on application of force over the course of a lengthy incident.
- Underscores that once suspect no longer resisting, officers can no longer employ significant levels of force.
- Clarifies that conclusory allegations about lack of training are insufficient to support a *Monell* claim.
- Underscores drawback to litigating qualified immunity on motion to dismiss instead of summary judgment. Video of the incident not part of the record, and court had to accept allegations of the complaint.

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*K.J v. City of San Diego,*  
17 F.4th 1247 (9th Cir. 2021)



30

## *K.J.* – Facts

- Plaintiff's mother pulled over for expired registration, and taken into custody along with two passengers, all with warrants.
- Denies any drug use and no drugs are found, though street drug packaging found.
- While riding to station sometimes seems normal, other times excitable and loud.
- Arrives at station and is agitated, but then calmed and placed in backseat, where she is found unconscious several minutes later, and subsequently dies.
- Suit for failure to provide medical care dismissed on pleadings: Video incorporated in complaint shows officers acted properly.

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## *K.J.* – Ninth Circuit

- Affirms.
- District court properly exercised discretion to consider video.
- Officers asked suspect whether she had ingested drugs and she said no.
- No drugs in the car or on any passenger.
- Though suspect acted erratically, she was also calm at times.
- None of the officers could be said to have acted unreasonably in failing to immediately call paramedics prior to her passing out.

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## *K.J.* – Impact

- Very helpful case.
- Properly defines the limitations on a law enforcement officer's obligation to summon medical care for arrestees.
- Clarifies when a district court can consider video on a motion to dismiss, which may allow officers to raise qualified immunity at the pleading stage, instead of on summary judgment.

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## *Murchison v. County of Tehama,* 69 Cal.App.5th 867 (2021)



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## *Murchison* – Facts

- Plaintiff lived in rural area and had blocked a road on his property with a rope bearing a sign stating “private.”
- Police receive complaint about blocked road, along with indication that plaintiff had a firearm.
- Determining plaintiff was an ex felon, plainclothes officers approach the road in hopes of prompting him to brandish a weapon, but plaintiff calls 911.
- As officers leave, one sees a rifle in an out building, and runs to get it, prompting plaintiff to run towards it. Officer draws weapon and throws plaintiff to ground.
- Trial court grants summary judgment on qualified immunity.

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## *Murchison* – Court of Appeal

- Reverses.
- Valid unlawful entry claim: Officers entered property without a warrant, and no exigent circumstances.
- Valid excessive force claim: Even though officers could reasonably perceive that plaintiff might pose a threat, plaintiff’s actions were prompted by the officers own improper action in entering his property and failing to identify themselves as officers earlier.
- No qualified immunity: Basic principles concerning warrantless entries were well established and several courts have found officers liable for excessive force where confrontation caused by failure to identify themselves as law enforcement officers.

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## *Murchison* – Impact

- “Bad facts make bad law.”
- Resolution of unlawful entry issue appears correct.
- Analysis of the excessive force claim problematic, insofar as it suggests that tactical decisions by officers that prompt the use of force can be considered as part of the reasonable force analysis.
- Supreme Court has suggested that such an approach is improper, and federal appellate courts are divided on the question.
- Court’s analysis of clearly established law for purposes of the qualified immunity deals largely with generalities, an approach repeatedly repudiated by the Supreme Court.

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*Ochoa v. City of Mesa,*  
26 F.4th 1050 (9th Cir. 2022)



38

## *Ochoa* – Facts

- Officers fatally shoot suspect who was wielding two knives, threatening officers and acting erratically as they attempted to arrest him.
- Family brings due process claim, asserting excessive force.
- District court grants summary judgment to officers: Force was reasonable as a matter of law.

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## *Ochoa* – Ninth Circuit

- Affirms.
- Due process claim for injury to familial rights subject to higher standard than Fourth Amendment claim.
- Fourth Amendment claim only requires showing that officers' use of force was not reasonable.
- Due process claim by family members requires proof that the officers' conduct "shocks the conscience."
- Must show officers' actions are unrelated to any legitimate law enforcement purpose, and undertaken solely with the purpose to inflict harm.

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## *Ochoa* – Impact

- Excellent discussion of differences between Fourth Amendment claims and Fourteenth Amendment claims.
- Underscores that even if a decedent's estate has a viable Fourth Amendment claim based on unreasonable use of force, any Fourteenth Amendment claim by family members faces uphill battle because of tougher standard.

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## First Amendment RLUIPA

42

Houston Comm. College System v. Wilson,  
\_\_ U.S \_\_, 2022 WL 867307 (2022)



43

*Houston Comm. College System – Facts*

- Plaintiff accused the Board of wasting money and had filed several lawsuits challenging the Board's actions.
- Board passes resolution censuring the plaintiff, characterizing his conduct as "not only inappropriate, but reprehensible."
- Takes no other action to impair his service on the Board.

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## *Houston Comm. College System* – Fifth Circuit

- Plaintiff sues for First Amendment retaliation and district court dismisses the action.
- Fifth Circuit reverses: Censure of plaintiff was plainly in retaliation for his First Amendment activity.

45

## *Houston Comm. College System* Supreme Court

- Reversed, 9-0: No First Amendment violation for censure unaccompanied by material impact on performance of duties.
- “[E]lected bodies in this country have long exercised the power to censure their members,” and no reason to believe that the First Amendment was intended to change that practice.
- Adoption of resolution itself a communicative act, and plaintiff cannot use his right to free speech “as a weapon to silence other representatives seeking to do the same.”
- Because censure did not impair plaintiff’s ability to perform his duties, Court does “not mean to suggest that verbal reprimands or censures can never give rise to a First Amendment retaliation claim.”

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## *Houston Comm. College System – Impact*

- Provides guidance on the degree to which political bodies may censure members without running afoul of the First Amendment.
- Governing bodies must be careful to confine actions to a simple statement of censure.
- Avoid taking collateral action such as barring participation in sessions or voting, that may impair a member's ability to perform their duties.

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*Boquist v. Courtney*,  
\_\_\_ F.4th \_\_\_, 2022 WL 1180876 (9th Cir. 2022)



48

## *Boquist* – Facts

- 12 state Senators refuse to attend session and prevent quorum.
- Majority Senators threaten to have rogue Senators arrested and brought to the session.
- Senator Boquist responds: “If you send the state police to get me, Hell's coming to visit you personally,” and “Send bachelors and come heavily armed. I'm not going to be a political prisoner in the state of Oregon.”
- Senate majority issues rule requiring Boquist to give 12 hours notice before arriving at the capitol.
- Boquist sues for retaliation, and district court dismisses complaint.

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## *Boquist* – Ninth Circuit

- Reverses.
- Complaint alleges facts sufficient to support retaliation claim.
- Unlike *Houston Community College*, action here could be viewed as impairing plaintiff's ability to perform his duties.
- Triable issues on whether plaintiff posed a security threat justifying the notice requirement.

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## *Boquist* – Impact

- First Ninth Circuit interpretation of *Houston Community College*.
- Provides guidance on legislative retaliation claims.
- Underscores that any action beyond mere censor risks possible retaliation claim.

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## *City of Austin v. Reagan Nat. Advertising*, \_\_U.S.\_\_, 2022 WL 1177494 (2022)



52

## *City of Austin* – Facts

- Sign companies challenge City's refusal to allow conversion of off-site billboards to digital billboards.
- District court enters judgment for City: No First Amendment violation.
- Fifth Circuit reverses: Under *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) strict scrutiny applies because regulation cannot be content neutral if its application requires reading the sign.

53

## *City of Austin* – Supreme Court

- Reverses and remands, 6-3.
- Just because content of sign must be examined to apply regulation does not mean it is content based.
- Distinction between off-site and on-site signs not content based on its face.
- Court had long recognized municipalities may regulate off-site signs.
- Evidence of impermissible purpose underpinning facially content-neutral restriction can show the restriction is nevertheless content based.
- Intermediate scrutiny applies to content neutral restrictions: Must be narrowly tailored to serve significant governmental interest.

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## *City of Austin* – Impact

- Major win for municipalities.
- Clears up confusion caused by *Reed*, which spawned challenges to sign ordinances.
- Generally upholds regulation of off-site signs.
- Not a free pass: Court remanded for application of intermediate scrutiny, so must still show significant government interest.
- Be aware of subtle content based distinctions as in *Reed*, e.g., barring some directional signs but not others.

55

## *New Harvest Christian Fellowship v. City of Salinas.*, 29 F.4th 596 (9th Cir. 2022)



56

## *New Harvest* – Facts

- Church challenges zoning ordinance prohibiting “[c]lubs, lodges, places of religious assembly, and similar assembly uses” from operating on the “ground floor of buildings facing Main Street within the Downtown Core Area.”
- Violates RLUIPA by imposing a substantial burden on religious exercise, and treating churches less favorably than similar secular facilities, such as theatres.
- District court dismisses action on summary judgment.

57

## *New Harvest* – Ninth Circuit

- Affirms in part and reverses in part.
- Ordinance did not substantially burden exercise of religion because (1) church could hold services on the second floor; (2) church could use other sites within the City and (3) church knew of restriction when it purchased the building.
- Ordinance violates equal terms provision of RLUIPA, because other similar nonreligious assemblies, such as theatres, were permitted to operate in the restricted area.

58

## *New Harvest*– Impact

- Provides clear guidelines on defending RLUIPA claims based on substantial burden arguments.
- Reaffirms need to review any restriction on religious activity very carefully, to make certain that similar secular activities are treated in a like manner.
- Have good arguments as to why the secular activity is different.

59

## *Riley’s America Heritage Farms v. Elasser*, 29 F.4th 484 (9th Cir. 2022)



60

## *Riley's* – Facts

- School severs longtime relationship with filed trip vendor when parents complain about vendors online political postings.
- Vendor sues for First Amendment retaliation.
- District court grants summary judgment to individuals based on qualified immunity, and dismisses injunctive relief claim against school.

61

## *Riley's* – Ninth Circuit

- Affirms in part, reverses in part.
- Affirms as to individuals: Not clearly established that a school district could not cease patronizing a company providing historical reenactments and other events for students because the company's principal shareholder had posted controversial tweets that led to parental complaints.
- Reverses as to claim for injunctive relief: Issues of fact as to whether school's action was the result of retaliation for protected speech.

62

## *Riley's* – Impact

- Very strong case on qualified immunity.
- One of the Ninth Circuit's most stringent applications of the clearly established law prong of qualified immunity.
- Helpful for qualified immunity in most First Amendment retaliation cases based on public employee speech, where the line between protected and unprotected speech is not always easy to discern.

63

## Municipal Tort Liability

64

*Perez v. City and County of San Francisco,*  
75 Cal.App.5th 826 (2022)



65

## *Perez* – Facts

- Plaintiff's son shot and killed with a firearm that was stolen from an off duty police officer's personal vehicle.
- Weapon was not the officer's primary service weapon, but a personal secondary weapon that he would sometimes carry both on and off duty.
- Trial court grants summary judgment to municipality: No respondeat superior because not related to officer's duties.

66

## *Perez* – Court of Appeal

- Reverses.
- Employer aware of and encouraged use of personal secondary weapons.
- Employer had regulations specifying that weapons were never to be left unsecured in an unattended vehicle.
- Officer had carried the weapon on a training assignment.
- Because officers can carry even when off duty, police departments could reasonably foresee potential liability.
- Acknowledges tension with *Henriksen v. City of Rialto* (1993) 20 Cal.App.4th 1612.

67

## *Perez* – Impact

- Concerning, because broad statement of respondeat superior undermines distinction between on duty and off duty conduct.
- Expands potential liability for off duty conduct by officers.
- Police departments may have to more rigorously regulate off duty conduct by officers, which will likely lead to friction with unions or other associations representing law enforcement personnel.

68

*DePaul Industries v. Miller*,  
14 F.4th 1021 (9th Cir. 2021)



69

*DePaul Industries*– Facts

- Oregon law requires that in some circumstances municipalities must contract with qualified nonprofit agencies for individuals with disabilities, i.e., QRFs.
- Plaintiff QRF contracted with city to provide unarmed security guards; city decides it needs armed security personnel and does not renew contract.
- Plaintiff sues City Attorney, claiming due process violation based on vested right to contract.
- District court denies City's Attorney's motion for summary judgment.

70

## *DePaul Industries*– Ninth Circuit

- Reverses.
- City Attorney entitled to qualified immunity.
- No case had interpreted the QRF statute as creating a property right in public contracts.
- No clearly established law would have put City Attorney on notice of any potential due process claim.

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## *DePaul Industries*– Impact

- Reminder that qualified immunity applies to the actions of all public employees, not just police officers.
- Very helpful because the court rigorously applies the clearly established law prong of qualified immunity.
- Particularly useful where challenged conduct involves application or interpretation of a statute or regulation.

72

*Martinez v. City of Beverly Hills,*  
71 Cal.App.5th 508 (2021)



73

*Martinez* – Facts

- Plaintiff tripped and fell when walking in an alley, as a result of 1.75 inches deep divot in edge of drainage swale.
- Divot had been there at least two years.
- Plaintiff sues for dangerous condition.
- Trial court grants summary judgment based on city's lack of actual or constructive notice of defect.

74

## *Martinez* – Court of Appeal

- Affirms.
- No evidence of actual notice: No complaints about divot in six years preceding accident and no claims or lawsuits in preceding 15 years.
- Rejects plaintiff's contention that City was required to submit evidence from every City employee who had been in the alley attesting to ignorance of the divot.
- No constructive notice because minor defect not "obvious," given location in rarely traversed alley, as opposed to a sidewalk subject to regular inspection.
- Rejects opinion of plaintiff's expert that divot was sufficiently obvious to impart constructive notice: Improper legal conclusion.

75

## *Martinez* – Impact

- Clarifies standards for determining when a defective condition is so obvious as to give rise to constructive notice for purposes of dangerous condition liability.
- Clarifies that municipalities have a lesser duty to inspect alleys for potential hazards to pedestrians, but emphasizes duty to inspect and repair sidewalks.
- Helpful language on rejecting all too common expert testimony that is merely a legal conclusion.

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*Mubanda v. City of Santa Barbara,*  
74 Cal.App.5th 256 (2022)



77

*Mubanda* – Facts

- Plaintiff sues city, asserting her son had drowned after falling off a paddle board due to dangerous condition of harbor.
- City successfully moves for summary judgment: Paddle boarding is a hazardous recreation activity under immunity of Government Code section 831.7.

78

## *Mubanda* – Court of Appeal

- Affirms.
- Paddle boarding akin to boating, which is expressly listed as a hazardous recreational activity in section 831.7.
- No gross negligence: City had taken numerous actions to promote the safety of paddle boarding within the harbor.
- Expert testimony insufficient to create issue of fact: Merely inadmissible conclusion as to how the case should be decided.
- Exception for activities for which a fee is charged by public entity inapplicable: City only leased property to paddleboard rental company.

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## *Mubanda* – Impact

- Provides guidance on application of the hazardous recreational activity immunity and its exceptions.
- Discussion concerning inadmissibility of conclusory expert testimony extremely helpful.

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## THANK YOU !

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