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Governmental Liability

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Committee Leadership

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In This Issue

From the Chair

Opportunities Await

By David J. MacMain

In our upcoming edition of the *For The Defense* (*FTD*), I discuss how opportunities were afforded to me over my 22 years with the Governmental Liability Committee (GLC) and thanked the many people past and present who have been part of my journey. My opportunities came in the way of a client who invited me to attend a panel counsel meeting and the conference; senior attorneys from all over the country who invited me to join them at dinners at the program so I could learn more about DRI; and Committee leaders who invited me (and others) to get involved in the Committee and offered chances to participate in program planning, article writing, and whatever else was needed at the time over my 22 years. I was afforded opportunities because I was made to feel welcomed and my input needed, and I decided that the opportunities were worth pursuing.

Over the 22 years that I have been involved, the opportunities the Committee affords to its members have increased ten-fold. We offer so many more forms of publications—*FTD* articles, newsletters, a daily community page, podcasts, circuit liaisons, and a §1983 compendium. We have grown to the point that we need to break our Committee into three substantive law groups. We have affinity groups to make sure that we are intentional in hearing and involving all of our members' voices. We have an annual program that has more than doubled in size and offers numerous add-ons including a litigation skills program, community service, dinners and lunches for subcommittees, several panel counsel meetings, fun runs, and networking galore. We have a Steering Committee Fly-In Meeting in August that I opened up to the entire community last year and again extend an open invite. In short, there are numerous opportunities to get involved if you choose.

I recognize that the practice of law is a full-time job; add in family and friends, firm commitments, and the ever-present pressure to develop and retain clients, and it does not leave time for much else. So why get involved in DRI and our Committee? Because the opportunities afforded to develop your network, interact with our carrier members, meet with and learn from some excellent lawyers, and invest in your career are simply too important to be missed. And, I would add, that if you don't get involved and help share the load, the continued offerings of our Committee will slowly ebb and cease to exist.

How do you get involved?

- An easy and immediate way to get involved is to help plan our 2021 Seminar to be led by Program Chair Monte Williams and Vice-Chair Tia Combs. To those of who have not been involved in planning a prior program, it is a true collaborative effort by many people. We begin with one hour calls in mid-March—held weekly—where we brainstorm about topics that would be of interest and value to our members. We try to find a mix of differing substantive areas such as police, prison, school, land use, municipal tort; a balance of academic and practical topics; a diversity of speaker backgrounds and approaches; and an offering of CLE programming, networking, community service and panel counsel opportunities. The calls start out with a broad swath of suggestions, new ideas, discussion of what worked and what didn't at the prior seminar, what feedback—good and bad—we received from the prior program, and what we want the next seminar to look like. Over the course of several calls, we start to refine the program, and thereafter identify top-flight speakers on the topics that make the cut. It is an interesting process and great way to have your voice heard, meet new members, and begin to shape what you want this Committee to be. If you are interested in participating, or in just listening in on a call or two before jumping in, please e-mail Monte Williams (monte.williams@steptoe-johnson.com), Tia Combs (TCombs@fmglaw.com) or me (Dmacmain@macmainlaw.com) and we will send you the meeting schedule and call-in information.
- Attend our annual Steering Committee Fly-In to be held on August 18–19 in Chicago. At the Fly-In meeting, the Committee Leadership "flies-in" to DRI Headquarters in Chicago for a one day meeting at which we plan the next year and discuss the direction of the Committee. It is our most important meeting as we accomplish much

of the committee-business and also get some direction, new ideas and suggestions from DRI leadership. . . . . But it is not all business. We go out to dinner the night before and/or attend a Cubs game at Wrigley following the meeting. It is a great chance to get to know others on the Committee, and network with colleagues from all over the country. While the meeting is usually just for Committee Leadership, *I am again extending an open invitation to any Committee member who wants to attend!* Please join us, as it is an excellent opportunity for you to meet your leaders, and for us to identify future committee leaders. Email me or Committee Vice Chairs Jody Corbett (jody@berkelawfirm.com) or Chris Heigele (cheigele@batyotto.com) if you are interested and we will be sure to add you to the invite list when our plans are finalized.

- Join and participate in one of our many endeavors—substantive law groups, publications, affinity groups, community page, etc. Look on our webpage under Leadership and contact the person(s) in charge of the activity you are interested in and they will find you a spot, little or big.

We are an active and growing Committee with lots of things to offer our members and our clients who attend our conferences, read our publications, follow our community page, listen to our webinars and podcasts, and use our webpage to find lawyers proficient in §1983 defense to hire to defend their cases. There has never been a time in the history of this Committee when there were more opportunities afforded to members who are committed, dependable, and willing to give of their time and talents. The *opportunity* to get involved, develop yourself, expand your practice, build your network and be part of the amazing things we are doing is before you—will you pursue it?

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The Sun Was Shining on Governmental Liability San Diego!

By Paul V. Mullin

The Governmental Liability Committee held its annual seminar in San Diego, California, in January. The seminar was a success in many ways. First, the attendance at the event set a new record for this site. Second, there was sold out special expert skills workshop on day one of the seminar. Third, the presentations were well received by attendees as the conference rooms remained full and engaged throughout all the sessions. Finally the attendees raised over $2,000 for the local food bank in a philanthropic project. These successes combined still did not match the spirit of camaraderie that was present among the governmental lawyers, claims professionals, and practitioners in attendance at meetings and the social events.

Day one of the seminar marked the Governmental Liability Committee's first offering of a day long workshop dealing with experts in the area of civil rights. The workshop quickly sold out. The impressive part of this workshop was the fact that almost half of the attendees were employed by governmental offices. The presenters were seasoned civil rights attorneys along with some experts in the field. The group worked through the day on all aspects of the expert witness deposition using an actual case fact pattern that had been provided to the attendees in advance. It was impressive to see how engaged the speakers, experts, and attendees worked through the case study and the differing perspectives offered in the interactive program. The bar has been set very high if the Committee chooses to try another workshop in 2021!

The Seminar hosted panel counsel meetings also during day one of the seminar. The meetings offered the leading insurance carriers and claims professionals to meet in an informal setting and catch up both on a professional level and a personal level. The meetings are a great opportunity for carriers to showcase what is going on in their respective companies and also get feedback from the panels that serve with them. The meetings were well attended and from the sounds heard coming from the rooms they were well received. This aspect of the conference is perhaps the most valuable part as it provides claims professionals and

attorneys to meet in a business meeting and then adjourn to a social setting cocktail hour and many panel dinners which occurred at the end of day one. This Committee is very proud of the partnership it has with the claims industry and sets the standard for all of DRI for panel meetings!

The second day of the seminar marked the beginning of the CLE part of the seminar. While it is impossible to recognize all the people who worked and spoke at the seminar it was clear a lot of work and time was devoted to planning, preparing, and presenting the seminar over the CLE days. The attendance and participation of the attendees was impressive. The speakers were all excited with how engaged the attendees were with their questions during and after each presentation. The sponsorship of this seminar is at an all-time high thanks to Kevin Allen's efforts on the Committee.

The CLE presentations began with an impressive presentation on the U.S. Supreme Court by Thomas Dupree. Dupree, a highly acclaimed lawyer from Washington, D.C., highlighted the Supreme Court's docket with a special emphasis how it impacted the professionals in the room in their daily practices. There was an emphasis on FOURTH AMENDMENT cases that are on the docket and ones that may be granted cert in the near future. This presentation set the tone for the entire seminar by the speaker's enthusiasm for the Court, the law, and the attendees.

After Dupree warmed up the crowd they were then greeted by a whole different perspective by an engaging and colorful presentation by local plaintiff's lawyer Eugene Iredale. Iredale lamented the decline of the jury trial and addressed many of the contributing causes from the judiciary to the attorneys in civil cases. The presentation then shifted to an engaging discussion of what a plaintiff sees in his counterpart claims professionals and lawyers. It was a great discussion of handling cases from the plaintiff's perspective.

The Seminar returned to "normal" with an excellent presentation of topics from experienced lawyers on the topic "Trial Masters: Tips and Tricks From the Best of the Best." The crowd was provided real life experiences, and from the comments received, they hit on many issues that confront the governmental lawyer.

The afternoon was highlighted by an update on *Monell* liability by Professor Karen Blum and her perspectives on case law that dealt with "official policy cases" and "single incident cases." It was an impressive presentation that provided attendees with current trends across the country on *Monell*-related topics.

The final day of the seminar began with an engaging presentation on FIRST AMENDMENT cases by New York lawyer Steven Stern. Stern matched the colorful performance of Iredale the day before by addressing the insightful but entertaining world of FIRST AMENDMENT claims and how professionals should address these claims when confronted with them on the local level. The attendees were then treated to a cutting edge panel discussion of TITLE IX school liability issues in the framework of changes that have recently been made to the enforcement of these claims. The attendees once again left this topic with real practice tips to take home in this highly litigated area.

The last day was completed with two panels of professionals addressing first "Working with Your Claims Professional" and finally "Ethical Issues in The Tripartite Relationship." Once again, these panels provided attendees with real world practical advice in dealing with municipal claims.

So much work went into a seminar to hopefully capture what the governmental lawyer needs in an educational seminar. The 2020 seminar appears to have met its target as attendees upon leaving this seminar reported that each session provided them with useful tools to take back to their respective practices. One can only wait to see what the Committee has in store for 2021 in Nashville.

If you're interested in serving on the Seminar Committee for 2021, contact DRI. ,If you have suggestions for topics please contact DRI, also.

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Food Bank Frenzy at the Seminar!

By Natalia Isenberg

From January 30–31, 2020, DRI Civil Rights and Governmental Tort Liability attorneys descended onto San Diego for their annual seminar and generously donated $2,047 to the selected charity, the Jacobs and Cushman San Diego Food Bank. With one dollar resulting in five meals, DRI seminar attendees' contributions added up to 10,235 meals. Seminar attendees played the "Food Bank Frenzy" modeled after the NCAA March Madness Tournament. Thirty-two teams started in the first round of the bracket challenge. Seminar attendees donated on average $25 each to "play" in the tournament. Participants voted for their teams to advance in each round. Due to a strong LSU presence at the conference, the LSU Tigers quickly took a fierce lead over the competition and won the last round. Axon VR generously loaned a virtual reality headset permitting attendees who donated at least $25 to engage in a simulation of a law enforcement officer responding to an emergency call with a suicidal or schizophrenic person.

On Friday, January 31, 2020, Jim Floros, CEO of the Food Bank met with several DRI Civil Rights Governmental Tort Liability Steering and Planning Committee members. (Pictured from left to right: Committee Chair David MacMain, Committee Co-Vice Chair Jody Corbett, Program Chair Paul Mullins, San Diego Food Bank CEO Jim Floros, Philanthropic Committee Chair Natalia Isenberg, Committee Co-Vice Chair Chris Heigele, Program Vice Chair Monté Williams, Marketing Chair Kevin Allen.) Special appreciation is given to Steering and Planning Committee members, specifically, Paul Mullins, Monte Williams, David MacMain, Jody Corbett, Mary Erlingson, Natalia Isenberg, Laurie Miller, Tricia Ambrose, Martha Thompson, and Diane Pumphrey, for their pre-seminar and on-site support, as well as DRI staff Dominique Hartsfield and Alex Nowak, and volunteers Harry Norton, Jr., Terry Norton, Chris Balch, Lee Ledet, Cathy St. Pierre, and Tara Johnston.

Natalia K. Isenberg is a partner in the Raleigh, North Carolina, office of Teague Campbell Dennis & Gorham, LLP. She is the Philanthropic Activities Liaison for the DRI Governmental Liability Committee.

Diversity Update

Our Committee Wants, and Needs, to Expand Diversity Efforts

By Anthony L Schumann and Janelle Fulton


We are excited to report that on January 30, 2020, at the San Diego seminar, the Governmental Liability and Civil Rights Committee held its first-ever diversity event: the Diversity and Inclusion Networking Happy Hour, which was sponsored by Greines, Martin, Stein & Richland, LLC, and MacMain, Connell & Leinheiser. This well-attended reception was merely the first step in the Committee's plan to promote diversity and inclusion in our membership, our leadership, our activities, and our seminars. If you would like more information or want to be part of this important initiative, please contact Anthony Schumann (anthony.schumann@qpwblaw.com) or Janelle Fulton (jfulton@macmainlaw.com).

Anthony L. Schumann is a partner in Chicago and Chair of Quintairos, Prieto, Wood & Boyer, P.A.'s Governmental Enforcement & Corporate Internal Investigations Practice Group. He has extensive experience assisting companies with internal investigations and in handling compliance issues including MBE/WBE compliance. For over 30 years he has focused in commercial litigation, employment law, government liability, and white collar criminal defense. He represents corporate, governmental and individual clients in state and federal courts during all stages of investigation and litigation. Mr. Schumann serves as diversity liaison for the DRI Governmental Liability Committee.

Janelle E. Fulton is a partner at MacMain, Connell & Leinhauser, LLC in West Chester, Pennsylvania, where she represents both local governments and private employers in litigation and a general counsel capacity. She is vice-liaison between the Government Liability Committee and the Diversity and Inclusion Committee.

WITL Update

Women in the Law in San Diego

By Tricia Ambrose

On January 30, 2020, during the lunch break for the 2020 annual Governmental Liability and Civil Rights seminar, 35 female attorneys—and a few male attorneys—gathered for lunch at Buster's Beach House. This is an annual event at the seminar and provides an opportunity for women to network with other women in the field and share similar experiences. It also provides a great opportunity for first time female attendees to meet and get to know other women in the Committee. Everyone who attended enjoyed a nice lunch, great view of the San Diego Bay and conversation, catching up with old friends, and meeting new friends and contacts. We look forward to lunch next year in Nashville!

Tricia Ambrose is a partner of MacMain Connell & Leinhauser in West Chester, Pennsylvania, where she provides representation and counseling of public and private entities in a wide variety of areas including civil rights and tort matters, labor and employment issues, school law and general operational matters. She also serves as counsel to law enforcement agencies and local government in the review and preparation of policies and provision of training. Additionally, Ms. Ambrose provides counseling for public authorities, schools and small businesses in all manner of issues including employment advice, statutory and regulatory compliance, formation and dissolution, and education law issues.

A New Effort to Combat Violence in Schools

The Genesis of the Federal Commission on School Safety

By Lee Ledet

Following the Feb. 14. 2018 shooting at Marjory Stoneman Douglas High School in Parkland, Florida, in which 17 people died and 17 others were injured, the Trump Administration began an initiative to enhance school safety by creating the Federal Commission on School Safety (FCSS). Created by executive order, the FCSS is a governmental agency that provides information, guidance, best practices and tools to implement safety initiatives in schools in order to provide a secure learning environment. The FCSS outlined goals and recommendations for its final report that was released in December 2018. Before releasing the report, commission members met with survivors of mass shootings, students, teachers, school safety personnel, administrators, law enforcement, mental health experts, and many others. Additionally, they conducted field visits and held several public listening sessions. Members analyzed over 25 different issues, including social-emotional support, crisis planning and the concept of violence as portrayed in popular media. Wodiska, Joan, "Federal Commission on School Safety Timeline," *Federal Commission on School Safety Timeline*, 18 Dec. 2018.

Based on the commission's findings, the federal government launched the School Safety Clearinghouse website https://www.SchoolSafety.gov in February 2020. The website's goal is to serve as a resource for all topics related to school safety, including threat assessments, emergency planning and premises security. Discussing the website's launch, U.S. Secretary of Education Betsy DeVos stated, "All students deserve a safe learning environment, and the Federal School Safety Clearinghouse is an essential resource for information and best practices." Giaritelli, Anna, "One Stop Shop for School Safety: Trump Administration Reveals New Website for School Safety," *Washington Examiner,* Feb. 10, 2020. The website is just one of the ways the Department of Education is attempting to improve school safety and security. The website is expected to equip decision makers with resources for developing, customizing, and implementing actionable school safety plans.

The website is divided into three main categories: (1) Prevent, (2) Protect and Mitigate, and (3) Respond and Recover. The website's section on Prevention helps school employees identify factors that could lead to violence including mental health behaviors, bullying, cyberbullying, and other behaviors associated with violence on a school campus. In the event, a threat is suspected, reporting recommendations are outlined. Protect and mitigate topics provide guidelines for establishing successful plans for emergency situations and offer recommendations for the school premise's physical security. Respond and recover topics provide resources for training, exercises, and drills to prepare for emergency situations. A combination of videos, programs, and reports can be found on the website to assist administrators, teachers, and parents.

School safety has been a top concern across the nation as violence has become more prevalent. In 2019 alone there were approximately 130 incidents of gunfire on school grounds, which resulted in 32 deaths and 77 injuries. "Gunfire on School Grounds in the United States." https://everytownresearch.org/, Feb. 11, 2019. This is a substantial increase from the 51 incidents that EverytownResearch.org reported in 2013. The federal government's creation of a school safety website represents a significant departure from past practice. In prior years, the federal government has generally left the issue of school safety for local and state governments to address. However, nothing promulgated by the FCSS requires states, districts or schools to adopt any specific safety practices.

Historically, the primary source of law addressing school safety has been state statutes and regulations. This has resulted in different standards in different localities. Some states have passed laws placing responsibility on the school, law enforcement, school boards or a combination of these entities to create school safety plans. These laws often require the implementation of school safety drills, mandate the presence of school resource officers, and set forth when and if weapons are permitted on school grounds. Currently, statutes in 43 states require a school safety plan, with a majority of those states requiring law enforcement agencies to be involved in the creation of

the school safety plan. Heidi Macdonald, Zeke Perez, Jr., "50-State Comparison: K-12 School Safety," *Education Commission of the States*, 25 Feb. 2019.

Safety or security drills are required by statute or regulation in 42 states. *Id.* The type and frequency of the drill varies from state to state. Some states such as Alaska or Washington, require one safety drill per month. *See* Alaska Stat. Rev. §14.03.140 and Wash Rev. Code Ann. §28A.320.125. While others such as Tennessee and Louisiana only require one safety drill annually. *See* Tenn. Code Ann. §49-6-807and La. Rev. Stat. Ann. §17:416.16. A school resource officer is defined by statute in 29 states. Heidi Macdonald, Zeke Perez, Jr. "50-State Comparison: K-12 School Safety." *Education Commission of the States*, 25 Feb. 2019. Of those statutes, all but one requires traditional or resource-officer specific training. *Id.* Carrying weapons on school grounds is permitted by some states, but each state varies as to the person(s) authorized to carry a weapon. *Id.* School security personnel are explicitly permitted to carry weapons in 30 states by state statute or regulation. *Id.* Additionally, 24 states give individual school districts the discretion to determine whether to permit weapons on school property. *Id.* Alternatively, some states (Hawaii, Idaho, Kansas, Michigan, Missouri, Ohio and Rhode Island) have not passed legislation specifically requiring safety plans for schools. *Id.*

Most states have created or enhanced their school safety statutes in response to increased school violence in recent years.. After the devastating incident that occurred at the Sandy Hook Elementary School on December 12, 2012, when 20 children between the ages of six and seven years old as well as six adult staff members were killed, the parents of the murdered children brought suit against the town and board of education for failing to protect the students from harm. *See Lewis v. Town of Newtown,* 214 A.3d 405 (Conn. Ct. App. 2019). Summary judgment was entered in favor of the town and board of education dismissing the claims. The parents argued the defendants were under a legal and ministerial duty to create and implement school security guidelines and a plan, and their failure resulted in liability. The Appellate Court of Connecticut held that the adoption of school security guidelines by the town and school board was an act of discretion and therefore, the town and school board were protected by governmental immunity statutes for discretionary actions. Following this fatal event, the State of Connecticut mandated the creation of school security and safety plans by each board of education. *See* Conn. Gen. Stat. Ann. §10-222m.

While courts have previously ruled on the liability of various governmental agencies in connection with school safety based upon state statutes or the lack thereof, the creation of the federal clearinghouse website leaves uncertainty in future litigation. Although the website creates no specific law or policy, its strategies and recommendations are given to school officials for providing secure learning environments. Therefore, school safety is now impacted at both the state and federal level. Future courts will have the difficult task of assessing liability by interpreting state laws on school safety while simultaneously evaluating the conduct of governmental entities which have followed the guidance provided by the clearinghouse website. More information can be found about the new website at https://*www.Schoolsafety.gov*.

Lee J. Ledet is a partner at the law firm of Erlingson Banks, PLLC in Baton Rouge, Louisiana. Erlingson Banks is a litigation and business law firm that represents government agencies, law enforcement, corporations, insurers, limited partnerships, closely held companies, and non-profit organizations. Erlingson Banks offers general counsel, litigation, and transactional services for our clients throughout the State of Louisiana. Lee represents state agencies and political subdivisions, local government, and public and private educational institutions in litigated matters and as general counsel. Lee is a member of DRI.

Don't Get Schooled

How to Avoid "Familial Status" Discrimination in Local Zoning Actions

By Bryce C. Rhoades and Claire E. Parsons


Of all the police powers local governments enjoy, perhaps none is more intrinsically "local" than planning and zoning. It is through zoning plans and decisions that localities can determine the very shape and texture of their communities. Adding complexity to the local nature of these decisions, however, is the fact that the federal Fair Housing Act imposes the obligation on municipal governments to avoid discrimination in the process. Like other federal civil rights statutes, the FHA prohibits discrimination based on factors such as race, religion, or national origin, but it also adds a less obvious protected category: familial status.

Both opponents and proponents of new developments have attempted to use this provision to prevent local governments from considering the impact on schools in their zoning decisions, claiming that it is a proxy for discrimination on the basis of familial status. Because zoning decisions are inherently tied to a community's values, though, it is not hard to understand why local governments and citizens would want to consider how new developments may affect area schools. What happens when city councils, county commissions, or zoning boards consider the number of children or school overcrowding when reviewing new developments? To answer this question, this article will provide a brief overview of the FHA in its application to land use regulation and analyze cases where discrimination challenges have been lodged on the basis of "familial status."

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, provides that it is unlawful to "otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. §3604(a). Section 813 establishes a private right of action for aggrieved persons. 42 USC §3613(a). And standing under the FHA is "as broad as is permitted by Article III of the Constitution." *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109 (1979). While the FHA does not specify *who* must avoid these practices, every circuit to address the issue has concluded that the "otherwise make unavailable or deny" language of the FHA applies to municipalities. *See, e.g., United States v. City of Parma*, 661 F.2d 562, 572 (6th Cir. 1981); *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1183–84 (8th Cir. 1974); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970).

Most certainly, "the FHA does not pre-empt or abolish a municipality's power to regulate land use and pass zoning laws." *Jeffrey O. v. City of Boca Raton*, 511 F.Supp.2d 1339, 1349 (S.D. Fla. 2007). Yet, its anti-discrimination provision invalidates any law or ordinance "that purports to require or permit any action that would be a discriminatory housing practice under" the Act. 42 U.S.C. §3615. Though few zoning actions and regulations are passed in circumstances suggesting an obvious intent to discriminate against a protected class, this does not mean local governments can ignore the FHA. A plaintiff can establish a violation of the FHA by showing either that the defendants were motivated by an intent to discriminate (*i.e.*, disparate treatment) or that the defendant's otherwise neutral action has an unnecessarily discriminatory effect (*i.e.*, disparate impact). *Larkin v. Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996). For these reasons, local governments should be mindful of the FHA's restrictions as they regulate land use.

In disparate treatment cases, courts apply the burden-shifting framework established by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Mhany Mgmt. v. Inc. Vill. of Garden City & Garden City Bd. of Trs.*, 985 F. Supp. 2d 390, 413-14 (E.D.N.Y. 2013). Under this framework, the plaintiff must first establish a prima facie case of discrimination. *Id.* This can be shown through the impact of the action; the historical background of the decision, including the exact sequence of events; departures from the normal procedure; and the historical or administrative history. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977). "Once a plaintiff presents a *prima facie* case of discrimination based on the *Vill. of Arlington Heights* factors, the burden shifts to the defendant to proffer a legitimate, non-discriminatory reason for its actions." *Mhany Mgmt*, 985 F. Supp. 2d at 414 (citing *Reg'l Econ. Cmty. Action Program v. City of Middletown*, 294 F.3d 35 at 49 (2d Cir. 2002)).

For claims of disparate impact, federal circuits generally use one of two approaches: a four-factor balancing test

established by the Seventh Circuit, *Metropolitan Housing Development Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), or the *McDonnell Douglas* burden-shifting analysis applied by the Second Circuit. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935-36 (2nd Cir. 1988).

Given these considerations, a local government must be mindful to avoid discriminatory intent when considering zone changes and approval of developments. A decision that denies or makes housing unavailable to a group based on familial status would be unlawful under the FHA. Though the matter has not been definitively settled, case law suggests that school overcrowding can be a valid consideration under the FHA, if the local government is mindful to avoid discriminatory intent.

In *Hallmark Developers v. Fulton County*, No. 1:02-cv-01862-ODE, 2004 U.S. Dist. LEXIS 30616 (N.D. Ga. Sep. 27, 2004), a developer sough to rezone a property "for the purpose of constructing a large scale development consisting of apartments, town homes, single family homes, and office/retail space." The developer's application was ultimately denied, and the developer argued that the county had been influenced by community groups who "objected to the project because it would attract blacks, as well as families with children who might over crowd the school system." The court ultimately rejected these arguments, finding that commissioners were not influenced by these groups, and noting that it is not illegal to object to a low-income development under the FHA *when there are legitimate, non-discriminatory reasons under the FHA*. The court stated that this can include school overcrowding.

Similarly, in *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 970 F. Supp. 1289 (N.D. Ohio 1997), a non-profit corporation sought to construct low-income housing. The corporation had previously developed at least four low-income housing projects in Ohio. The site plan was submitted to the planning commission and approved. The city council then passed an ordinance approving the planning commission's decision. However, pursuant to Ohio law and the city charter, residents of the city submitted a petition requiring the ordinance to be submitted to referendum. As a result of the petition, the ordinance approving the site plan did not go into effect, and the city denied the developer a building permit. There was some evidence in the record suggesting that citizens, when organizing their petition effort, made derogatory remarks about children and African-Americans.

The court held that "a review of the evidence reveals a . . . question of fact concerning the role of anti-family bias in the denial of Plaintiffs' site plan and requests for building permits. This alone is sufficient reason to deny Defendants' motion for summary judgment on Plaintiffs' fair housing claim." *Id.* at 1319. This case eventually reached the U.S. Supreme Court, but the plaintiffs had abandoned their FHA claim by that time. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003).

However, the court, in discussing the citizens' possible discriminatory intent, acknowledged in a footnote that the citizens likely also had non-discriminatory reasons for supporting the referendum. "Other possible rationales for the citizens' petition (and subsequent referendum) include, for example, concern about the effect of low-income housing on property values of surrounding properties, *or worries over increased demand on public services or schools*." *Id.* at 1318 n.32 (emphasis added).

Further, in *Fair Housing Advocates Association v. City of Richmond Heights*, 209 F.3d 626 (6th Cir. 2000), the Sixth Circuit considered an FHA familial status challenge to the ordinances of several cities requiring minimum square footage based on the number of occupants. While the ordinances were upheld on other grounds, at least one city considered school overcrowding when it passed the ordinances. *Id.* at 629.

And in *United States v. City of Black Jack*, 508 F.2d 1179, 1187 (8th Cir. 1974), the Eighth Circuit invalidated a zoning ordinance that had a racially discriminatory effect. In so doing, however, the court noted, "The asserted community interest in preventing overcrowding of the schools also was not furthered by the ordinance." *Id.* at 1187. This suggests that school overcrowding indeed can be a valid consideration under the FHA.

Finally, in *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988), the Ninth Circuit held that the refusal to approve housing developments was racially discriminatory under the FHA. Again, the court noted that the city "attempts to justify its denial of the Kornblum project's application on the grounds of preventing school overcrowding. However, [the city] approved at least one other development in the area even though such development concededly would have an impact on the schools." *Id.* at 484. *See also Mhany Mgmt.*, 819 F.3d 581, 614 (2d Cir. 2016) ("Finally, citizen concerns regarding school overcrowding do not cast doubt on the district court's mixed—motive analysis.").

The ultimate conclusion from these cases is that municipalities may consider the effect of school overcrowding under the Fair Housing Act as long as school overcrowding is a legitimate community concern. On the other hand, local

governments must ensure that school-crowding concerns do not become a stand-in for general animus toward families with children. Furthermore, courts are more likely to be skeptical when local governments consider the impact of school crowding where evidence exists of other discrimination, including on the basis of race. In short, the local interest in regulating land use via zoning decisions and the local interest in ensuring high-quality schools are not destined to clash due to the FHA's prohibitions against discrimination on the basis of familial status. As long as the concern about schools is genuine, based on evidence, and other indicators of discriminatory intent are absent, local governments are permitted to consider the impact on schools in land use decisions without violating the FHA.

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How Correctional Institutions Can Take Full Advantage of the PLRA's Exhaustion Requirement

By Justin M. Schaefer and Christopher N. Jacovitch


In 1996 Congress passed the Prison Litigation Reform Act ("PLRA"). Senator Bob Dole, one of the bill's sponsors, stated that the PLRA was designed to address the "alarming explosion" in lawsuits filed by inmates since the 1970s, which "tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population." Among other things, the Act requires that inmates exhaust administrative remedies through a grievance process before filing suit in federal court. Failure to file a grievance or adhere to an correctional facility's grievance process typically results in dismissal of an inmate's case.

The PLRA's exhaustion requirement is a powerful tool when defending suits brought by inmates regarding their conditions of confinement. Nevertheless, correctional institutions often do not fully utilize the PLRA's exhaustion requirement. This article provides an overview of the exhaustion requirement, identifies legal issues that routinely arise when inmates follow grievance procedures, and recommends a framework for an effective grievance system that can help protect against inmate litigation.

PLRA's Exhaustion Requirement

The PLRA's exhaustion requirement, found at 42 U.S.C. §1997e, states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Two issues that are frequently litigated related to the exhaustion requirement are: (1) the level of inmate compliance necessary to exhaust a claim, and (2) the availability of the administrative remedy.

Compliance

In *Woodford v. Ngo*, the Supreme Court held that an inmate must strictly adhere to the grievance procedure established by an institution to successfully exhaust administrative remedies. The Court stated that "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." 548 U.S. 81, 90–91 (2006).

In *Booth v. Churner*, the Supreme Court held not only that exhaustion was mandatory, but it must be pursued by an inmate "even where the relief sought . . . cannot be granted by the administrative process." 532 U.S. 731, 734 (2001). For example, in the context of monetary damages, an inmate must use the grievance process, even if monetary damages are not a possible remedy under the correctional institution's grievance procedure. So long as the grievance process exists and is available to the inmate, it must be used regardless of what the inmate is seeking.

In line with these precedents, courts typically take a strict compliance approach to exhaustion, requiring inmates to precisely adhere to the grievance procedures adopted by an institution before allowing a lawsuit to proceed. Naturally, questions arise over how strict or onerous the process may be, but courts usually address those through the lens of availability.

Availability

In *Booth*, the Supreme Court found that a remedy is available if it is "capable of use for the accomplishment of a purpose." 532 U.S. at 737. Because an inmate need only exhaust available remedies, courts will excuse a failure to exhaust in a system that cannot be used. The Supreme Court has described the availability requirement as a "built-in exception to the exhaustion requirement." *Ross v. Blake*, 136 S. Ct. 1850, 1855 (2016).

In *Ross*, the Supreme Court highlighted several circumstances where administrative remedies would be unavailable, including when the procedure is "a simple dead end—with officers unwilling to provide any relief to aggrieved inmates," when the system is "so opaque that it becomes . . . incapable of use," and when "administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." 136 S. Ct. at 1859–60.

The takeaway here is that a grievance system should be useful and capable of producing results for inmates—even if the inmate cannot ultimately obtain the relief they seek—while also being simple enough for inmates to use and understand. Moreover, officials should not prevent inmates from pursuing meritorious claims, especially through nefarious means.

Crafting an Acceptable Grievance Process

Because a grievance procedure can dispose of an inmate's claim before a lawsuit is even filed, prisons and jails must craft policies and procedures that give inmates a practical opportunity to grieve, while also preserving an institution's ability to resolve disputes internally to avoid litigation.

Know Your Laws — When crafting such policies and procedures, decisionmakers should initially research their state and local laws. Some states have administrative regulations enumerating specific items a grievance system must contain—although typically these apply only to state correctional facilities.

Create Precise Grievance Policies — Grievance policies should be detailed, but concise. As noted above, a grievance may be deemed unavailable if it is overly complicated or contains procedural pitfalls. A simple process is much more likely to be considered "available" by a court.

Adequately Inform Inmates of the Grievance Process — Although some federal courts have concluded that an inmate's failure to exhaust cannot be excused even where the inmate did not know of the institution's grievance process, *see Brock v. Kenton County, KY*, 93 Fed. Appx. 793 (6th Cir. 2004); *Yousef v. Reno*, 254 F.3d 1214, 1221 (10th Cir. 2001); other circuits have held that such remedies are unavailable if inmates are never told about them, *see, e.g., Hernandez v. Dart*, 814 F.3d 836, 842 (7th Cir. 2016) ("But 'unavailability' extends beyond "affirmative misconduct" to omissions by prison personnel, particularly failing to inform the prisoner of the grievance process."). Even in those circuits where lack of notice does not excuse a failure to exhaust, it is unlikely that an inmate will be required to strictly follow a policy that he or she has not been informed of. Thus, it is important for inmates to have notice of the procedural requirements of the grievance system if the institution intends for it to be used. This notice should be provided upon booking and in written form, usually in an inmate handbook which simply lays out the process for filing a grievance. To avoid issues regarding whether inmates have actual notice of a policy, inmate signatures should be obtained to confirm that they have read the materials and understand the grievance process. Some of these issues may be avoided entirely by using computer kiosk systems, as discussed below.

Designate an Official to Receive Complaints and Provide an Appeal Process — Grievance systems can be streamlined by designating one official, typically of a high rank, to review complaints, and another higher ranking official to handle any appeals. This two-level system ensures that grievances do not fall through the cracks while also promoting efficient resolution of claims by allowing different parties to conduct reviews of grievances and offer potential remedies.

Place Time Limits on when a Grievance and Appeal may be Filed — Inmate issues can be difficult to investigate. Grievances filed long after incidents occur result in diminished opportunities for correction. Accordingly, an administrative limitations period should be placed on the filing of any grievance. A recommended policy should require inmates to file grievances within one week of an occurrence. The policy should also require the official responsible for reviewing grievances to respond within

a week as well. Inmates who are not satisfied with the response they receive should then have a week to file an appeal and the official in charge of appeals should have a week to decide the appeal.

Because failure to exhaust results in a dismissal *without prejudice*, an institution's failure to place any time limits on complaints provides inmates the opportunity to file appropriate grievances after dismissal of their court cases. But a system with time limits can result in an inmate's claim being indefinitely exhausted, meaning that a second lawsuit based on the same underlying claim would still be dismissed based on the inmate's failure to exhaust. *See Dole v. Chandler,* 438 F.3d 804 (7th Cir. 2006).

Make Sure that the Systems Are Being Implemented Effectively — Oversight of a grievance system should be a high priority for any institution. Processes that never provide relief to inmates or that do not result in speedy adjudication of inmate grievances may be found to be unavailable. Proper record keeping can ensure that adequate oversight occurs; all grievances, responses, and appeals should be signed and dated to evidence that officials are adhering to established procedures.

Computer Kiosk Systems — In recent years, many facilities have begun to use computer kiosk systems in the grievance process. This approach has numerous benefits. For one, it reduces the need for physical contact between inmates and officers, which promotes safety. It also allows for easier record keeping, with timestamped grievances and responses stored electronically. Furthermore, it provides an opportunity to ensure that inmates are fully aware of the grievance process; most kiosks require that inmates review (or re-review) an institution's grievance procedures before a grievance may be filed electronically.

Kiosk systems are not without drawbacks, however. They can lead to increases in the number of grievances filed by inmates who can easily type out even minor complaints at any time. This would, of course, lead to more time spent reviewing grievances. Additionally, technical problems with a kiosk may make the grievance process unavailable to inmates; therefore, a backup paper system should be available if this occurs.

Conclusion

This article provides only a brief overview of the myriad issues that may arise related to the PLRA's exhaustion requirement. To take full advantage of the PLRA, institutions should make their grievance policies easy to understand and capable of being applied consistently and effectively.

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Recent Cases of Interest

Second Circuit

***Vugo, Inc. v. City of New York*, 931 F.3d 42 (2d Cir. 2019)**

In this First Amendment case, the Second Circuit Court of Appeals reversed the Southern District of New York's decision denying defendant City of New York's summary judgment motion. The Second Circuit held that the City did not violate plaintiff's First Amendment rights by banning video advertisements in for-hire vehicles while making an exception for taxicabs.

Plaintiff challenged the City's rule that bans advertisements in for-hire vehicles absent authorization from the City's Taxi and Limousine Commission ("TLC"). The ban was originally enacted because passengers find in-ride advertisements annoying. However, in 2005, the TLC permitted a limited category of advertisements in taxis on screens, otherwise known as Taxi TVs, which it required taxis to install. The TLC required these Taxi TVs to be installed to allow taxicab riders to track the progress of their metered fare and pay by credit card. The TLC authorized advertising on Taxi TVs to offset the cost to the taxicab owners of installing the newly mandated equipment.

Plaintiff Vugo, Inc. ("Vugo") filed suit against the City challenging the rule banning advertisements in for-hire vehicles. Vugo wished to sell an advertising platform to certain for-hire vehicles such as Uber and Lyft. Vugo's primary argument was that the ban is impermissibly under-

inclusive under the First Amendment because the City's interest in enacting the ban bears no relationship to the City's justification for exempting Taxi TV advertising. Vugo requested that the court declare the rule unconstitutional and enjoin its enforcement. Both parties moved for summary judgment. The district court held that the ban was unconstitutional because (1) the City's justification for the Taxi TV exception (compensating taxicab owners for the cost of new equipment) bears no relationship to the City's asserted interest (protecting passengers from annoying advertisements), and (2) the ban was more extensive than necessary to advance the City's interest.

The Second Circuit reversed and granted summary judgment for the City because the ban did not violate plaintiff's First Amendment rights. The Second Circuit acknowledged that the parties agreed that the prohibition on advertising in for-hire vehicles is a content-based restriction on commercial speech and, as such, is subject to intermediate scrutiny. Under the intermediate scrutiny standard in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the inquiry is whether (1) the expression is protected by the First Amendment; (2) the asserted government interest is substantial; (3) the regulation directly advances the government interest asserted; and (4) the regulation is no more extensive than necessary to serve that interest. Prongs three and four are considered in tandem to determine if there is a sufficient fit between the regulator's ends and the means chosen to accomplish those ends.

First, the Second Circuit reasoned that the second prong was met because the City's asserted interest, to protect passengers from the annoying sight and sound of in-ride advertisements, is substantial.

Next, the Second Circuit reasoned that the third and fourth prongs were met because there was a sufficient fit between the City's ends and the means chosen to accomplish those ends. Regarding prong three, Vugo argued that the in-ride advertising ban fails this prong because the exception for advertising on Taxi TVs renders the ban unconstitutionally underinclusive. However, the Second Circuit determined that the ban was not underinclusive and that there was a sufficient nexus between the ban and its exception for taxis because both advance the City's interest in improving the overall passenger experience. While the advertisement ban improved the overall passenger experience, so too did the Taxi TVs, which allowed passengers to pay by credit card. Also, under the third prong, the Second Circuit reasoned that the ban would be constitutional even if there were not such a relationship because the exception neither reflects discriminatory intent nor renders the ban ineffective at improving the in-ride experience for City residents and visitors. The Court noted that such a relationship is not an independent requirement under the First Amendment, but rather an analytical tool for assessing whether a regulation is part of a substantial effort to advance a valid state interest. Here, the Court acknowledged that although the "City's reason for excluding Taxi TV from its in-ride advertisement ban is not directly related to the City's interest in enacting the ban, the exclusion [was] nevertheless rational." It noted the Taxi TV exception reflects the City's reasonable decision that the costs of permitting advertisements in taxis were outweighed by the benefits of compensating taxi owners for the expense of installing new equipment. As such, it reasoned that there were no grounds for it to upset this policy judgment. Last, regarding prong four, the Second Circuit held that the City's ban is not substantially more restrictive than necessary to achieve the City's aims, and noted the City's regulation is reasonable.

Therefore, the Second Circuit concluded that the City's prohibition of advertisements in for-hire vehicles does not violate the First Amendment because the City's asserted interest is substantial, the prohibition directly advances that interest, and the prohibition is no more extensive than necessary to serve that interest.

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Fifth Circuit

***Ratliff v. Aransas Cty., Texas*, 948 F.3d 281 (5th Cir. 2020)**

An arrestee brought suit against two sheriff's deputies under 42 U.S.C. §1983, asserting claims for excessive use of force. The plaintiff was shot five times when he refused to drop his weapon during an armed confrontation with the deputies following a 911 call from plaintiff's fiancée. When the deputies arrived at the plaintiff's residence, they were told by his fiancée that plaintiff had been drinking "all day and all night." They also were told he had thrown her to the ground, punched her "everywhere," and choked her so hard that she thought she would die. When the deputies walked toward plaintiff on the front porch, he shouted "Get the f*** off my property" while holding a loaded, semi-automatic pistol. The deputies issued five orders to disarm to which the plaintiff responded, "shoot me . . . shoot me" and "hey, you're on my property." One of the deputies

fired nine shots and hit the plaintiff five times. The whole encounter lasted about twenty-five seconds. Based on these facts, the district court granted the deputies' motion for summary judgment asserting qualified immunity. The Fifth Circuit affirmed.

On appeal, plaintiff argued the district court erred by excluding testimony from his criminal trial that he did not point the gun at the deputies. He also argued that the deputies were not entitled to summary judgment because the direction he was pointing the gun was genuinely disputed. The Fifth Circuit disagreed with both arguments, going so far as ruling that "the direction of [plaintiff's] gun was immaterial to the district court's analysis . . . because 'other facts [had] establish[ed] that the suspect was a threat to the officer[s],' which would include the fact that [plaintiff] had been accused of a violent crime, the fact that [plaintiff] was drunk and confrontational, and the fact that [plaintiff] had ignored five orders to drop his weapon." In additional analysis, the Fifth Circuit reasoned that once plaintiff "ignored repeated warnings to drop his weapon, the deputies . . . had ample reason to fear for their safety." Therefore, the deputies' use of force was not unreasonable.

***Cutrer v. Tarrant Cty. Local Workforce Dev. Bd.*, 943 F.3d 265 (5th Cir. 2019), as revised (Nov. 25, 2019)**

A former employee filed suit against the Tarrant County Workforce Development Board, alleging discrimination and retaliation claims and violations of the Fair Credit Reporting Act. The county board filed a motion to dismiss asserting its "sovereign immunity," which the district court granted. On appeal, the Fifth Circuit reversed and remanded.

The Fifth Circuit rejected the county board's argument that "it's *basically* the State of Texas and hence enjoys state sovereign immunity." The court held that "[b]ecause Tarrant County, the City of Arlington, and the City of Fort Worth are not the State of Texas, they obviously cannot confer the State's sovereign immunity upon a board by interlocal agreement." In addition, the Fifth Circuit disagreed with the county board's argument that the sovereign immunity factors articulated in *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986), supported a determination that the county board was "an arm of the state." In its analysis, the Fifth Circuit paid particular attention to *Clark*'s money factor and gave the county board "multiple opportunities to carry its burden . . . to identify where [the county board] would get the money to pay an adverse judgment in this case." While the county board asserted it was "wholly dependent on public funding," it could not provide the Fifth Circuit with a single instance in the past where the State of Texas appropriated money to pay a judgment against a local board. Ultimately, the Fifth Circuit rejected the county board's *Clark* arguments and stated that "[a] local board cannot invoke the ancient and august protections reserved to the sovereign while steadfastly refusing to explain or identify how or why a money judgment would in fact affect the sovereign."

***Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258 (5th Cir. 2019)**

The mother of a high school cheerleader brought a 42 U.S.C. §1983 suit on behalf of her minor daughter, alleging the school and school officials violated the student's First Amendment rights after she was removed from the cheerleading team when her cheerleading coaches discovered a series of posts on her personal social media accounts containing profanity and sexual innuendo. The district court granted the school officials' motion to dismiss asserting qualified immunity. The Fifth Circuit affirmed because the student's free speech rights were not clearly established at the time she was dismissed from the cheerleading team.

After acknowledging the uncertain status of the circuit's precedent on school speech, the court went on to "synthesize" its precedent with the following guidance: "First, nothing in our precedent allows a school to discipline non-threatening off-campus speech simply because an administrator considers it 'offensive, harassing, or disruptive' . . . Second, it is 'indisputable' that non-threatening student expression is entitled to First Amendment protection, even though the extent of that protection may be 'diminished' if the speech is 'composed by a student on-campus, or purposefully brought onto a school campus' . . . And finally, as a general rule, speech that the speaker does not intend to reach the school community remains outside the reach of school officials. Because a school's authority to discipline student speech derives from the unique needs and goals of the school setting, a student must direct her speech towards the school community in order to trigger school-based discipline." While attempting to provide clear guidance, the Fifth Circuit also recognized that the "pervasive and omnipresent nature of the Internet raises difficult questions about what it means for a student using social media to direct her speech towards the school community."

***Defrates v. Podany*, 789 F. App'x 427 (5th Cir. 2019)**

An arrestee brought a 42 U.S.C. §1983 action against an off-duty police officer, alleging false arrest and excessive force claims arising from the plaintiff's arrest at an off-campus function for his son's school. In response, the officer filed a motion for summary judgment asserting qualified

immunity. The district court granted his motion. The Fifth Circuit affirmed, holding (1) the officer had arguable probable cause to arrest the plaintiff for criminal trespass and (2) the plaintiff failed to meet his burden of showing the use of force violated clearly established law.

In determining that the officer had probable cause for the plaintiff's arrest, the Fifth Circuit relied the record showing the off-duty officer knew the school had issued the plaintiff two criminal-trespass warnings because of his troublesome and threatening behavior. Plaintiff argued that the officer could not have probable cause because he did not personally observe school officials telling the plaintiff to leave the school function. The Fifth Circuit rejected this argument, stating the officer was entitled to rely on an oral assurance that the plaintiff had been asked to leave.

As part of its excessive force analysis, the Fifth Circuit reiterated that the court's "job is not to decide the best course of action" but instead "to determine whether [a plaintiff] has identified law clearly placing the unreasonableness of [an officer's] actions under the circumstances beyond debate." The panel went on to describe this burden as "an uphill battle for any plaintiff."

***Cook v. Hopkins*, 19-10217, --- F. App'x ----, 2019 WL 5866683 (5th Cir. 2019), *petition for cert. filed*, (U.S. No. 19-998) (Feb. 10, 2020)**

The family of a woman that tragically died as a result of domestic violence brought a 42 U.S.C. §1983 action against the city, police officers, and emergency dispatchers, alleging the defendants' response to a pair of 911 calls violated the victim's due process and equal protection rights under the Fourteenth Amendment. In asserting their due process claims, the plaintiffs argued that because the City "promised" the victim that they would increase police patrols in her neighborhood and arrest her abuser when she called 911, the City created a "special relationship" between the victim and itself.

The district court dismissed plaintiffs' due process claims. In affirming the district court's dismissal, the Fifth Circuit stated that "it would be contrary to our precedent and Supreme Court precedent to recognize a 'special relationship' here." Specifically, the Fifth Circuit reasoned that the plaintiffs did not allege that any of the defendants affirmatively acted to restrain the victim's personal liberty sufficiently to show that a "special relationship" existed. Critically, the Fifth Circuit rejected the plaintiffs' reliance on the state-created danger theory in support of their due process claims. While conceding that other circuits recognize the state-created danger theory, the Fifth Circuit not only reiterated that it does not recognize such a theory, but the court specifically declined to recognize the theory as part of this case.

***Cooper v. Flaig*, 779 F. App'x 269 (5th Cir. 2019) (per curiam)**

A pair of officers faced excessive use of force claims arising from the officers' use of their tasers to detain the subject of a 911 call. The subject died in custody, and an autopsy revealed that he died as a result of methamphetamine intoxication complicated by a prolonged struggle. The family for the deceased brought suit against the officers under 42 U.S.C. §1983. The district court denied the officers' assertion of qualified immunity and improperly reasoned that because of "unsettlement in the law . . . the court cannot find as a matter of law that the Officers' use of force was objectively reasonable in light of clearly established law."

The Fifth Circuit reversed and rendered. In its opinion, the Fifth Circuit ruled that the plaintiffs failed to satisfy their burden to show "the law was so clear, under circumstances reasonably analogous to those [the defendant officers] confronted, that no reasonable officer would have used the amount of force they used." Specifically, the court noted that the plaintiffs could not identify a "factually analogous case" that would establish the officers' use of their tasers was unreasonable. Moreover, the Fifth Circuit stated the existing precedent for taser deployment demonstrates that an officer's use of a taser is justified where two or more of the factors provided in *Graham v. Connor*, 490 U.S. 386 (1989), support the use of force. In this case, the court found that at least two of the *Graham* factors supported the officers' use of force; namely, (1) the officers' reasonable suspicion that the decedent had committed a crime such as burglary or trespass and (2) the reasonable belief that the decedent posed a threat to himself, his brother, and the officers.

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Seventh Circuit

***Barnes v. City of Centralia*, 943 F.3d 826 (7th Cir. 2019)**

The Seventh Circuit recently discussed the sometimes difficult issue of when a police officer is acting under color of law. Officer Peebles had been the "go to" officer when dealing with a local gang. *Id.* at 829. While Peebles was

arresting two of the gang's members for threatening a young witness to a shooting, the plaintiff drove past and yelled "bald motherf****" and "thirsty," *i.e.*, overzealous. *Id.* Another officer who witnessed the yelling, Sgt. James, believed the plaintiff was attempting to intimidate Officer Peebles into not arresting the suspects. The plaintiff was known to have connections to the gang, including allowing members to use her home as a safehouse. She later posted on Facebook that "This thirsty b**** Mike out here on the same on [sic] bulls***" and "But this b**** [**4] don't believe that what goes around come[s] around and when you got kids of your own." *Id.*

Officer Peebles was made aware of the posts and, believing the plaintiff was threatening his family, contacted a prosecutor. *Id.* at 830. Peebles was advised that he could file a report as a private citizen. He called Sgt. James and stated that he feared for his family and wanted to ensure nothing happened to them. James believed that the plaintiff had threatened Officer Peebles and decided to arrest her for intimidation of a public official. *Id.* The charges were later dropped by prosecutors.

The plaintiff sued for unreasonable seizure and malicious prosecution. Both officers testified that Officer Peebles had made his complaint against the plaintiff as a private citizen. His only role in the arrest and prosecution had been providing a voluntary statement and he was unaware that the plaintiff had been charged and was not contacted by prosecutors. The officers were granted summary judgment by the district court. *Id.*

Noting that "'Section 1983 does not cover disputes between private citizens, even if one happens to be an officer,'" the Seventh Circuit explained that Peebles was acting as a private citizen when he made his complaint. *Id.* at 831 (quoting *Plaats v. Barthelemy*, 641 F. App'x. 624, 627 (7th Cir. 2016)). Although he had encountered the plaintiff while on duty, he was not the investigating officer. Rather, his involvement was limited solely to that of a complaining witness. Sgt. James was the arresting officer and he testified that he acted wholly on his own discretion. Officer Peebles did not know Sgt. James would arrest the plaintiff and was not contacted by prosecutors after the arrest. Taken together, these facts showed Peebles acted as private citizen. *Id.* Moreover, when he made his complaint, Officer Peebles was not exercising the authority provided him by the state. *Id.*

***Martin v. Marinez*, 934 F.3d 594 (7th Cir. 2019)**

In this case, the plaintiff appealed a jury verdict of minimal damages after it was determined the defendant officers had lacked reasonable suspicion for his initial stop. 934 F.3d 594, 596 (7th Cir. 2019). The plaintiff was initially stopped by the defendant officers for inoperative tail and brake lights, although he claimed he had not committed any traffic violations. He told officers that his license had been taken due to a ticket and was asked to step out of the car. He was then handcuffed and placed in a patrol vehicle. Search of the plaintiff's car revealed a handgun with the serial numbers removed and crack cocaine. *Id.*

The plaintiff was taken to the police station, where officers discovered that he had a prior conviction for murder. He was taken to jail and charged with being a felon in possession of a firearm, possession of a firearm with a defaced serial number, and cocaine possession. He was also issued citations for the faulty taillight and failure to provide his driver's license. *Id.* The plaintiff spent over two months in jail. He filed a motion to suppress the evidence from the traffic stop, which was granted. The charges against him were then dropped. *Id.* at 596-97.

The plaintiff sued the arresting officers, alleging Fourth Amendment violations. *Id.* at 597. He requested damages including for the time he was incarcerated and lost business income from the same period. The defendants moved for partial summary judgment, arguing that they possessed probable cause to arrest the plaintiff once the gun and drugs were discovered in his car. The district court agreed, which limited the plaintiff's damages to the short period between the initial traffic stop and the discovery of the gun in his car. Thus, he could not recover for the period of his incarceration. The jury found in the plaintiff's favor on the unlawful stop claim and awarded him $1.00, but found against him on his false arrest and unreasonable search claims. *Id.*

The plaintiff appealed the grant of partial summary judgment limiting his available damages, arguing that he should have been allowed to recover for damages arising out of his subsequent incarceration as they were "fruit of the poisonous tree." *Id.* at 597-98. In essence, the plaintiff sought to recover for all damages that were proximately caused by a constitutional violation including his time in jail and consequential damages. *Id.* at 598. The Court of Appeals noted that the plaintiff's false arrest claim failed as the officers found an illegal firearm and cocaine in his car. *Id.* As the exclusionary rule does not apply in the civil context, the evidence found in the search was still a basis to find the officers had probable cause for the plaintiff's arrest. *Id.* at 599.

The plaintiff argued that he should be able to recover for his incarceration in spite of the fact that his false arrest

claim would fail as such damages were proximately caused by the initial unreasonable detention. *Id.* The Seventh Circuit rejected this proximate cause theory, holding that the failure of the plaintiff's false arrest and unreasonable search claims at trial limited his recovery to the period before the officers asked him to provide his driver's license. *Id.* at 605. Allowing him to recover for his incarceration, which followed an arrest supported by probable cause, would cause a discrepancy between the constitutional violation that the plaintiff experienced and the damages he could receive. The plaintiff's right to be free from being stopped without reasonable suspicion was violated and he received compensation by the jury's award of nominal damages. *Id.* Proximate cause was irrelevant to this question. Even if it was, "[a]ny number of superseding, intervening events could have broken the chain of causation, from the discovery of the contraband itself to the independent decision to deny bail, which was undoubtedly predicated in part on Martin's criminal history and other factors unrelated to the initial stop." *Id.*

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Eighth Circuit

***Minter v. Bartruff*, 939 F.3d 925 (8th Cir. 2019)**

The Eighth Circuit Court of Appeals reversed in part and remanded the dismissal of the plaintiff-inmates' federal claims against the DOC and prison officials under Rule 12(b)(6).

In this case, two inmates who were convicted of sexual abuse offenses alleged they were required to complete a six to eighteen month "Sex Offender Treatment Program" and that completion of this program would reduce their sentence by allowing them to accrue earned-time credits, thus shortening their date of discharge. However, the inmates alleged that they were unable to participate in the program due to its limited capacity. As such, they alleged exclusion from the program violated their procedural and substantive due process rights under the Fourteenth Amendment and their Eighth Amendment right to necessary psychological or psychiatric medical care. The district court granted the defendants' motion to dismiss with prejudice on two grounds—first, that the plaintiffs failed to exhaust their administrative remedies before bringing suit as required under §1983, and second, that the suit was *Heck*-barred because "success on their claims would necessarily imply the invalidity of their lost earned-time credits."

The Eighth Circuit Court of Appeals disagreed with the district court, finding that a state's post-conviction judicial remedies are not "administrative remedies" within the purview of those remedies which must be exhausted under 42 U.S.C. §1997e(a). Further, the court found that the defendants failed to meet their burden to support the affirmative defense of "failure to exhaust" by failing to identify what administrative remedies were available or what those remedies might be.

With regard to whether the claims were *Heck*-barred, the court noted that the exclusive federal remedy for the plaintiffs' Fourteenth Amendment claim for restoration of earned-time credits was a *habeus corpus* action. Thus, the district court properly determined that this claim was *Heck*-barred. However, the Eighth Amendment claim regarding unconstitutional denial of necessary medical care sought prospective relief. Because the district court did not consider whether this prospective relief could properly be brought under §1983, the case was remanded.

***Hamner v. Burls*, 937 F.3d 1171 (8th Cir. 2019)**

In this case, the plaintiff brought suit against prison officials alleging they violated his rights under the Fourteenth Amendment by subjecting him to atypical and significantly worse prison conditions without adequate procedural protections. He also claimed that prison officials retaliated against him for filing grievances. The district court screened the complaint under 28 U.S.C. §1915A, dismissing the due process claim with prejudice but allowing the retaliation claim to proceed. He then filed an amended complaint expanding on his due process argument, raising claims under the Eighth Amendment and arguing that officials were deliberately indifferent to his serious medical needs based on his gaps in receiving multiple prescriptions for various mental illnesses and that they imposed unconstitutional conditions of confinement. The district court eventually dismissed all counts for failure to state a claim upon which relief may be granted under Rule 12(b)(6).

The Eighth Circuit Court of Appeals first evaluated whether the prison officials were entitled to qualified immunity. Despite the plaintiff's attempt to argue that the officials had failed to allege the defense of qualified immunity in response to his initial complaint, the court found the procedural posture of the case had materially changed from the time of the first complaint to the amended complaint and that it was in the interest of practicality and judicial economy to address the issue. Thus, the court found it was appropriate to consider the qualified immunity question. The court found the plaintiff was unable to establish that the defendants violated his clearly established rights with regard

to the deliberate indifference claim because the defendants were not personally responsible for administering his medication and the "gaps" of which he complained were not enough to show a widespread failure of care.

Similarly, the court found that plaintiff's claim that officials were deliberately indifferent to the serious risk of harm arising from the conditions of his administrative segregation in light of his serious mental illness did not overcome qualified immunity. The plaintiff failed to cite to any case law to support his contention, leading the court to find that the circumstances were not such to put the constitutional question "beyond debate."

Finally, the court found the plaintiff failed to establish a violation of his Fourteenth Amendment rights because administrative segregation itself did not deprive a mentally ill prisoner of a liberty interest.

Thus, the court affirmed the district court's rulings.

***Martz v. Barnes*, 787 F. App'x 356 (8th Cir. 2019)**

In this case, the defendants (prison personnel) filed an interlocutory appeal of the district court's denial of their motion for summary judgment on the basis of qualified immunity. The Eighth Circuit Court of Appeals reversed the district court's ruling and remanded to the district court to enter judgment in favor of the defendants.

The plaintiff alleged that he was hit with pepper spray directed towards his cell mate. He alleged he was left overnight without a shower and without a change of clothes or medical attention, despite alerting prison officials he had been hit. The plaintiff filed suit alleging use of unconstitutional excessive force and deliberate indifference. The defendants filed a motion for summary judgment on the basis of qualified immunity, which the district court denied, finding that while the defendants did not use excessive force in the deployment of the pepper spray, they were not entitled to qualified immunity on the excessive-force and deliberate-indifference claims based on the denial of clean up and medical care after the pepper-spray incident.

The Eighth Circuit Court of Appeals disagreed, finding that the plaintiff did not meet his burden of establishing that the law was clearly established such that a reasonable officer would have understood his actions violated those rights. The court held that absent a prior use of unconstitutional force, it was not clearly established that defendants could be held liable for excessive force based on the failure to decontaminate or the denial of medical care alone. Thus, the defendants were entitled to qualified immunity on the delayed contamination claim.

Likewise, the court found the defendants were entitled to qualified immunity on the plaintiff's claim that they were deliberately indifferent by denying him a decontamination shower and medical care. Because the record indicated that these facilities were available, it was not clear that the defendants were deliberately indifferent. Therefore, the court reversed the denial of summary judgment on the excessive force and deliberate indifference claims and directed the district court to enter judgment in favor of the defendants on those claims.

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Ninth Circuit

***Nicholson v. City of Los Angeles*, 935 F.3d 685 (9th Cir. 2019)**

Court found that the five hour detention of plaintiffs, four teenagers, and the use of handcuffs during the detention, after one of them was shot holding a replica gun, violated their clearly established Fourth Amendment rights to be free from unlawful arrest and excessive force. Court also found Gutierrez played an integral role in the prolonged detention and handcuffing, but plaintiffs could not make out a Fourteenth Amendment claim against him as the right was not clearly established.

***Capp v. Cty. of San Diego*, 940 F.3d 1046 (9th Cir. 2019)**

Plaintiff alleged that social workers retaliated against him in violation of the First Amendment after he questioned abuse allegations against him and criticized the county. Plaintiff was placed on the Child Abuse Central Index and a social worker coerced his ex-wife to file an ex parte custody application. Other claims were made per the Fourth and Fourteenth Amendment and per *Monell*. Per a Rule 12 motion, the court held that plaintiff pled a viable First Amendment retaliation claim and denied qualified immunity to the social worker as there was potential evidence of retaliatory intent, but held plaintiff failed to plausibly allege Fourth and Fourteenth Amendment claims as well as a *Monell* claim.

***Martinez v. City of Clovis*, 943 F.3d 1260 (9th Cir. 2019)**

The Ninth Circuit affirmed the district court's grant of summary judgment in favor of police officers in an action brought by a victim of domestic abuse under 42 U.S.C. §1983 and state law. While the panel held that the officers' conduct violated plaintiff's constitutional right to due process by affirmatively increasing the known and obvious

danger plaintiff faced, the panel held that the officers were entitled to qualified immunity because it was not clear at the time that their conduct was unconstitutional. Case related to the state-created danger doctrine which applies when an officer reveals a domestic violence complaint made in confidence to an abuser while simultaneously making disparaging comments about the victim, and praising the abuser in the abuser's presence, in a manner that reasonably emboldens the abuser to continue abusing the victim with impunity.

***Tuuamalemalo v. Greene*, 946 F.3d 471 (9th Cir. 2019)**

The Ninth Circuit affirmed district court's denial of summary judgment on the Fourth Amendment claim per qualified immunity in an incident where an officer applied carotid hold (court referred to as a "choke hold") to plaintiff, rendering him unconscious, as court found plaintiff was a non-resisting person and was being restrained by five other officers on the ground. The court also precluded summary judgment for overlapping state law claims.

***Blight v. City of Manteca*, 944 F.3d 1061 (9th Cir. 2019)**

The Ninth Circuit affirmed district court's grant of summary judgment on Fourth Amendment allegations. The appellate court found: probable cause for the at-issue search warrant, that the search was reasonably executed, and that the search-related detention was reasonable in duration. By virtue of its ruling, the Court did not need to reach qualified immunity. In affirming the district court's grant of summary judgment, the Ninth Circuit rejected plaintiff's "judicial deception" arguments vis-à-vis the at-issue search warrant.

***Orn v. City of Tacoma*, 949 F.3d 1167 (9th Cir. 2020)**

Court denied qualified immunity for officer who shot and severely wounded plaintiff after a slow speed car pursuit as, viewing the evidence in the light most favorable to plaintiff, the officer did not have an objectively reasonable basis for believing plaintiff posed a threat of serious physical harm to any of the officers and this right was clearly established.

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Eleventh Circuit

***Toole v. City of Atlanta*, No. 19-11729, ___ F. App'x ___, 2019 WL 7183437 (11th Cir. Dec. 26, 2012)**

Plaintiff was involved in a protest march in downtown Atlanta following the grand jury decision not to indict the police officer involved in the Ferguson, Missouri shooting of Michael Moore. Plaintiff was arrested while in the act of filming police officers dispersing the protesters, with a dispute of fact as to whether plaintiff was standing in the street or on the sidewalk when arrested by an Atlanta police officer. Plaintiff was cited for disorderly conduct, which required that the suspect "impede the flow of vehicular or pedestrian traffic." The street had been closed to traffic due to the protests.

The district court denied qualified immunity, and an appeal was taken. The Eleventh Circuit reinforced that the operable standard for qualified immunity was not whether the officer had "probable cause," but the more relaxed standard of whether the officer had "arguable probable cause"—could a reasonable officer in the same circumstances and possessing the same knowledge have believed that probable cause existed to arrest plaintiff? If so, there is no constitutional violation.

Not only were there issues of fact concerning where plaintiff was standing, but the ordinance allowed an exception where an individual could show that "the predominant intent of such conduct was to exercise a constitutional right." The court held that the officer did not have actual probable cause, and that no reasonable officer, under the facts construed in a light most favorable to plaintiff, could have believed he had probable cause to make the arrest. Thus, summary judgment based on qualified immunity was inappropriate.

As to the First Amendment claim asserted by plaintiff based on the filming of police officers, the Eleventh Circuit reinforced the principle that individuals have a First Amendment right, subject to reasonable time, manner, and place restrictions, to photograph or videotape police conduct. The court held that under the disputed facts, the First Amendment claim survived summary judgment.

***Hines v. Jefferson*, No. 18-14211, ___ F. App'x ___, 2019 WL 6114433 (11th Cir. Nov. 18, 2019)**

Mother of high school student sued school resource officer for her actions in breaking up a fight between female students at a local high school. On the excessive force claim, the district court granted summary judgment based on qualified immunity. Plaintiff had been in a fistfight with

another student, and the officer had lifted plaintiff to escort her to a deputy's office, with plaintiff squirming, wiggling, and twisting the entire time to try to get away from the officer. The court found that it could not be said that the force used was "so grossly disproportionate to the situation" that every reasonable officer would conclude such actions were unlawful. Thus, qualified immunity was appropriate.

Plaintiff also brought a malicious prosecution claim, but the Eleventh Circuit agreed with the district court that there was arguable probable cause to arrest plaintiff for obstruction of an officer. Moreover, the officer had arguable probable cause to arrest plaintiff for disorderly conduct. Finally the court concluded that the use of force was not "corporal punishment," as there was no proof that the use of force was intended by the officer as discipline.

***Kondrat'yev v. City of Pensacola*, 949 F.3d 1319 (11th Cir. 2020)**

Relying on the recent Supreme Court decision in *American Legion v. American Humanist Association*, 139 S.Ct. 2067 (2019), the Eleventh Circuit reversed its earlier decision and allowed a 34-foot Latin cross (the "Bayview Cross") to remain in Bayview Park, where a cross was originally installed in 1941. The Eleventh Circuit scrutinized *American Legion* closely, determining those principles in which a majority of the Supreme Court's justices had concurred. One principle from *American Legion*, as interpreted by the Eleventh Circuit, was that history and tradition play important roles in Establishment Clause analysis.

Further, at least five justices agreed that an established religious display or monument was entitled to a formal presumption of constitutionality, though how and when such presumption arose and how and when such presumption could be rebutted were less clear. The governing considerations for the creation of such presumption are: 1) that identifying the original purpose of an established monument may be especially difficult; 2) that as time goes by, the purposes of an established monument often multiple; 3) the message conveyed by the monument may change over time; and 4) when the passage of time imbues a monument with familiarity and historical significance, removing it may no longer appear neutral toward religion, but hostile. The court found that under the *American Legion* analysis, allowing the cross to remain on city property did not cause an Establishment Clause violation.

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