Municipal Tort and Civil Rights Litigation Update

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MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

FOR

THE LEAGUE OF CALIFORNIA CITIES

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I. POLICE LIABILITY—EXCESSIVE FORCE, SEARCH AND SEIZURE, QUALIFIED IMMUNITY.

A. *County of Los Angeles v. Mendez,* ___ U.S. ___, 137 S. Ct. 1539 (2017).

- **Excessive force and liability for unlawful search.**

In *County of Los Angeles v. Mendez,* __ U.S. __, 137 S. Ct. 1539 (2017), the Supreme Court addressed the Ninth Circuit's long established "provocation rule." Under the "provocation rule," a police officer could be held liable for an otherwise reasonable use of force under *Graham v. Connor,* 490 U.S. 386 (1989) if the situation that spawned the use of force was the result of an independent, reckless violation of the Constitution by the police officer. *Mendez,* 137 S. Ct. at 1546. The rule was typically applied where police officers unlawfully entered premises in violation of the Fourth Amendment, and upon entry were confronted by an armed suspect, thus necessitating the use of force. Under the "provocation rule," even though the use of force might have been justified under *Graham,* nonetheless, the officers could be held liable because their earlier constitutional violation "provoked" the confrontation and subsequent use of force. *Id.*

In *Mendez,* officers received a tip from a confidential informant that an armed and dangerous individual for whom they had an arrest warrant was seen on a bicycle outside a residence. The officers went to the residence, asked for and were initially denied entrance by the owner, but eventually entered and searched the premises without finding the suspect. *Id*. at 1544. Other officers searched the grounds and came upon various outbuildings, including a one-room shack. *Id*. Unbeknownst to the officers, Mr. Mendez was sleeping on a futon with his wife, with a BB gun across his lap. *Id.* The officers entered without giving "knock notice." As a result, when the officers entered, Mr. Mendez thought it was the owner of the house and picked up the BB gun so he could stand up, which the officers perceived as a threat, thus causing them to shoot Mendez and his wife. *Id*. at 1544-45.

Following a bench trial, the district court found that the officers had reasonably perceived a threat to their safety and, therefore, the force employed was reasonable under *Graham*. *Id*. at 1545. However, the district court found that defendants could still be liable for excessive force under the "provocation rule" because the defendants' search of the shack independently violated the Fourth Amendment due to the absence of a warrant and the failure to give "knock notice." *Id*.

The Ninth Circuit affirmed, finding that although the officers were entitled to qualified immunity on the knock-and-announce claim, nonetheless, the warrantless entry of the shack violated clearly established law and under the "provocation rule" they could, therefore, be liable for excessive force. *Id*. at 1545-46.

In a unanimous opinion, the Supreme Court reversed, holding that the "provocation rule" improperly conflated two independent Fourth Amendment claims—an unreasonable seizure for purposes of excessive force, and unreasonable search. *Id*. at 1546-47. The court noted that the "provocation rule" "is an unwarranted and illogical expansion of *Graham*." *Id*. at 1548.

However, while the Court repudiated the "provocation rule" with its essentially automatic imposition of a liability on a defendant for a prior constitutional tort, nonetheless the Court expressly held that under some circumstances an earlier Fourth Amendment violation by a police officer could give rise to liability for injuries officers subsequently inflict as a result of the use of force in the course of a search. Thus, the Court observed that even "if the plaintiffs in this case cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused *by the warrantless entry*. The harm proximately caused by these two torts may overlap, but the two claims should not be confused." *Id*. at 1548 (emphasis in original).

Thus, although the Supreme Court eliminated the Ninth Circuit's "provocation rule," for the first time it has held that police officers might be held liable for injuries caused by the lawful use of force under *Graham*, so long as that use of force could be

said to be proximately caused by a prior Fourth Amendment violation. In *Mendez*, the Court remanded the matter to the Ninth Circuit for a clearer determination of precisely what Fourth Amendment violation proximately caused the officers' use of force. The Court observed that it was unclear from the Ninth Circuit's prior opinion whether it believed that the use of force was caused by the officers' violation of the "knock and announce" rule—for which the officers had been found qualifiedly immune—or whether the mere absence of the warrant itself could be said to have proximately caused the use of force and subsequent injury. *Id.* at 1548-49.

Although *Mendez* is in many respects a defense victory given its eradication of the "provocation rule," nonetheless, it expressly adopts a theory of liability that plaintiffs have been asserting for years—that an unlawful search may give rise to liability for a subsequent use of force. The debate in most cases will center on the issue of proximate cause, i.e., whether the particular Fourth Amendment violation is closely related to the subsequent use of force. In *Mendez*, much of the briefing concerned whether the mere absence of a warrant in and of itself could be said to have proximately caused the use of force, or whether it was merely a "but for" cause of the sort generally insufficient to support liability under basic tort principles. In some instances, the underlying Fourth Amendment violation will necessarily be closely related to the use of force, such as the knock notice violation for which the officers were found qualifiedly immune in *Mendez*. It is highly foreseeable that a surprise entrance by police officers might startle a homeowner who may be armed (especially given Supreme Court jurisprudence underscoring the right to carry a gun for self-protection in the home), thus prompting the use of force by police officers.

Similarly, one of the reasons police officers are required to seek a warrant is that judicial review assures that any search and entry is supported by probable cause. If officers fail to secure a warrant when appropriate and lack probable cause, a strong argument can be made by plaintiffs that the failure to secure a warrant resulted in the

subsequent use of force, because had officers sought judicial intervention, they would not have been allowed to enter in the first place. In contrast, purely technical defects in a warrant, such as failure to adequately describe what is to be seized, or the places to be searched, are probably not closely related to a subsequent use of force, as circumstances likely would have played out the same regardless of whether the warrant was technically defective.

Hopefully, the Ninth Circuit will clarify the causation standard in its decision in the *Mendez* case on remand.

B. *Lowry v. City of San Diego*, 858 F.3d 1248 (9th Cir. 2017).

- **Proper canine "Bite and Hold" policy does not result in excessive force.**

In *Lowry v. City of San Diego*, 858 F.3d 1248 (9th Cir. 2017), an en banc panel of the Ninth Circuit clarified that use of a canine in a "bite and hold" scenario did not constitute excessive force. In *Lowry*, the plaintiff was bitten on her lip after she had returned to her place of business shortly before 11:00 p.m. after an evening of drinking, and fell asleep on the couch. When she had entered the office she had triggered a burglar alarm to which police officers responded, accompanied by a police service dog. The officers inspected the building and found a door to a darkened office suite propped open. Unable to see inside, one of the police officers warned: "This is the San Diego Police Department! Come out now or I'm sending in a police dog! You may be bitten!" *Id*. at 1252. No one responded and the officers suspected that a burglary might be in progress and the perpetrator was still inside the suite. The officers repeated the warning and after receiving no response, one of the officers released the police dog from her leash and followed closely behind as they scanned each room. When they entered one room, the officer saw a figure—the plaintiff—lying down on a couch and the police dog leaped on the couch and bit her. The officer immediately pulled the dog off the plaintiff.

The plaintiff filed suit against the City of San Diego, asserting a claim under *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978), alleging that the City's policy of "bite and hold" constituted excessive force and violated the Fourth Amendment. *Id*. at 1253. The district court granted the City's motion for summary judgment, finding that the force used was reasonable. A divided three judge panel of the Ninth Circuit reversed the summary judgment and remanded. However, the Ninth Circuit granted rehearing en banc, reversed the panel decision and affirmed the grant of summary judgment to the City.

The en banc panel found that under the circumstances, the use of force was reasonable. The court concluded that the amount of force was relatively minor, as the police dog had only bitten the plaintiff once. The court contrasted that to several cases where the court had held that use of a canine could constitute excessive force where the animal bit a suspect severely and repeatedly. *See id*. at 1257 (citing *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005) (en banc); *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994)). The court noted that the presence of the officer closely behind the police dog was a significant factor in making certain that the dog did not inflict more serious injuries. *Id*.

The court also noted that the crime potentially confronting the officers was severe—a burglary at night in a commercial building. The officers could reasonably believe that someone engaging in such conduct at night posed a potential hazard, especially given the lack of response to the officer's commands. *Id*. at 1258.

The court also noted that the absence of a response indicated that whoever was there might be resisting the officer's authority, thus warranting use of force in order to ensure compliance with the officer's commands. *Id*. at 1258-59. Moreover and significantly, the officers repeatedly gave warnings of what was about to occur, and could therefore reasonably assume that the lack of response indicated that any suspect was going to resist arrest. *Id*. at 1258-59.

The Ninth Circuit also noted that while less intrusive means might have been used to examine the suite, that nonetheless, under the Fourth Amendment, the officers were not required to employ such tactics. *Id*. at 1259 ("In assessing alternatives, however, we must not forget that 'officers "are not required to use the least intrusive degree of force possible."'"). The court also found that use of the dog without a leash was reasonable because having an officer follow the animal on a short leash would expose the officer to potential danger. *Id*. at 1259-60.

Although highly factually specific, nonetheless *Lowry* provides strong guidance for those cities with police departments that employ a "bite and hold" policy for canines, as opposed to "find and bark." Based on *Lowry*, a "bite and hold" policy will likely withstand constitutional attack, so long as specific guidelines are in place. For example, use of the canine should be limited to those circumstances where, given the nature of the crime, officers face a potential threat of physical harm, for example, a burglary such as in *Lowry*, or when confronted with an armed suspect. In addition, an off-the-leash canine under a "bite and hold" policy should only be deployed after a warning is given and a reasonable time for response has elapsed. Moreover, an officer should follow closely, consistent with safety concerns, to assure that ultimate use of force by the canine is appropriate and terminated when necessary.

Although "bite and hold" policies have been under attack for several years, nonetheless *Lowry* provides strong support for such policies when implemented with appropriate guidelines.

C. *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017).

- **Fourth Amendment applies to administrative seizures of property and forecloses automatic 30-day impoundment of a vehicle driven by an unlicensed driver under Cal. Veh. Code § 14602.6(a)(1).**

In *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017), the plaintiff's car was impounded for 30 days pursuant to California Vehicle Code section 14602.6(a)(1). She had loaned her car to a driver with a suspended license who was stopped by the police, who then impounded the vehicle in accordance with the Vehicle Code provision which authorizes a 30-day impoundment of any car driven by an unlicensed driver, subject to a hearing within two business days. *Id.* at 1195-96.

Plaintiff sued the City, various police officers and the Chief of Police, arguing that the automatic 30-day impoundment violated the Fourth Amendment in that a seizure for that lengthy period could not be deemed reasonable. The District Court granted summary judgment to the defendants, finding that the 30-day impoundment period was a valid administrative penalty. The Ninth Circuit, however, reversed. The court noted that even if the initial seizure was justified by probable cause, that a detention can become unreasonable under the Fourth Amendment where the duration of the seizure is unreasonable. *Id*. at 1196-97. The court acknowledged that it was departing from the Seventh Circuit, which had found such impoundments valid under the Fourth Amendment. *Id.* at 1197 (citing *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003)). The court emphasized that Vehicle Code section 14602.6(a) ran afoul of the Fourth Amendment because of the mandatory 30-day impoundment period, noting that a seizure under Vehicle Code section 22651(p) would not necessarily run afoul of the Fourth Amendment because the latter provision did not have a mandatory impoundment period. *Id*. at 1197-98.

Brewster clearly has a direct impact on city policies with respect to seizing and impounding vehicles driven by unlicensed drivers or those driving on a suspended license. In order to avoid potential liability under *Brewster*, a city may well want to implement a policy whereby impounded vehicles are not held for a mandatory 30-day period, but made available to the owner on a shorter time frame. Alternatively, the hearing required under the statute could be expanded to make a particularized determination as to how long a specific vehicle should be held.

D. *Hernandez v. Mesa,* __ U.S. __, 137 S. Ct. 2003 (2017).

- **Qualified immunity must be determined based upon facts known to the officer at the time the incident occurred.**

In *Hernandez v. Mesa,* __ U.S. __, 137 S. Ct. 2003 (2017), a Border Patrol officer was sued for shooting a 15-year-old Mexican national across the U.S.-Mexican border. The boy's parents alleged that the shooting violated the Fourth Amendment and that they had a right to bring a direct action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The district court granted the Border Patrol officer's motion to dismiss, and after a panel of the Fifth Circuit affirmed in part and reversed in part, an en banc panel unanimously affirmed the district court's dismissal of the claim. The en banc panel found that plaintiffs could not assert a Fourth Amendment violation because the decedent was a Mexican citizen who had no significant voluntary connection to the United States, and that even assuming the existence of a possible Fifth Amendment claim, the officer was entitled to qualified immunity because there was no clearly established law concerning an excessive force claim arising from use of force by a United States official on United States soil, against a foreign national on foreign soil. *Id.* at 2006.

The Supreme Court reversed the Fifth Circuit en banc panel, declining to reach the Fourth Amendment issue and directing the circuit court to address the question of whether plaintiffs could state a *Bivens* action at all, given the Court's recent decision in

Ziglar v. Abbasi, ___ U.S. ___, 137 S. Ct. 1843 (2017) which had noted that such claims must be rigorously restricted. *Id.* at 2006-07. The Court reversed the Fifth Circuit's decision with respect to qualified immunity on the Fifth Amendment claim because it was premised on the notion that no clearly established law would have put the officer on notice that he could be potentially liable for using force across the border against a foreign national. However, the Court noted that, at the time the officer shot the youth, the officer was unaware that the boy was, in fact, an alien who had no significant voluntary connection to the United States. *Id.* at 2007. The Court found that qualified immunity was therefore inappropriate:

"The qualified immunity analysis thus is limited to 'the facts that were knowable to the defendant officers' at the time they engaged in the conduct in question. [Citation omitted.] Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant."

Id. at 2007.

Hernandez reaffirms the general principle that in evaluating a police officer's conduct, including entitlement to qualified immunity, the focus must be on the facts known or knowable to the officer at the time of the incident in question. After-acquired evidence is simply irrelevant to the qualified immunity issue.

E. *S.B. v. County of San Diego,* No. 15-56848, 2017 WL 1959984 (9th Cir. May 12, 2017).

- **Defendant police officer entitled to qualified immunity where plaintiff could not identify clearly established law in the form of appellate decisions addressing a directly analogous factual situation.**

In *S.B. v. County of San Diego*, No. 15-56848, 2017 WL 1959984 (9th Cir. May 12, 2017), the court applied an extremely stringent standard for determining clearly

established law for purposes of qualified immunity. In *S.B.*, the plaintiff's father (Brown) was shot by a police officer who perceived he was about to draw a knife and attack another officer. Relatives had been concerned about Brown's behavior all day and eventually went to a fire station to report that he was intoxicated, acting aggressively, and apparently suffering from bipolar disorder, among other complications. Officers eventually went to Brown's house, where they found him in his kitchen, with several knives on his person, although he did not have knives in his hands. Brown eventually complied with the officers' demands that he get on his knees, and while one officer was covering him with a Taser, and the others with guns drawn, Brown made some movement to touch one of the knives, which one officer perceived as an attempt to attack other officers with the knife, thus prompting him to shoot.

The district court denied summary judgment, finding numerous issues of fact concerning the officers' account of how the shooting transpired. The Ninth Circuit reversed, finding that the officer was entitled to qualified immunity. Significantly, the court noted that there were numerous issues of fact as to whether the officer's use of force was reasonable. However, it concluded that the officer was entitled to summary judgment because plaintiffs could not identify any appellate opinion with directly analogous facts. It rejected the plaintiffs' contention that the court's decision in *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011), constituted clearly established law concerning an officer's potential liability for shooting a mentally ill person armed with a knife because there the suspect had only threatened himself, and not others. Of particular note, the court cited the Supreme Court's recent decision in *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548 (2017), as underscoring the need to identify specific case law with analogous facts in order to find that the law is clearly established for purposes of analyzing a qualified immunity claim. As the Ninth Circuit noted in *S.B.*, "We hear the Supreme Court loud and clear. Before a court can impose liability on [the officer], we must identify precedent as of August 24, 2013—the night of the shooting—that put [the officer] on clear notice that using deadly force in these particular circumstances would be

excessive." *S.B.*, 2017 WL 1959984 at *6. The court emphasized, "[W]e must 'identify a case where an officer acting under similar circumstances as [the officer] was held to have violated the Fourth Amendment.' [Citation omitted.] We cannot locate any such precedent." *Id*.

Significantly, the court also emphasized that district court opinions would be insufficient to constitute clearly established law for purposes of qualified immunity. *Id*. ("However, 'district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity.'").

S.B. is significant because it applies the Supreme Court's decision in *White* very stringently, and it provides strong support for the qualified immunity defense on behalf of police officers.

II. FIRST AMENDMENT CLAIMS.

A. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___ U.S. ___, 137 S. Ct. 2012 (2017).

- **Free Exercise Clause of First Amendment prohibits governmental entities from denying generally available public benefits to religious organizations.**

Trinity Lutheran Church of Columbia, Inc. v. Comer, ___ U.S. ___, 137 S. Ct. 2012 (2017), arose from a program by the State of Missouri designed to recycle scrap tires for use as playground surfaces. Under the state program, any organization with a playground could request the state to provide them with rubber mats made from the recycled tires. However, because the Missouri Constitution had a strict provision prohibiting economic support of any religion, the state barred religious organizations from participating in the program. Thus, although the Trinity Lutheran Church of Columbia would otherwise qualify for the benefit, the State of Missouri rejected its

application. The church sued, arguing that withholding the otherwise generally available benefit constituted a burden on the church's free exercise of religion under the First Amendment. The district court rejected the contention, citing the Supreme Court's earlier decision in *Locke v. Davey*, 540 U.S. 712 (2004), which held that the State of Washington could properly withhold state scholarships for university studies from students majoring in divinity, noting that withholding the scholarship money did not burden a student's free exercise of religion.

The Eighth Circuit affirmed. It held that although the state probably could allow religious organizations to participate in the Scrap Tire Program without running afoul of the Establishment Clause, nonetheless the stricter provisions of the Missouri Constitution prohibiting state aid to religion, prevented the state from extending the program to religious organizations. It also found that the state's action did not violate the Free Exercise Clause of the First Amendment. *Id*. at 2018-19.

In a 7-2 decision, the Supreme Court reversed, holding that the Missouri program violated the Free Exercise Clause by denying the Church an otherwise available public benefit on account of its religious status. *Id*. at 2021-22. The Court noted that in *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion), the Court had struck down under the Free Exercise Clause a Tennessee statute that disqualified ministers from serving as delegates to the state's constitutional convention. The plurality opinion noted that the statute effectively discriminated against the plaintiff based upon his religion—he was denied a benefit solely because of his status as a minister. *See* 137 S. Ct. at 2020 (citing 435 U.S. at 627). Analogizing to *McDaniel*, the Court observed that the Missouri statute itself denied a generally available benefit based solely on the church's status as a religious organization. As a result, it put the church to an improper choice—it could participate in an otherwise available benefit program or it could remain a religious institution. *Id*. at 2021-22.

The Court distinguished *Locke* on the ground that the Washington scholarship statute was extremely limited in scope, in that it solely prohibited use of funds to study for the ministry. In contrast, the Missouri statute involved a public benefit that had little or nothing to do with supporting religious doctrine. *Id*. at 2023-24.

In this regard, it is critical to note that four of the seven justices in the majority refused to join in a footnote which attempted to limit the scope of the court's holding to the specific program at issue, i.e., the Scrap Tire Program. *See id*. at 2024 n.3 ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."). Thus, at least four justices believed the case should be given broader application and indeed Justice Gorsuch, joined by Justice Thomas, wrote a concurring opinion broadly construing the prohibition against the free exercise of religion and suggesting that *Locke* should be overruled. *Id*. at 2025-26.

As a result, despite the purportedly limiting language of footnote 3, *Trinity Lutheran Church* will likely have a broad impact with respect to the participation of religious organizations in public programs. To be sure, it has long been established that where the government makes public facilities available to community organizations, it cannot exclude religious organizations from using the facilities, even for religious teachings, without running afoul of the Free Speech Clause of the First Amendment, or the Equal Protection Clause of the Fourteenth Amendment. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). However, *Trinity Lutheran Church* now expands those principles under the rubric of the Free Exercise Clause to include benefits provided to the general public under various programs. Under *Trinity Lutheran Church*, cities and other public entities will have to review any public subsidy or in-kind benefit programs to make certain that religious organizations are not improperly excluded. For example, a local policy by which offenders perform community service in the form of cleaning up

private property, such as mall parking lots, might have to be extended to playgrounds or facilities owned by religious organizations.

Moreover, *Trinity Lutheran Church* could have a particularly profound impact in California, where the California Constitution's No Preference and, more particularly, No Aid provisions have been given a very stringent interpretation. The No Aid Clause hasbeen viewed as prohibiting virtually any direct financial support of a religious organization. Many cases interpreting the No Preference and No Aid Clauses of the California Constitution would likely come down differently if the Free Exercise principles of *Trinity Lutheran Church* are rigorously applied. *See*, *e.g.*, *County of Los Angeles v. Hollinger*, 221 Cal. App. 2d 154 (1963) (First Amendment, No Aid Provision and No Preference Provision of the California Constitution bar county from subsidizing religious parade that will be filmed as part of a promotional film for the county showing various parades). Based on *Trinity Lutheran Church*, it is anticipated that all public entities will see an uptick in litigation, faced with the ultimate Hobson's choice—a lawsuit based on an Establishment Clause claim on one hand, or a Free Exercise Clause-based lawsuit on the other.

B. *Santopietro v. Howell*, 857 F.3d 980 (9th Cir. 2017).

- **Posing for photographs in public and non-coercive solicitation of tips for doing so, constitute creative expression protected by the First Amendment.**

In *Santopietro v. Howell*, 857 F.3d 980 (9th Cir. 2017), the plaintiff, along with her colleague Ms. Patrick, traveled to the Las Vegas Strip for purposes of posing as "sexy cops," and soliciting tips from tourists who wished to photograph them. The county and its police force had earlier entered into a Memorandum of Understanding ("MOU") whereby it acknowledged that its business licensing scheme did not apply to street performers who solicited tips in a non-coercive fashion. The MOU had acknowledged

that street performance was a protected activity, as was non-coercive solicitation of payment for such street performances. *Id.* at 985.

Three undercover police officers approached the plaintiff and Ms. Patrick and asked how much a picture cost and plaintiff replied that it didn't cost anything, that they were just asking for a tip. *Id*. at 984. One of the officers then posed with the two women and made a motion to leave without tipping them. *Id*. Ms. Patrick then reminded one of the officers about the tip, who then replied that no tip would be forthcoming. *Id*. Ms. Patrick then asked the officers to delete the photo from the camera. *Id*. One of the officers then asked the plaintiff what she would do if they did not leave a tip, and she indicated that she would not do anything and would not demand a tip, only that she believed that he had promised one. *Id*. When Ms. Patrick indicated that she thought they had a verbal agreement, both she and the plaintiff were arrested for engaging in a business without a license in violation of the county ordinance. *Id*.

The district court granted summary judgment to the officers, concluding that Ms. Patrick and the plaintiff, "by association," were conducting a business without a license in violation of the county municipal code. *Id.* at 986.

The Ninth Circuit reversed. The court reaffirmed that engaging in street performances constituted protected First Amendment activity. *Id.* at 987-88. The court also noted that solicitation of tips was also entitled to the same constitutional protection as traditional speech, and that solicitation of a tip in a non-coercive matter was protected activity. *Id.* at 988.

The court also held that plaintiff had been improperly arrested based upon statements made by her colleague Ms. Patrick. The court emphasized that the plaintiff had been arrested solely because of her association with Ms. Patrick—an association undertaken for the purpose of engaging in First Amendment protected activity, i.e., posing as "sexy cops." The court held that this "expressive association" was protected by

the First Amendment, and therefore the arrest was unlawful. *Id.* at 989-90. The court observed:

> "Here, the record indicates the Officers had no evidence before them when they decided to arrest Santopietro that suggested that the 'sexy cops' *association* had any purpose that could have fallen outside the protection of the First Amendment . . . . Nor was there evidence of Santopietro's intent to engage with Patrick in anything other than clearly constitutionally protected expressive activity (which, again, includes active solicitation of voluntary tips). Both 'sexy cop' performers were engaging largely, if not entirely, in activity that was not only legitimate but also constitutionally protected."

Id. at 990.

The court also observed that "the sale of a snapshot of a performer's protected street performance is likely protected in itself" by the First Amendment. *Id*. at 993. The court emphasized that "[a]lthough the 'customer' is involved in the process of creating the work at issue here" there is "no dispute that Santopietro and Patrick 'applie[d] their creative talents' [citation omitted], to help create the picture." *Id.*

The Ninth Circuit's decision in *Santopietro* again underscores the great care that must be taken in attempting to enforce local regulations regulating commercial transactions in public spaces. It makes it clear that posing for "character photos" is a protected activity, as is soliciting tips for engaging in that activity. Thus, any attempts to regulate such "creative expression," must adhere rigorously to general First Amendment standards, i.e. time, place, manner restrictions.

C. *First Resort, Inc. v. Herrera*, 860 F.3d 1263 (9th Cir. 2017).

- **Permissible regulation of commercial speech concerning pregnancy clinical services.**

First Resort, Inc. v. Herrera, 860 F.3d 1263 (9th Cir. 2017), addresses the ability of a local public entity to regulate commercial speech, most specifically commercial speech concerning pregnancy consultation services. The Ninth Circuit found that so long as such ordinances are drawn narrowly to address only commercial speech, they do not

run afoul of the First Amendment, nor are they preempted by the state False Advertising Law, California Business and Professions Code section 17500.

The City of San Francisco passed an ordinance aimed at preventing limited services pregnancy centers (LSPCs), which neither provided abortion services nor referred patients to facilities that did, from engaging in misleading advertising. The court noted that such centers often engaged in misleading practices, which caused pregnant women who might be considering an abortion to come to the centers, where they were counseled against terminating the pregnancy. The ordinance specifically prohibited any statement, including over the internet, concerning pregnancy-related services "which is untrue or misleading, whether by statement or omission, that the (LSPC) knows or which it by the exercise of reasonable care should know to be untrue or misleading." S.F. Admin. Code, ch. 93 § 93.4.

The plaintiff, an LSPC, filed suit for injunctive and declaratory relief, asserting that the ordinance violated the First Amendment in various respects, including that it was vague and overbroad, discriminated based upon viewpoint, and regulated protected speech. The district court granted summary judgment to the city, and the Ninth Circuit affirmed.

The Ninth Circuit noted that the ordinance was concerned with regulating only commercial speech, i.e. speech by the LSPCs that was attempting to solicit customers to use its services. *First Resort,* 860 F.3d at 1271-74. That the centers did not charge for such services in all instances did not matter, as patient stories were used in fundraising efforts, and hence had a commercial component to them. *Id*. at 1272.

The Ninth Circuit also noted that the statute was not overbroad in that it only prohibited false or misleading speech, which were terms of common understanding. *Id*. at 1271. It also concluded that the statute did not engage in viewpoint discrimination, as it only applied to centers that did not offer abortion services, and a center might choose not to offer abortion services for purposes entirely unrelated to whether the operator

believed such procedures were proper; for example, logistic limitations might prevent an operator from offering the services. *Id*. at 1277-79.

The court also found that the local ordinance was not preempted by state law regulating false advertising. *Id*. at 1279-81. The court observed that the local ordinance was a civil regulatory statute, and did not impose any criminal penalties. *Id*. at 1280. In addition, the local ordinance was actually broader than the state false advertising law, in that the latter only regulated express statements, whereas the local ordinance also covered implied misrepresentation, i.e. omission of pertinent information which left a false impression on the public. *Id*. at 1280-81.

The *First Resort* case provides a very clear template for local ordinances attempting to regulate false and misleading statements by LSPCs. It also narrowly construes state preemption law as granting local entities greater leeway in regulating activities that might also be subject to regulation under state consumer protection statutes, such as the false advertising law.

III. HOUSING DISCRIMINATION.

A. *Bank of America Corp. v. City of Miami,* ___ U.S. ___, 137 S. Ct. 1296 (2017).

- **City may be able to assert a Fair Housing Act ("FHA") claim against lenders engaging in discriminatory mortgage practices if it can establish proximate cause, i.e., a close relationship between the discriminatory conduct and a direct economic injury to the city.**

In *Bank of America Corp. v. City of Miami*, ___ U.S. ___, 137 S. Ct. 1296 (2017), the Supreme Court held that public entities could assert claims against lenders under the FHA, although it left open the question of whether cities could ultimately succeed on such claims. In *Bank of America*, the City of Miami sued various lenders asserting that

their discriminatory lending practices resulted in an extremely high rate of defaults on mortgages of minority citizens, thus causing economic damage to the city in the form of having to abate the nuisance of abandoned properties, provide heightened police and fire protection for economically ravaged areas and loss of tax revenue. The district court dismissed the claim, finding that the city's economic claims were outside the zone of interest protected by the FHA and that, in any event, the city could not show a causal connection between the bank's discriminatory conduct and any economic injury. The Eleventh Circuit reversed, holding that the city's injuries fell within the zone of interest protected by the FHA and that the complaint adequately alleged a proximate cause of injuries to the city.

The Supreme Court affirmed in part and reversed in part. It agreed with the Eleventh Circuit that the injuries alleged by the city did indeed fall within the zone of interests addressed by the FHA. However, it remanded to the lower courts to examine the proximate cause issue more closely. It emphasized that there had to be a direct link between the discriminatory conduct of the lenders and the specific injury suffered by the city. The Court stated that it would not be enough that the type of injuries suffered by the city, i.e., a loss in tax revenue from defaulted properties and an increased burden of providing law enforcement and other community services, were generally foreseeable as a result of the bank's discriminatory lending practices. *Id.* at 1305-06. The Court noted:

> "In the context of the FHA, foreseeability alone does not ensure the close connection that proximate cause requires. The housing market is interconnected with economic and social life. A violation of the FHA may, therefore, '"be expected to cause ripples of harm to flow'" far beyond the defendant's misconduct. [Citation omitted.] Nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel. And entertaining suits to recover damages for any foreseeable result of an FHA violation would risk 'massive and complex damages litigation. [Citation omitted.]'"

Id. at 1306.

The Court emphasized that "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Id*. It analogized to other tort actions, and noted "we have repeatedly applied directness [sic] principles to statutes with 'common-law foundations.'" *Id*. Thus, it suggested that damages should not go beyond any "first step" of liability, although the Court declined to address what that "first step" might be in the first instance. *Id*.

Thus, although the Supreme Court in *Bank of America* clarified that public entities could assert damage claims under the FHA, nonetheless, its failure to specifically address and clarify what constitutes proximate cause for purposes of recovery leaves such claims up in the air. Nonetheless, in the wake of the financial market meltdown in 2008 and resulting foreclosure crises that caused many cities to face urban and suburban blight, the court's decision provides a basis for cities to possibly recoup attendant expenses and revenue losses in the form of an FHA action, though ultimate success on such claims remains highly uncertain.