Municipal Tort and Civil Rights Litigation Update

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MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

FOR

THE LEAGUE OF CALIFORNIA CITIES

CITY ATTORNEYS' SPRING CONFERENCE

May 10, 2019

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I. CIVIL RIGHTS – EXCESSIVE FINES.

A. *Timbs v. Indiana*, __U.S.__, 139 S.Ct. 682 (2019)

● Excessive Fines Clause of Eighth Amendment Applies To Civil Forfeiture Actions In State Court.

Timbs v. Indiana, __U.S.__, 139 S.Ct. 682 (2019) arose from a civil forfeiture proceeding whereby local law enforcement officials attempted to seize Mr. Timb's $42,000 Land Rover following his conviction for a drug trafficking offense that carried a maximum fine of $10,000. A state trial court rejected the civil forfeiture claim, finding that since the vehicle was worth more than four times the amount of any fine, forfeiture would result in an excessive fine in violation of the Eighth Amendment. An Indiana intermediate appellate court affirmed, but the Indiana Supreme Court reversed, finding that the excessive fines clause of the Eighth Amendment applied only to the federal government and not to the states.

The Supreme Court reversed. The Court held that the excessive fines clause was "fundamental to our scheme of ordered liberty," "deeply rooted in the nation's history and tradition" and hence fully incorporated and applicable to the states via the Fourteenth Amendment. It noted that in *Austin v. U.S.*, 509 U.S. 602 (1993) it had held that civil *in rem* proceedings could violate the excessive fines clause when the forfeiture is at least partially punitive in nature. The Court declined to revisit *Austin*, because the issue had not been raised below.

Timbs is an extremely important case for local public entities. It clarifies that the Eighth Amendment applies to fines levied by local government. It is likely to be the touchstone for further efforts to challenge fines for traffic and parking violations in circumstances where indigency prevents an individual from paying the fine. In addition, it provides support for challenges to administrative fines and abatement actions where the fines may significantly exceed the cost of cleanup.

II. LAW ENFORCEMENT LIABILITY

A. *City of Escondido v. Emmons*, __U.S.__, 139 S.Ct. 500 (2019)

● Courts Must Identify Highly Analogous Case Law In Order To Overcome Qualified Immunity In Use Of Force Cases.

In *City of Escondido v. Emmons*, __U.S.__, 139 S.Ct. 500 (2019), Officer Craig responded to a domestic disturbance call at a residence, with Sergeant Toth later arriving with other officers as back up. Craig knocked on the door and asked that they be allowed to enter to perform a welfare check. Instead, a man, Mr. Emmons, came outside and brushed past Craig, refusing the officer's command not to close the door. Officer Craig stopped Emmons and took him to the ground using minimal force, i.e. without striking him or displaying a weapon. Emmons was subsequently charged with interfering with a police officer.

Emmons sued Toth and Craig, along with the city and various other officers, asserting the officers had used excessive force in violation of the Fourth Amendment. The district court granted summary judgment to the officers. It concluded Toth could not

be liable for excessive force, because video evidence indicated he did not use force at all. The court found that Craig was entitled to qualified immunity, because the law was not clearly established as to whether use of minimal force under those circumstances would violate the Fourth Amendment.

The Ninth Circuit reversed in an unpublished memorandum disposition, stating that there was a genuine issue of material fact as to whether the force was excessive, and that "the right to be free of excessive force was clearly established at the time of the events in question." The Supreme Court reversed the Ninth Circuit in a per curiam opinion. The Supreme Court noted that the Ninth Circuit had no explanation as to why it had reversed summary judgment as to Toth, given that there was no evidence that he had used any force at all. It found that Officer Craig could be entitled to qualified immunity, given that the Ninth Circuit cited no existing case law involving analogous facts that would have put the officer on notice that his conduct would violate the Constitution. The Court again underscored the point that in analyzing qualified immunity, appellate courts must not define the right at issue at too high a level of generality.

Emmons is an important case for several reasons. First, it is the most recent in a uniform line of cases from the Supreme Court chiding the lower appellate courts, and particularly the Ninth Circuit, for defining clearly established law at a high a level of generality. Second, it is significant that the Supreme Court reversed an unpublished memorandum disposition, making it clear that the Court will monitor lower courts for egregious departure from Supreme Court precedent, even if done in an unpublished

opinion. Third, the case is a reminder to the lower courts that each defendant is entitled to separate consideration in terms of evaluating liability under section 1983. The Court emphasized that it was "puzzling" that the Ninth Circuit had reversed summary judgment as to Toth, given that there was no evidence that he was involved in the use of force. Finally, the case is another illustration of the increasing value of video evidence as support for a motion for summary judgment. The video evidence showed that the force used was minimal, that Emmons displayed no pain or significant discomfort, and that Toth was not involved in the incident. In the absence of such video evidence, the plaintiff may have had much more leeway to contest the officers' accounts of the events in question.

B. *Emmons v. City of Escondido,* __F.3d __, 2019 WL 1810765 (9th Cir. 2019)

● Officer Entitled to Qualified Immunity For Use Of Minimal Force To Subdue Suspect.

Having been admonished by the Supreme Court for defining clearly established law at too high a level of generality, on remand the Ninth Circuit exhaustively examined its case law concerning use of force against a mildly resisting suspect, and concluded no case would have put Officer Craig on notice that use of minimal force against Emmons would violate the Fourth Amendment. The Ninth Circuit's opinion on remand contains very helpful language on the need to identify specific case law in the use of force context in order to overcome qualified immunity.

C. *Jessop v. City of Fresno,* 918 F.3d 1031 (9th Cir. 2019)

- **Qualified Immunity For Theft Of Property Seized With A Valid Warrant.**

Does the Constitution prohibit police officers from stealing property seized with a valid warrant? The answer is apparently unclear, at least according to the Ninth Circuit. In *Jessop v. City of Fresno*, 918 F.3d 1031 (9th Cir. 2019) plaintiffs alleged that police officers stole $225,000 in rare coins and cash that had been seized pursuant to a valid warrant. They filed suit, asserting claims under the Fourth and Fourteenth Amendments. The district court granted the police officers' motion for summary judgment based on qualified immunity.

The Ninth Circuit affirmed. The court held that the officers were entitled to qualified immunity for the Fourth Amendment claim, because the law was not clearly established whether the Fourth Amendment governed retention of property after an initial seizure. Citing an existing circuit split on the issue, the Ninth Circuit therefore found that since the law was not clearly established, the officers were entitled to qualified immunity.

The court also held the officers were entitled to qualified immunity on plaintiff's Fourteenth Amendment claim for violation of substantive due process. The court noted the absence of clearly established law recognizing a substantive due process claim based on theft of property pursuant to a valid warrant. It observed that there was only a single circuit court decision on the issue, and that court had held that there was no Fourteenth Amendment substantive due process claim.

Jessop is a very helpful case for public entities in underscoring the need for a plaintiff to identify specific case law governing the particular factual situation confronted by officers in order to avoid application of qualified immunity. However, while *Jessop* is certainly correct in its interpretation of the legal niceties concerning the Fourth Amendment claim, despite the circuit court opinion suggesting that the Fourteenth Amendment does not encompass theft by law enforcement officers, it seems somewhat extraordinary to conclude that the Constitution does not prohibit theft by police officers under color of authority. Given the current broad-based attack on qualified immunity by legal scholars and advocates representing both liberals and conservatives, *Jessop* may well provide further fuel for the movement to drastically scale back qualified immunity.

D. *Advance Building & Fabrication, Inc. v. California Highway Patrol*, 918 F.3d 654 (9th Cir. 2019)

- **No Qualified Immunity For Administrative Inspection Conducted During Execution Of A Warrant As Part Of A Criminal Investigation.**

Administrative inspections are among the most frequent activities undertaken by public employees, and given their informal nature and typical relationship to civil proceedings, it is easy to ignore the Fourth Amendment implications of such searches. In *Advance Building & Fabrication, Inc. v. California Highway Patrol*, 918 F.3d 654 (9th Cir. 2019) an employee of the State Board of Equalization stopped by the plaintiff's factory, mistaking it for another business. Harsh words were exchanged, and the state

employee later informed his superiors that he had been physically assaulted by the plaintiff. The California Highway Patrol was notified and CHP officers obtained a search warrant for the business in order to examine videotapes that might have captured the incident. The plaintiff alleged that during execution of the warrant, the state employee accompanied the officers and began going through file cabinets of personal records.

The plaintiff sued the officers, as well as the state employee, alleging violation of the Fourth Amendment based upon the unlawful search of his files. The trial court denied the state employee's motion for summary judgment based on qualified immunity and the Ninth Circuit affirmed. The court rejected the state employee's assertion that state regulations authorized him to review plaintiff's files, noting that the statutes in question did not permit forcible entry in order to effectuate such a review. Nor could the administrative search of the records be justified by the concurrent execution of the warrant, because the warrant for the criminal investigation was narrowly tailored to seek only video evidence concerning the underlying incident. Moreover, it was clearly established that Fourth Amendment liability may be imposed upon a public employee present at a search where his/her presence was not related to the objectives of the intrusion.

Advance Building underscores the importance of viewing administrative searches through the prism of the Fourth Amendment. That an ordinance, statute or regulation may give a public employee the right to inspect documents, building sites or the like, does not

necessarily authorize that the inspection may be undertaken in a particular manner, i.e. without notice, with a forcible entry or some other serious invasion of privacy rights.

E. *Whalen v. McMullen*, 907 F.3d 1139 (9th Cir. 2018)

- **Fourth Amendment Bars Warrantless Administrative Search Carried Out for purposes Of Criminal Investigation.**

Whalen v. McMullen, 907 F.3d 1139 (9th Cir. 2018) provides another reminder to be alert to potential Fourth Amendment issues arising from administrative searches. There, a police detective was conducting an investigation into possible Social Security fraud by the plaintiff. The detective was part of the unit that verified entitlement to Social Security disability benefits for both civil administrative proceedings, and possible referrals for criminal prosecution. In order to verify the plaintiff's entitlement to benefits based on disability and the existence of possible fraud, the detective gained entry to her home by asserting he was investigating a case of identity theft. After observing her physical condition and surreptitiously videotaping the encounter, the detective submitted a report indicating that plaintiff did not seem to be disabled so as to be entitled to benefits. (For example, her wheelchair was being used as a blanket holder). Her benefits were later terminated, but she was not criminally prosecuted.

Plaintiff sued the detective, arguing that his warrantless entry into her home by means of a ruse violated the Fourth Amendment. The district court granted the detective's motion for summary judgment based on qualified immunity and plaintiff appealed. In affirming summary judgment for the detective, the Ninth Circuit emphasized that the

warrantless search violated the Fourth Amendment. The court rejected the contention that this was a purely administrative search that was justified by the "special needs" doctrine, as the detective was not merely investigating for purposes of the civil administrative proceeding, but for purposes of a possible criminal prosecution as well. Thus, even if this could be characterized as an administrative search, nonetheless it was conducted in order to serve general law enforcement purposes and hence was subject to the Fourth Amendment warrant requirement. However, because the law was not clearly established, the detective was entitled to qualified immunity.

Whalen again underscores the importance of not blurring the distinction between searches conducted for purely administrative purposes, which may be subject to the "special needs" exception, and those conducted under circumstances where there may be a possibility of criminal prosecution, thus creating greater potential for Fourth Amendment issues.

F. *Hines v. Youseff*, 914 F.3d 1218 (9th Cir. 2019)

- **Law Enforcement Officials Entitled To Qualified Immunity Based On Absence Of Clearly Established Factual Basis For Liability.**

Valley Fever is an illness caused by fungal spores, and highly prevalent in the Central Valley of California. Although most individuals who contract the disease have relatively minor symptoms, some patients experience severe complications and death. In *Hines v. Youseff*, 914 F.3d 1218 (9th Cir. 2019) African-American prisoners in Central Valley prisons sued state prison officials for violation of the Eighth Amendment,

asserting that exposing them to the hazards of Valley Fever constituted cruel and unusual punishment, given the statistical proclivity of African-Americans to suffer particularly severe complications from the disease. They also asserted that prison officials violated the Equal Protection clause of the Fourteenth Amendment, because given the disparate impact the disease had an African-Americans, it was discriminatory to keep them in the same conditions as non-African-American prisoners. The district court granted summary judgment to the defendant officials based on qualified immunity, and the plaintiffs appealed.

In affirming summary judgment for defendants, the Ninth Circuit held that the defendants were entitled to qualified immunity on both claims, given that the higher susceptibility of African-American prisoners to severe complications of the disease was not clearly established at the time of the events in question. At most there was some minor statistical indication of a higher susceptibility to complications, but the failure of prison officials to act on this information did not rise to the level of an Eighth Amendment violation, nor violate equal protection by subjecting African-American prisoners to greater peril than non-African-American prisoners.

The key point to take from *Hines*, is that entitlement to qualified immunity does not always turn on the question of a clearly established law, but on a clearly established factual basis for liability. Public officials and employees often act on less than ideal information, and it is important to bear in mind that qualified immunity applies both as to reasonable mistakes of law and reasonable mistakes of fact.

G. *Horton v. City of Santa Maria*, 915 F.3d 592 (9th Cir. 2019)

● Officer Entitled To Qualified Immunity For Failure To Prevent Prisoner Suicide.

In *Horton v. City of Santa Maria*, 915 F.3d 592 (9th Cir. 2019), the plaintiff was arrested after slashing the tires of his girlfriend's car. Although agitated, plaintiff denied any suicidal ideation, and after his mother refused to bail him out, requested that one of the officers, Brice, call his mother just to let her know what was going on. Brice then spoke with plaintiff's mother, who informed him that several weeks earlier the plaintiff had been briefly put on a 5150 hold for possible suicide, but that physicians had determined he was not a danger to himself, and had released him. Unbeknownst to Brice, as he was speaking with plaintiff's mother, plaintiff was attempting to hang himself in his holding cell. Plaintiff was found and revived, but suffered severe injuries.

Plaintiff sued Brice, the City, and other officers, asserting that they violated the Fourteenth Amendment by failing to provide for his serious medical needs in that they had not properly evaluated and monitored him for possible suicide. Plaintiff also asserted that there had been a failure to summon medical care under Government Code section 845.6. Brice moved for summary judgment based on qualified immunity and the absence of any basis to find him liable for failure to summon medical care under state law. The district court denied the motion and Brice appealed.

The Ninth Circuit affirmed in part and reversed in part. The court held that Brice was entitled to summary judgment on the federal claim based on qualified immunity,

because no clearly established law would have suggested that Brice could be held liable under these circumstances. Particularly significant was the fact that the Ninth Circuit standard for evaluating Fourteenth Amendment claims based upon failure to provide medical services to pre-trial detainees had changed since the incident had occurred. At the time of the incident, the Ninth Circuit only allowed liability to be imposed on an officer for failing to provide for a pre-trial detainee's serious medical needs where the officer subjectively believed that care was necessary. In *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th. Cir. 2016) (en banc) the Ninth Circuit had changed the standard, rejecting any requirement of subjective intent, and holding that an officer could be liable where there was a substantial risk of serious harm to a prisoner that could have been eliminated through reasonable and available measures. Since Brice's conduct had to be evaluated under the law as it existed at the time of the incident, he was plainly entitled to qualified immunity.

However, the court affirmed the denial of summary judgment based upon an alleged failure to summon medical care under Government Code section 845.6. It also held that it lacked jurisdiction to review the denial of the City's motion for summary judgment for liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978) because it was not directly related to the issues that were subject to review in the context of the denial of qualified immunity to Officer Brice. In so holding however, the court emphasized that on remand any *Monell* claim against the City could be premised on

application of the *Castro* standard in assessing whether a constitutional violation had occurred.

Although *Horton* is helpful to public entities in that it reaffirms application of qualified immunity, nonetheless the opinion contains troubling dicta concerning application of the *Castro* standard to *Monell* claims, even where the underlying conduct occurred prior to *Castro*. In addition, the decision's interpretation of California law concerning failure to summon medical care under Government code section 845.6, erodes the protections of that immunity, a point made in a very strong dissent. As the dissent noted, the *Horton* majority's interpretation of California law is squarely at odds with governing California case authority, and unless and until the California Supreme Court directly addresses the issue, public entities will be subjected to greater potential liability for section 845.6 claims in federal court, than in state court.

H. *Ioane v. Hodges,* 903 F.3d 929 (9th Cir. 2018)

- **Officer Not Entitled To Qualified Immunity For Monitoring Bathroom Use During Execution Of A Warrant.**

Ioane v. Hodges, 903 F.3d 929 (9th Cir. 2018) arose from execution of a search warrant for documents by IRS agents. During the search, a female occupant of the home asked to use the restroom. A female agent agreed, but even though the female occupant had not been detained, and indeed had been told she was free to leave, the agent would not let her use the restroom unless the agent was allowed to observe her in the restroom. She did so, and after completing the search, the agents left.

The plaintiff sued the IRS agent for violation of the Fourth Amendment, asserting that the female agent had unreasonably intruded on her privacy by insisting on monitoring her bathroom use. The agent moved for summary judgment based on qualified immunity, arguing that the law was not clearly established with respect to whether same-sex monitoring of bathroom use during the course of a search violated the Fourth Amendment. The district court denied the motion, and the agent appealed.

In affirming the denial of summary judgment, the Ninth Circuit rejected the agent's contention that it was required to cite a case with "identical facts" in order to render the law clearly established for purposes of denying qualified immunity. The court observed that it had repeatedly held in the context of jail searches, that observation of an unclothed individual was a significant intrusion on personal privacy. The Ninth Circuit emphasized that the plaintiff was not under arrest, nor even detained, and that there was no justification at all for monitoring her bathroom use. Given the absence of any justification for the intrusion, as well as case law putting the defendant on notice of the severe intrusion on personal privacy resulting from such observation, the court concluded that the officer was not entitled to qualified immunity.

Ioane is somewhat concerning, given its departure from recent Supreme Court authority directing the lower courts to identify cases that are closely factually analogous to the circumstances confronting an officer before denying qualified immunity, particularly in the context of Fourth Amendment claims. It is anticipated that plaintiffs

will frequently cite *Ioane* in an effort to avoid rigorous application of the Supreme Court's dictates concerning application of qualified immunity.

I. *Sandoval v. County of Sonoma*, 912 F.3d 509 (9th Cir. 2018)

● Impoundment Of Vehicle Of Unlicensed Driver Under Vehicle Code Section 14602.6 Subject To Fourth Amendment.

Vehicle Code section 14602.6 empowers police officers to impound the vehicle of an unlicensed driver for up to 30 days, subject to an administrative hearing for the owner to reclaim the vehicle. In *Sandoval v. County of Sonoma*, 912 F.3d 509 (9th Cir. 2018), plaintiffs sued a city and a county, arguing that the seizure of vehicles pursuant to the statute was subject to the Fourth Amendment, and that an automatic 30 day hold was unconstitutional, in that it was applied without regard to whether it was reasonable under the particular circumstances. The district court granted summary judgment to the plaintiffs, and the public entities appealed.

The Ninth Circuit affirmed the judgment, noting that after the district court's ruling, it had issued its opinion in *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017), which had held that seizures under section14602.6 were subject to the Fourth Amendment. It rejected defendants' argument that the seizures were warranted as an administrative penalty, that they could be justified by the "community caretaking" exception, or that they were reasonable in light of the severity of the offense in question.

The Ninth Circuit also affirmed the dismissal of plaintiffs' claim under the Bane Act, Civil Code section 52.1, noting that under current law plaintiffs were required to show that the defendants had a specific intent to violate their rights, but that given the uncertainty of the law as applied to Vehicle Code section 14602.6, plaintiffs could not show that defendants had any specific intent to violate their rights. The court also affirmed the district court's denial of class certification, noting that the individualized nature of Fourth Amendment determinations rendered such claims inappropriate for adjudication on a class wide basis.

Sandoval reaffirms *Brewster*'s holding that seizures under the Vehicle Code section14602.6 must comply with Fourth Amendment standards, meaning that retention beyond the initial seizure must be justified by particularized circumstances. Given the potential for liability, public entities should be wary of impounding vehicles for any of significant period of time under section 14602.6. On the other hand, *Sandoval* provides strong authority for opposing Fourth Amendment class-action claims, given the court's recognition that the unique factual circumstances underlying such claims generally makes them poor candidates for class adjudication. In addition, the court's further clarification of the standards governing Bane Act claims will be helpful to public entities, particularly its conclusion that where the law is not clearly established, the plaintiff will be unable to demonstrate the specific intent necessary to support such a claim.

J. *Taylor v. County of Pima*, 913 F.3d 930 (9th Cir. 2019)

● ***Heck v. Humphrey*, 512 U.S. 477 (1994) Bars Any Civil Rights Claim Where Any Part Of Plaintiff's Injury Is Attributable To A Valid Conviction.**

In *Taylor v. County of Pima*, 913 F.3d 930 (9th Cir 2019), the plaintiff was convicted in 1972 of 28 counts of felony murder arising from arson of a hotel. In 2012, the plaintiff filed a state court post-conviction petition citing newly discovered evidence indicating that the fire was not caused by arson. The government disputed the new theory, but nonetheless agreed to vacate the plaintiff's prior conviction, in exchange for plaintiff pleading nolo contendere to the same counts and being sentenced to time served. Plaintiff agreed and was released, and then filed suit against the County, asserting he had been wrongfully convicted as a result of unconstitutional policies and customs concerning prosecution of African-Americans. The defendant successfully moved to dismiss, arguing, among other grounds, that the plaintiff could not obtain damages for wrongful conviction, because of his subsequent nolo contendere plea.

The Ninth Circuit heard the appeal after granting certification under 28 U.S.C. section 1292 (b). The court noted that in *Heck v. Humphrey*, 512 U.S. 477 (1994) the Supreme Court had held that where success on a civil rights claim would call into question the validity of a criminal conviction, the suit could not proceed unless or until the conviction was successfully vacated either on direct review, or by habeas corpus. The Ninth Circuit concluded that here, *Heck* barred any claim for damages arising from time served as a result of plaintiff's initial wrongful conviction, because success on his civil

rights claim would call into question the validity of the sentence, and undermine the validity of the plea deal. Although his initial conviction had been vacated, the time served was part of his subsequent plea agreement, which remained a valid conviction.

Taylor is helpful in reaffirming the strict application of *Heck*, and is especially noteworthy given the increasing reluctance of courts to apply *Heck* in all but the most straightforward cases.

III. ABSTENTION

A. *Herrera v. City of Palmdale*, 918 F.3d 1037 (9th Cir. 2019)

- ***Younger* Abstention Justifies Stay Of Federal Civil Rights Action Pending Disposition Of State Court Nuisance Abatement Action, But Fourth Amendment Search And Seizure Claims May Proceed.**

Herrera v. City of Palmdale, 918 F.3d 1037 (9th Cir. 2019) arose from a state court nuisance abatement action directed at plaintiffs' motel. Just before the state action was filed, plaintiffs filed suit in federal court, seeking injunctive and declaratory relief to the effect that the local enforcement actions violated due process, were discriminatory and improper, and seeking damages for various Fourth Amendment search and seizure violations. The defendants moved to dismiss the action, or for the court to stay the federal case based on abstention under *Younger v. Harris*, 401 U.S. 37 (1971). The district court agreed to stay the federal action, and plaintiffs appealed.

The Ninth Circuit affirmed application of *Younger* abstention to the claims for declaratory and injunctive relief. Although *Younger* itself concerned abstention from interfering in an ongoing state court criminal proceeding, the Ninth Circuit noted that the Supreme Court had expanded its reach to state court administrative enforcement proceedings that were akin to a criminal prosecution. It held that the nuisance abatement proceeding at issue here fell squarely within *Younger* and hence abstention was warranted in order to allow the state court action to proceed, and to possibly adjudicate federal claims that plaintiffs were attempting to raise in federal court.

However, the court held that the lower court had erred in abstaining as to the Fourth Amendment damages claims, because the search and seizure issues that plaintiffs were raising were not likely to be adjudicated in the state court nuisance abatement proceeding.

Herrera is a very useful case, as it clarifies application of *Younger* abstention to one of the most commonly prosecuted actions by local entities – nuisance abatement proceedings. The decision should prevent plaintiffs from attempting to circumvent, or delay state court enforcement proceedings by filing suit in federal court.

IV. FIRST AMENDMENT – REGULATION OF SPEECH IN A NONPUBLIC FORUM.

A. *American Freedom Defense Initiative v. King County*, 904 F.3d 1126 (9th Cir. 2018)

● Regulation Of Speech In Nonpublic Forum Must Be Viewpoint Neutral, Sufficiently Definite To Foreclose Arbitrary Enforcement, And Advance A Valid Regulatory Purpose.

American Freedom Defense Initiative v. King County, 904 F.3d 1126 (9th Cir. 2018) arose from a challenge to a local ordinance regulating advertising that could be displayed on government owned buses. Plaintiff sought to display an anti-terrorism ad depicting several individuals of Middle Eastern descent. The County refused to accept the ad, asserting it violated provisions of the local ordinance banning false statements, disparaging material, and content that may disrupt the transit system. Plaintiff submitted a revised, factually accurate ad, which the County again declined, asserting that it was disparaging and might disrupt the transit system. Plaintiff filed suit challenging the regulation under the First Amendment, and the district court granted summary judgment to the County.

The Ninth Circuit affirmed in part and reversed in part. The court noted that the bus advertising space was a nonpublic forum. Accordingly, strict scrutiny does not apply, but any regulation must be reasonable, viewpoint neutral and sufficiently specific to avoid arbitrary enforcement. The court upheld the prohibition on false advertising, as well as the prohibition on material likely to disrupt the transit system. However, the court held that the prohibition on "disparaging" racial and ethnic groups was viewpoint-based and hence ran afoul of the First Amendment. It also found that the County had improperly applied the prohibition on displays likely to disrupt the transportation system,

given that although it had rejected plaintiffs ad, it had previously allowed buses to display substantially similar content, with no impact on the operation of the transit system.

American Freedom underscores the importance of examining any regulation of speech with particular care, mindful of the need to precisely define prohibited conduct and avoid viewpoint discrimination. It is also a reminder of the need to enforce regulations in uniform fashion and to be able to provide concrete reasons justifying application of the regulation.

V. MUNICIPAL TORT LIABILITY

A. *Arista v. County of Riverside*, 20 Cal.App.5th 1051 (2018)

- **Assumption Of Duty To Undertake Rescue With Due Care.**

In *Arista v. County of Riverside*, 20 Cal.App.5th 1051 (2018) a wife and children sued the County for negligence, wrongful death and violation of civil rights arising out of the failure of County personnel to rescue their husband and father. Plaintiffs alleged the decedent had left home in the morning for a bike ride in the mountains, noting he would be back in the early afternoon. When he did not return by late afternoon, the wife became worried, and eventually spoke with him on a cell phone, learning that he had fallen from his bicycle, was disoriented, and somewhere near Santiago peak. She called the local police, who then contacted the Sheriff's Department. According to plaintiffs, a lieutenant from the Sheriff's Department who had no search and rescue experience assured them that the Sheriff's Department would handle the situation, and prevented them from undertaking an effort to effect a rescue on their own. Plaintiffs also alleged that search

and rescue personnel were available who could have found the missing victim, but that the lieutenant failed to alert them, and in fact believed that that victim was not missing, but simply having an affair. When the search was finally started the next morning, the victim was found dead. Plaintiffs contended that had the search promptly started the night before, the victim would have been found and survived.

The County successfully demurred to the operative complaint, arguing that it had no duty to undertake a rescue effort, and that in any event it was immune from liability under state law under Health & Safety Code section 1799.107. The County also argued that plaintiffs failed to allege facts sufficient to show that the County had a policy, custom or practice of deliberate indifference in conducting search and rescue operations and hence the federal civil rights claim must be dismissed as well. Plaintiffs appealed.

The Court of Appeal reversed as to the state law claims, holding that plaintiffs had properly pleaded causes of action for negligence and wrongful death. The court held that by representing that County personnel would undertake rescue efforts, County employees had created a special relationship between the County and the plaintiffs, which in turn spawned a duty to conduct the search and rescue operation in a reasonable manner. The court emphasized that the assurances of County personnel had prevented the plaintiffs from undertaking their own search, which might have resulted in the victim being found and rescued. The court noted that Health & Safety Code section 1799.107 did not immunize a public entity from liability for gross negligence in providing emergency

services, and that plaintiffs' allegations were sufficient to support a gross negligence claim here.

Arista is a very troubling case. The opinion contains very loose language concerning the low threshold for creating a special relationship based upon undertaking search and rescue operations. It has effectively created a tort of "negligent failure to rescue," which could greatly expand the potential liability of public entities when rendering not simply search and rescue services, but emergency services in general.

B. Steinle v. City & County of San Francisco, 919 F.3d 1154 (9th Cir. 2019)

●Sheriff's Issuance Of Memo Directing Employees Not To Provide Prisoner Release Information To ICE Is A Discretionary Act Shielded By The Immunity Of Government Code Section 820.2.

In *Steinle v. City & County of San Francisco*, 919 F.3d 1154 (9th Cir. 2019) the plaintiffs' adult child was murdered by an undocumented alien who had previously been in County custody for an offense, but had been released without notifying federal ICE agents, pursuant to a memo issued by the Sheriff limiting local cooperation with ICE agents. Plaintiffs sued the Sheriff and the County, asserting various state tort claims. The district court granted a motion to dismiss without leave to amend, finding that issuance of the memo was a discretionary act and therefore shielded from liability under Government Code section 820.2.

The Ninth Circuit affirmed. The court emphasized that the immunity of section 820.2 turns on whether the underlying act is merely operational, or instead reflects a basic policy decision. The court found that the Sheriff's decision to issue a memo limiting departmental cooperation with ICE in line with Sanctuary City regulations, constituted a basic policy decision of the sort protected by section 820.2.

Steinle is a helpful case in two respects. First, it again emphasizes the broad application of section 820.2 to policy decisions by government officials, and clarifies the distinction between operational decisions and policy making. Second, it frees local public entities from liability concerns under state law for decisions regarding the extent to which local governments will cooperate with federal immigration officers.