2018 Nevada Government Civil Attorneys Conference

42 U.S.C 1983 Litigation Update

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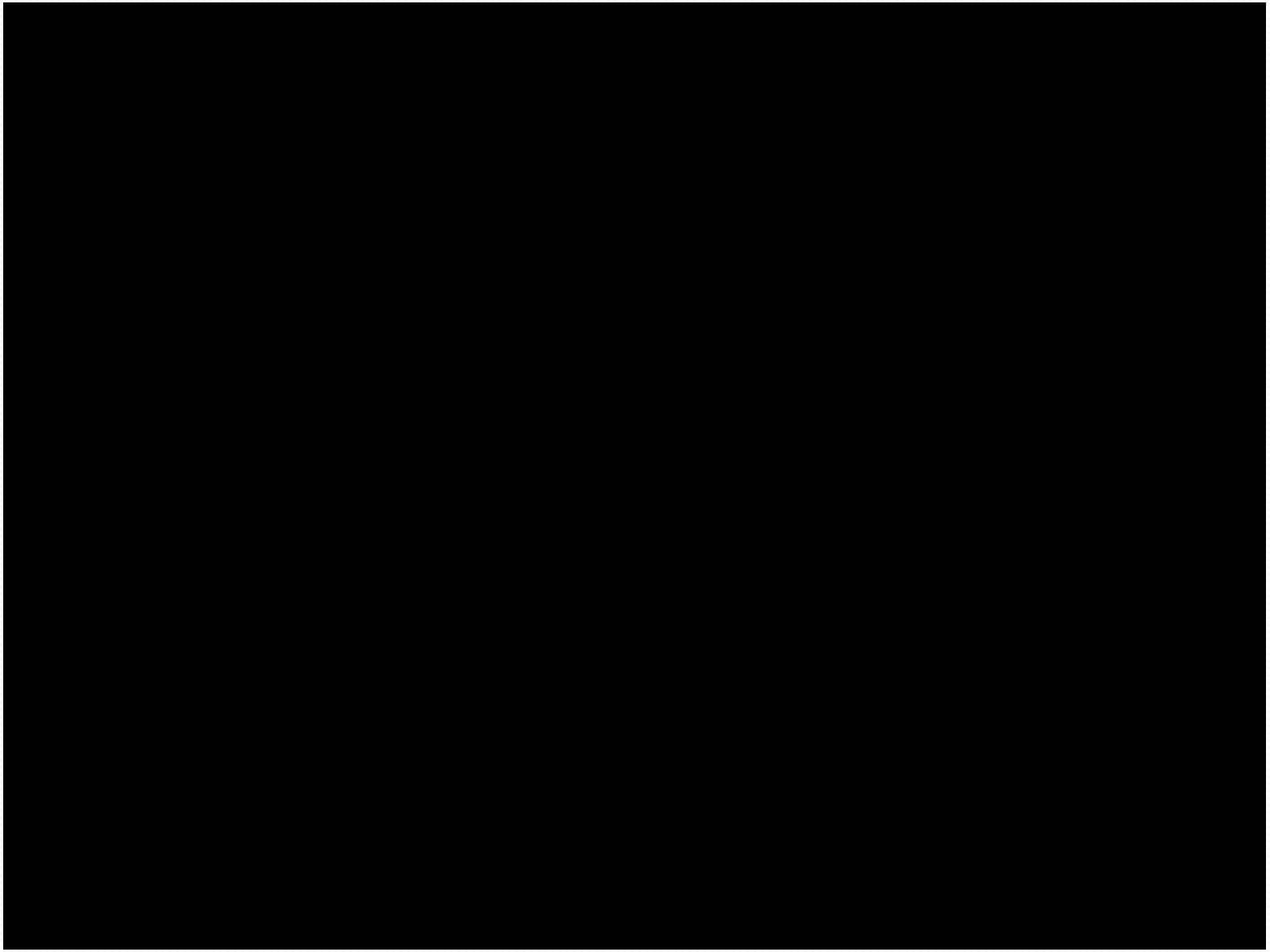
Unconscious Bias

- **Bias** is a prejudice in favor of or against one thing, person, or group compared with another usually in a way that's considered to be unfair. Biases may be held by an individual, group, or institution and can have negative or positive consequences.

- **Unconscious biases** are social stereotypes about certain groups of people that individuals form outside their own conscious awareness. Everyone holds unconscious beliefs about various social and identity groups, and these biases stem from one's tendency to organize social worlds by categorizing

    - *University of California, San Francisco*

Unconscious Bias – WD WA



Unconscious Bias
Jury Instructions – WD WA

- "The proposed instructions are intended to alert the jury to the concept of unconscious bias and then to instruct the jury in a straightforward way not to use bias, including unconscious bias, in its evaluation of information and credibility and in its decision-making."

Unconscious Bias
Jury Instructions – WD WA

PRELIMINARY INSTRUCTION TO BE GIVEN
TO THE ENTIRE PANEL BEFORE JURY SELECTION

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the [plaintiff,] defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.

Accordingly, during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.

Unconscious Bias Jury Instructions – WD WA

PRELIMINARY INSTRUCTIONS TO BE GIVEN BEFORE OPENING STATEMENTS

DUTY OF JURY

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.[1] Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.[2]

In addition, please do not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be—that is entirely up to you.

Unconscious Bias Jury Instructions – WD WA

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;
(2) the witness's memory;
(3) the witness's manner while testifying;
(4) the witness's interest in the outcome of the case, if any;
(5) the witness's bias or prejudice, if any;
(6) whether other evidence contradicted the witness's testimony;
(7) the reasonableness of the witness's testimony in light of all the evidence; and
(8) any other factors that bear on believability.

You must avoid bias, conscious or unconscious, based on the witness's race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender in your determination of credibility.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

Unconscious Bias
Jury Instructions – WD WA

INSTRUCTION TO BE GIVEN
DURING CLOSING INSTRUCTIONS
(perhaps before 7.5 – Verdict Form)

DUTY OF JURY

I want to remind you about your duties as jurors. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.[1] Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.[2]

First Amendment "Audits"

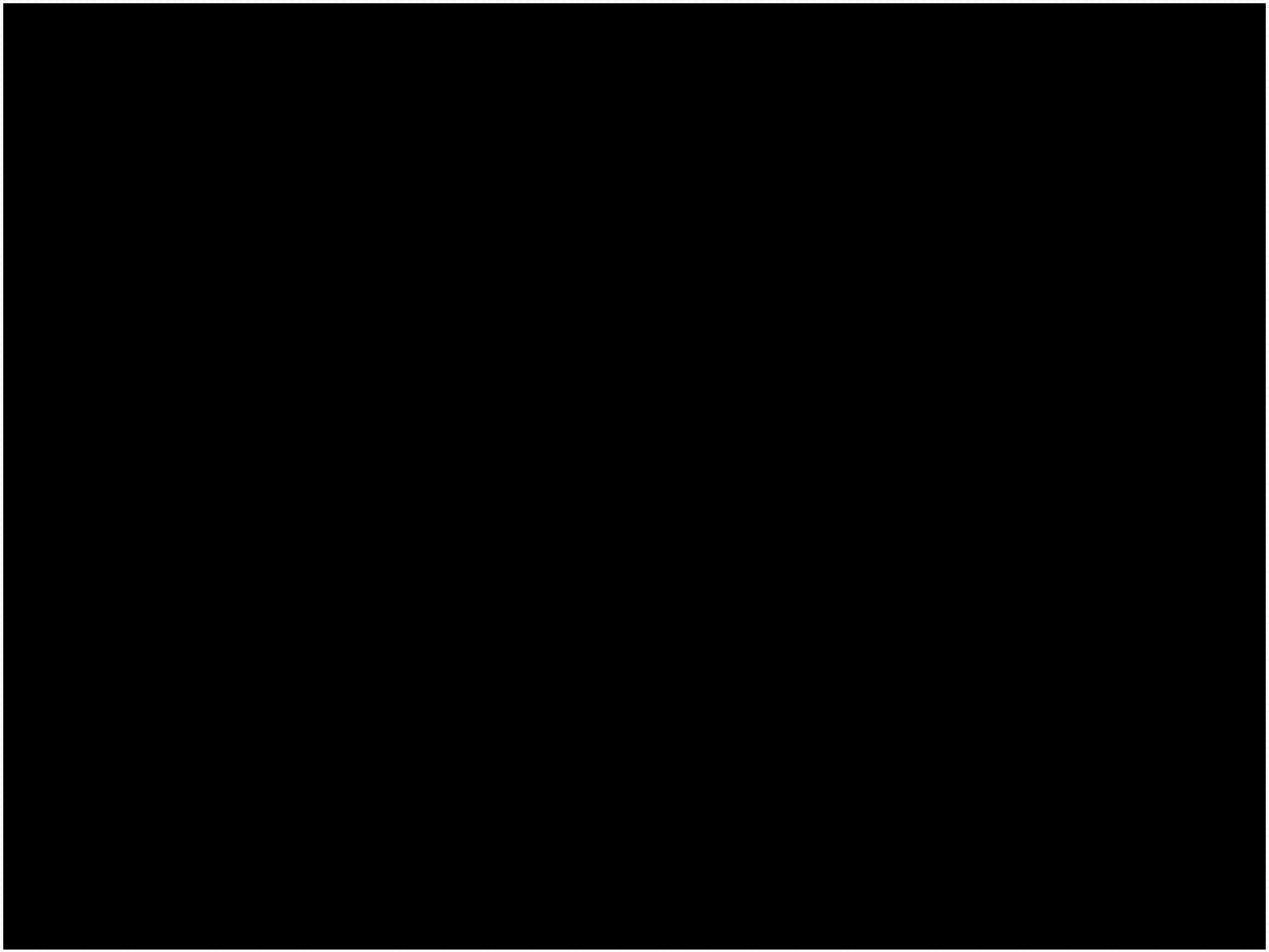
- An "audit" of a public employee's respect for a person's First Amendment rights.
  - A person, usually holding a cell phone or camera, will approach a public employee in a public place and record the interaction.
  - Seeking a government employee, often a police officer, who will "infringe" on the person's right of free speech by trying to prevent them from filming or photographing in public areas.

Turner v. Driver, 848 F.3d 678 5th Circuit - 2017

- In October 2015, Turner filed suit in the Northern District of Texas against Driver, Grinalds, and Dyess in their individual capacities. Turner brought claims under 42 U.S.C. § 1983, alleging that they violated his First, Fourth, and Fourteenth Amendment rights.
- Turner sought compensatory damages, punitive damages, attorneys fees and costs, and declaratory judgment that the defendants had violated his constitutional rights.

Turner v. Driver, 848 F.3d 678

5th Circuit – 2017 – filmed Sept. 2015



Turner v. Driver, 848 F.3d 678 5th Circuit - 2017

- Ultimately, after a supervisor (Lt. Driver) arrived on scene and spoke with Turner and the officers, Driver "lectured" Turner, and the officers finally released him and returned his camera to him.

Turner v. Driver, 848 F.3d 678 5th Circuit - 2017

- The three officers filed motions to dismiss Turner's amended complaint. The district court granted the motions to dismiss on the basis of qualified immunity.
- The court reasoned that Turner failed to meet his burden of showing that the defendants were not entitled to qualified immunity because he failed to show that their actions violated any of his clearly established statutory or constitutional rights or that their actions were objectively unreasonable.
- In particular, the district court ruled that a First Amendment right to video record police activity was not clearly established.

Turner v. Driver, 848 F.3d 678 5th Circuit – 2017 - Holdings

- [1]-Where officers saw plaintiff video recording a police station from a public sidewalk across the street, handcuffed him when he refused to identify himself, placed him in the back of a patrol car, and released him after a supervisor arrived, **defendants were entitled to qualified immunity as to plaintiff's First Amendment claim because there was no clearly established First Amendment right to record the police at the time of his activities;**
- [2]-A First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions;
- [3]-The officers were entitled to qualified immunity as to plaintiff's Fourth Amendment unlawful detention claim;
- **[4]-Plaintiff's unlawful arrest claim survived because the officers' actions were disproportionate to any potential threat that he posed or to their investigative needs.**

Location

- The location of the activity ultimately determines how much protection the activity receives under the First Amendment.
  - Public Areas
  - Non-Public Areas

Public Areas

- Streets
- Sidewalks
- Parks
- Parking Lots….maybe
- Waiting rooms…maybe
- Front desk areas…maybe
  - Areas that are VISIBLE FROM public areas

- MAIN QUESTION – DOES THE PUBLIC HAVE ACCESS TO THIS AREA?
  - If yes…probably a public area

Non-Public Areas

- Broadly – government property to which the public does not generally have access.
  - "Employee Only" areas of office buildings
  - Other areas to which the government has a strong interest in restricting access
  - Again - DOES THE PUBLIC HAVE ACCESS TO THIS AREA?
    - If there is a question – err on the side of "Public" in this context

Rights in Public Areas

- People have very broad First Amendment Rights in public areas.
- Any interference by the governmental entity and/or its employees is a violation of these rights.

- Do these rights extend to video recording?
  - YES – all circuit courts of appeal have held that the First Amendment extends to video recording.
    - *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995)

Restrictions on these rights in public areas

- VERY limited
  - Governmental entity can impose reasonable restrictions on the time, place and manner of the protected conduct.
  - Cannot relate to the content of what the individual is "communicating", but rather when, where and how it is being communicated.

Restrictions in Non-Public Areas

- Restrictions placed upon individuals in non-public areas are permissible if they are reasonable and are not content-based.
  - In the First Amendment audit context, this will rarely come up because the filmers are focusing on areas that are clearly “public”

How to handle an "Audit"

- Employees should not do anything in an attempt to prohibit, stop or interfere so long as the person is simply filming in or around a public area.
- The individual may attempt to provoke a response in some way, but the employee should not interfere unless the person becomes a threat, becomes abusive, or begins to disrupt the operation of the government office.
  - Ask calmly for the person to stop the disruptive behavior;
    - avoid asking them to stop filming if possible.
  - If that doesn't work, contact a supervisor and/or law enforcement.

How to handle an “Audit”

- DON’T
  - Argue with the individual.
  - Attempt to confiscate the video recorder.
  - Initiate physical contact unless absolutely necessary for self-defense/defense of another person.

- REMEMBER – they want a confrontation, so if you ignore them they will usually lose interest and go away.


JUSTICE DELAYED
IS
JUSTICE DENIED
JUDGE MIRANDA DU
&
RENO ATTORNEY BRIAN BROWN
SUMMARY
JUDGMENT
IS UNCONSTITUTIONAL
7th Amendment

Recent Decisions – Ninth Circuit Court of Appeals by Amendment

- The Ninth Circuit Court of Appeals has issued more than 20 Opinions on matters that were brought pursuant to 42 U.S.C 1983.
- 7 decisions based on 1st Amendment
- 2 decisions based on the 2nd Amendment
- 7 decisions based on the 4th Amendment
- 2 decisions based on the 5th Amendment
- 2 decisions based on the 14th Amendment

First Amendment Decisions

- **Contest Promotions, LLC v. City and County of San Francisco, No. 17-15909 (9th Cir. 2017)** - The panel affirmed the district court's Fed. R. Civ. P. 12(b)(6) dismissal of an action brought pursuant to 42 U.S.C. § 1983 challenging San Francisco's sign-related regulations. Through its Planning Code, San Francisco prohibits new billboards but allows onsite business signs relating to activities undertaken on the premises, subject to various rules. Noncommercial signs are exempt from the rules. Plaintiff, an advertiser that rents the right to post signs on the premises of third-party businesses, alleged that the City's Planning Code violates the First Amendment by exempting noncommercial signs from its regulatory ambit. **The panel held that the distinction drawn between commercial and noncommercial signs in the City's Planning Code survived intermediate scrutiny under Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980). The panel held that the distinctions directly advanced the City's substantial interests in safety and aesthetics and was not impermissibly underinclusive.**

First Amendment Decisions

- **JOSEPH A. KENNEDY v. BREMERTON SCHOOL DISTRICT, No. 16-35801(9th Cir. 2017)** The panel affirmed the district court's denial of preliminary injunctive relief in an action brought by a high school coach who alleged that his school district retaliated against him for exercising his First Amendment rights when it suspended him for kneeling and praying on the football field's fifty-yard line in view of students and parents immediately after high school football games. The panel held that plaintiff spoke as a public employee, not as a private citizen when he kneeled and prayed on the fifty-yard line immediately after games in school logoed attire while in view of students and parents. The panel held that plaintiff had a professional responsibility to communicate demonstratively to students and spectators and he took advantage of his position to press his particular views upon the impressionable and captive minds before him. **The panel held that because plaintiff's demonstrative speech fell within the scope of his typical job responsibilities, he spoke as a public employee, and the district was permitted to order him not to speak in the manner that he did. Plaintiff accordingly could not show a likelihood of success on the merits of his First Amendment retaliation claim, and was not entitled to a preliminary injunction.**

First Amendment Decisions

- **JANELL HOWARD, Plaintiff-Appellant, v. CITY OF COOS BAY, No. 14-35506 (9th Cir. 2017)** The panel affirmed the district court's summary judgment in an action brought under 42 U.S.C. § 1983 and Oregon state law by a former employee of the City of Coos Bay, Oregon, who alleged that the City violated the First Amendment and state law by refusing to rehire her as a Finance Director. The City terminated plaintiff from her position as Finance Director in 2008. In 2009, she filed her first lawsuit against the City alleging that her termination was retaliatory(Hunter I). While that lawsuit was pending, plaintiff's former position became vacant and she applied for the job. Her application was rejected in 2011. After a jury ruled in plaintiff's favor in Howard I, plaintiff filed a second action against the City in 2012, alleging that the City retaliated against her for her first lawsuit when it rejected her employment application (Howard II).The panel first held that plaintiff's claims were not barred by claim preclusion because plaintiff's retaliation claim in the present suit arose from events that occurred after she filed her complaint in Howard I . The panel held that claim preclusion does not apply to claims that accrue after the filing of the operative complaint. The panel held, however, that issue preclusion barred plaintiff from recovering economic damages which she has already received as a result of Howard I —namely the loss of the salary and benefits she could have earned as the City's Finance Director. Nevertheless, because plaintiff presented a new request for punitive damages and because she may have been able to demonstrate new non-economic damages, the panel considered the merits of her suit against the City. **The panel held that no reasonable jury could find that plaintiff's first suit was a substantial reason for the City's refusal to consider her for the Finance Director position in 2011. The panel held that rightly or wrongly, because of her previous termination in 2008, the City had demonstrated that it would have rejected plaintiff's application in 2011, irrespective of her suit.** The panel held that plaintiff's claim under the Oregon Whistleblower Act failed as a matter of law. Thus, the panel rejected plaintiff's assertion that the Act should be construed analogously to Title VII of the United States Code, and permit claims of retaliation brought by former employees.

First Amendment Decisions

- **Epona, LLC v. County of Ventura, No. 17-55472 (9th Cir. 2017)** Plaintiffs filed suit challenging the County's permitting scheme, which required individuals to obtain a Conditional Use Permit (CUP) to host weddings on their properties. The Ninth Circuit reversed the district court's dismissal of plaintiffs' First Amendment claim; affirmed the dismissal of plaintiffs' Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc et seq., claim; vacated the denial of a preliminary injunction; and remanded. The panel applied Kaahumanu v. Hawaii, 682 F.3d 789 (9th Cir. 2012), and **held that plaintiffs functioned as wedding "vendors" because they seek to profit from facilitating and providing a commercial space for weddings; because they are wedding vendors, they may suffer economic injury as a result of the CUP scheme; and an injunction may redress this harm. Therefore, plaintiffs had Article III standing to bring their First Amendment challenge. In regard to the First Amendment claim, the permitting scheme was unconstitutional because it lacked definite and objective standards and lacked a time limit. In regard to the RLUIPA equal treatment claim, the panel held that plaintiffs did not assert that they were a religious institution or assembly.**

First Amendment Decisions

- EAGLE POINT EDUCATION v. JACKSON COUNTY SCHOOL DISTRICT NO. 9, Nos. 15-35704, 15-35972 (9th Cir. 2018)
- Juan D. VEGA, Jr., Plaintiff-Appellant, v. UNITED STATES of America et al; No. 13-35311 (9th Cir. 2018)
- ACOBSON; Peter Ragan, Plaintiffs–Appellants, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY; No. 16-17199 (9th Cir. 2018)

Second Amendment Decisions

- **Robert Mahoney et al v. Jeff Sessions and the City of Seattle, No. 14-35970, (9th Cir. 2017)** The panel affirmed the district court's judgment upholding the use of force policy adopted by the City of Seattle; and rejected the claims under 42 U.S.C. § 1983 of plaintiffs, a group of approximately 125 Seattle Police Department ("SPD") officers who allege that Seattle violated the Second Amendment right of police officers to use firearms for the core lawful purpose of self-defense. The panel applied a two-step inquiry to determine whether the challenged law or regulation violated the Second Amendment. At step one, the panel assumed without decidingt hat the use of force policy was subject to Second Amendment protection. At step two, the panel held that the use of force policy recognized that the plaintiffs could use their department-issued firearms in self-defense in an encounter with a suspect, and concluded that the use of force policy did not impose a substantial burden on plaintiffs' right to use a firearm for the purpose of lawful self-defense. The panel also concluded that the use of force policy was not such a severe restriction that it amounted to a destruction of the Second Amendment right. The panel, therefore, applied thei ntermediate level of constitutional scrutiny to determine whether the policy violated the Second Amendment.Applying intermediate scrutiny, the panel concluded that the use of force policy was constitutional under the Second Amendment because there was a reasonable fit between the policy of Seattle's important government interest in ensuring the safety of both the public and its police officers. The panel also affirmed the district court's dismissal ofplaintiffs' substantive due process and equal protection claims.

Second Amendment Decisions

- **Teixeira v. County of Alameda, No. 13-17132 (9th Cir. 2017)** The en banc court affirmed the district court's dismissal, for failure to state a claim, of an action brought pursuant to 42 U.S.C. § 1983 alleging that the County of Alameda violated the Second Amendment when it denied individual plaintiffs conditional use permits to open a gun shop because the proposed location of the shop fell within a prohibited County zone. The County of Alameda (1) requires firearm retailers to obtain a conditional use permit before selling firearms in the County and (2) prohibits firearm sales near residentially zoned districts, schools and day-care centers, other firearm retailers, and liquor stores. Plaintiffs challenged the County's zoning ordinance, alleging that by restricting their ability to open a new, full-service gun store, the ordinance infringed on their Second Amendment rights, as well as those of their potential customers. The en banc court held that plaintiffs had not plausibly alleged that the County's ordinance impeded any resident of Alameda County who wished to purchase a firearm from doing so. Accordingly, plaintiffs failed to state a claim for relief based on infringement of the Second Amendment rights of their potential customers. The en banc court further held that plaintiffs could not state a Second Amendment claim based solely on the ordinance's restriction on their ability to 4 TEIXEIRA V. COUNTY OF ALAMEDA sell firearms. **The panel held that a textual and historical analysis of the Second Amendment demonstrated that the Constitution does not confer a freestanding right on commercial proprietors to sell firearms. Alameda County's zoning ordinance therefore survived constitutional scrutiny**. Concurring, Judge Owens joined all but Part II.D of the majority opinion. In Judge Owens' view, there was no need to decide whether the Second Amendment guarantees the right to sell firearms because the ordinance at issue here fell within that category of presumptively lawful regulatory measures, and plaintiffs therefore could not state a viable Second Amendment claim. Concurring in part and dissenting in part, Judge Tallman concurred in the majority's decision to affirm the dismissal of the Second Amendment facial challenge. He dissented from the dismissal of the constitutional challenge as applied to plaintiffs, stating that the majority's analysis of the Second Amendment challenge to locating a full-service gun shop in an unincorporated area of Alameda County substantially interfered with the right of its customers to keep and bear arms. Dissenting, Judge Bea stated that neither the historical evidence nor the language of District of Columbia v. Heller, 554 U.S. 570 (2008) supported the majority's conclusion that the Second Amendment offers no protection against regulations on the sale of firearms.

Fourth Amendment Decisions

- **Martino Recchia v. City of Los Angeles, No. 13-57002 (9th Cir. 2018)** In an action concerning the warrantless seizure of Martino Recchia's twenty birds and euthanization of all but two of the birds, the panel (1) affirmed the district court's summary judgment on Recchia's Fourteenth Amendment claim against Los Angeles Department of Animal Control officers and state law claims as to all defendants; and(2) vacated summary judgment on Fourth Amendment claims against the officers and constitutional claims against the City of Los Angeles. Concerning Recchia's claim that the Officers violated his Fourth Amendment rights, the panel held that there was a genuine factual dispute about whether Recchia's healthy looking birds posed any meaningful risk to the other birds or humans at the time they were seized. **The panel affirmed the dismissal in part as to the seizure of the birds that appeared sick, but vacated and remanded in part as to the seizure of any birds that were wholly healthy in outward appearance.** The panel instructed the district court on remand to consider in the first instance whether the Officers were entitled to qualified immunity for any potential constitutional violation. Concerning Recchia's claim that the Officers violated his Fourteenth Amendment procedural due process rights by denying him a hearing before taking and destroying his healthy-looking birds, the panel held that to the extent that Recchia argued that he was denied a meaningful post-seizure hearing due to the euthanization of the birds, the district court properly granted summary judgment to the Officers because neither of the Officers was involved in the decision to euthanize the birds. The panel further held that the Officers did not violate Recchia's procedural due process rights when they seized his birds without a pre-seizure hearing because California Penal Code § 597.1 provided for adequate process. The panel noted that it did not matter whether Recchia's birds were properly seized under the statute or whether there was an emergency. The panel vacated summary judgment in favor of the City on Recchia's constitutional claims. The panel instructed the district court on remand to consider whether to grant Recchia permission to amend his complaint under Fed. R. Civ. P. 15 and 16 to assert his theory of municipal liability. The panel affirmed the district court's summary judgment to defendants on Recchia's state tort law claims based on events tied to the seizure of the birds. The panel held that discretionary immunity shielded the defendants from liability.

Fourth Amendment Decisions

- **SARA LOWRY v. CITY OF SAN DIEGO, No. 13-56141 (9th Cir. 2017)** The en banc court affirmed the district court's summary judgment in favor of the City of San Diego in an action brought pursuant to 42 U.S.C. § 1983 alleging that the City's policy of training its police dogs to "bite and hold" individuals resulted in a violation of plaintiff's Fourth Amendment rights. Plaintiff alleged that during the execution of a search by police officers, a police canine attacked plaintiff in her office where she was sleeping, and bit her upper lip. **The en banc court held that there were no genuine disputes of material fact regarding plaintiff's claim. From the perspective of a reasonable officer on the scene, the type and amount of force inflicted was moderate, the City had a strong interest in using the force, and the degree of force used was commensurate with the City's interest in the use of that force. The en banc court concluded that the force used was not excessive and did not violate the Fourth Amendment. Because the officers' actions were constitutional, the City could not be held liable under Monell v. Department of Social Services of New York, 436 U.S. 658, 694 (1978).**Dissenting, Chief Judge Thomas noted that plaintiff was sleeping in the privacy of her office, when she was attacked and injured by a police dog trained to inflict harm on the first person it encountered. He stated that a reasonable jury could find that the City of San Diego's use of a police dog was unreasonable under the circumstances presented.

Fourth Amendment Decisions

- **Longoria v. Pinal County, No. 16-15606 (9th Cir. 2017)** In this 42 U.S.C. 1983 action, the Ninth Circuit reversed the district court's grant of qualified immunity for the sheriff and affirmed the dismissal of claims brought by family members alleging that the sheriff used excessive force when he shot and killed Manuel Longoria. The panel held that the sheriff's credibility or the accuracy of his version of the facts was a central question that had to be answered by a jury. Defendants were not entitled to qualified immunity because there was a material issue of fact as to whether the sheriff violated Longoria's clearly established constitutional right. However, Longoria's family did not have standing to sue on their own behalves. Finally, the panel reversed the grant of summary judgment on plaintiffs' wrongful death claim under Arizona state law, because there was a material dispute of facts as to the use of reasonable deadly force.

Fourth Amendment Decisions

- **Smith v. City of Santa Clara, No. 14-15103 (9th Cir. 2017)** The panel affirmed the district court's judgment, entered following a jury verdict, in favor of several police officers and the City of Santa Clara, in an action brought pursuant to 42 U.S.C. § 1983 alleging that police officers violated plaintiff's constitutional rights under state and federal law when they conducted a search of her home. Santa Clara police officers, over plaintiff's objections, entered her home, without a warrant, to search for her daughter who was on probation and who police had probable cause to believe had just been involved in a theft of an automobile and a stabbing. **The panel held that once the government has probable cause to believe that a probationer has actually reoffended by participating in a violent felony, the government's need to locate the probationer and protect the public is heightened. The panel held that this heightened interest in locating the probationer was sufficient to outweigh a third party's privacy interest in the home that she shared with the probationer.** The panel held that Georgia v. Randolph, 547 U.S. 103 (2006), which recognized a limitation on warrantless consent searches, was not directly applicable because the Supreme Court's probation-search cases did not rest on a consent rationale. Instead, the question was whether a warrantless probation search that affects the rights

Fourth Amendment Decisions

- Ryan J. Bonivert v. City of Clarkson No. 35292 (9th (Cir. 2018)
- Chares Edward Byrd v. City of Phoenix Police Depart. No. 16152 (9th Cir. 2018)
- Rustin I. Smith v. City and County of Honolulu No. 17309 (9th Cir. 2018)
- Robert Reese Jr. v. County of Sacramento No. 16195 (9th Cir. 2018)

Fifth Amendment Decisions

- **Colony Cove Properties, LLC v. City of Carson, No. 16-56255 (9th Cir. 2018)** The panel reversed the district court's judgment and remanded with instructions to enter judgment in favor of defendant in an action brought by the owner of a mobile home park who alleged that defendant, the City of Carson, engaged in an unconstitutional taking in violation of the Fifth Amendment when it approved a lower rent increase than plaintiff had requested. Applying the factors set forth in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) **the panel first held that plaintiff did not present sufficient evidence to create a triable question of fact as to the economic impact caused by the City's denial of larger rent increases. The panel then held that plaintiff failed to present sufficient evidence supporting its investment-backed expectations claim. Finally, the panel held that the character of the City's action could not be characterized as a physical invasion by the government. The panel concluded that based on the evidence, no reasonable finder of fact could conclude that the denials of plaintiff's requested rent increases were the functional equivalent of a direct appropriation of the property. Accordingly, the panel held that the district court should have granted the City's motion for judgment as a matter of law.**
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Fourteenth Amendment Decisions

- **Richard A. Palm v. Los Angeles Department of Water and Power, No. 16-55691, (9th Circ. 2018)** The panel affirmed the district court's order (1) granting defendants' motion to dismiss; (2) denying plaintiff leave to amend his third amended complaint; and (3) denying plaintiff's motion for reconsideration in his 42 U.S.C. § 1983action alleging that the Los Angeles Department of Waterand Power terminated his employment in a probationary promotional position without due process of law in violation of the Fourteenth Amendment. **The panel held that based on the plain language of theLos Angeles Charter, the Los Angeles Civil Service Rules,and Circuit precedent, plaintiff lacked a protected propertyinterest in his probationary employment as Steam PlantMaintenance Supervisor. He therefore could not maintain a claim under the Fourteenth Amendment based on his termination from that position and his return to his permanent position as Steam Plant Assistant.**