CPOA CASE SUMMARIES – MARCH 2022

CONSTITUTIONAL LAW/ POLICE CONDUCT

A. A jury could infer that a police officer was acting within the scope of his employment when he negligently left his firearm in his vehicle after returning home from work.

Perez v. City & Cnty. of S.F., 75 Cal. App. 5th 826 (2022)

Facts: Marvin Cabuntala was employed as a police officer by the police department ("Department") of the City and County of San Francisco ("City"), and had a primary firearm issued by the Department. He also owned a personal gun that the Department had approved and qualified as a secondary firearm, which he regularly carried on and off duty, as authorized by the Department. He also regularly transported it in his vehicle while commuting to and from work. Officer Cabuntala was also a Department "specialist." Specialists work with a special operations group outside of patrol assignments. Officer Cabuntala testified at his deposition that specialists are "on call 24/7" and that he had responded at all hours outside of his regular schedule. Specialists were not permitted to respond to incidents without a firearm.

In August 2017, Officer Cabuntala drove home after participating in a City-assigned training session, arriving shortly before the end of his scheduled work hours. He left his personal, secondary firearm unsecured inside his vehicle. That night, Officer Cabuntala's vehicle was broken into and his firearm was stolen. The firearm was subsequently used to kill the son of Mayra Perez ("Plaintiff").

Plaintiff sued Cabuntala, the City, and others. The City moved for summary judgment. The trial court granted the City's motion for summary judgment, finding as a matter of law that Officer Cabuntala's conduct was not within the scope of his employment. Plaintiff appealed.

Held: The First District Court of Appeal explained that "'[t]he doctrine of respondeat superior holds an employer liable for torts of its employees committed within the scope of their employment.'" (*Marez v. Lyft, Inc.* (1st Dist. 2020) 48 Cal.App.5th 569*,* 577.) "[T]he central justification for respondeat superior[is] that losses fairly attributable to an enterprise—those which foreseeably result from the conduct of the enterprise—should be allocated to the enterprise as a cost of doing business." (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004.) The First District explained that "'foreseeability' as a test for *respondeat superior* []means that *in the context of the particular enterprise* an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." (*Id.* at pp. 1003–1004.)

Considering the risk that a police officer will negligently mishandle a firearm in the context of a police department's particular enterprise, the First District asserted the "central role of firearms" in the policing enterprise, and observed that police officers act "as the official representative of the state, with all of its coercive power," and one of the "visible symbols of that power" is "a gun." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 216.)

The Court reviewed the evidence: the Department allowed officers to carry approved, secondary firearms while on duty and officers regularly did so; the Department knew or reasonably should have known that officers transport these firearms on their commutes to and from work because there was no evidence that such firearms were required to be left at the police station after an officer's shift was over; the Department allowed officers to carry handguns while off duty as long as they also carried indicia of their status as police officers; Department specialists may be called to respond to incidents at any time, and must carry a firearm when they respond; Officer Cabuntala—a Department officer and specialist—brought his Department-approved secondary firearm while traveling to a Department-assigned training session; he did so because he was on-duty and would be training near a county jail[1]; and the firearm was present in his vehicle upon his return home because he brought it to his assigned work location for these work-related purposes.

The Court explained that it considered these facts "in the context of the enterprise of policing, the centrality of firearms to that enterprise, and the underlying rationale for respondeat superior that 'losses fairly attributable to an enterprise—those which foreseeably result from the conduct of the enterprise—should be allocated to the enterprise as a cost of doing business.' (*Farmers, supra*, 11 Cal.4th at p. 1004.)" Given this context, the Court held that a jury could reasonably find a nexus between the Department's enterprise of policing and the risk that one of its officers would negligently fail to secure a Department-approved, secondary firearm upon returning home from work. The Court found that the risk at issue in the instant case sharply contrasted with the risk of workplace sexual harassment at issue in *Farmers* which, although foreseeable "as a general matter," was not "typical of or broadly incidental to the particular enterprise" of the employer. (*Farmers*, at p. 1009.) Accordingly, the Court concluded that a jury could reasonably find that Officer Cabuntala's negligent failure to secure his Department-approved firearm in an unattended vehicle after returning home from a Department-assigned training fell within the scope of his employment. The Court thus held that the City failed to demonstrate that Plaintiff could not establish respondeat superior liability as a matter of law, and accordingly reversed the grant of summary judgment.

For a more detailed discussion of this case, please see Client Alert Vol. 37, No. 5, available at www.jones-mayer.com.

B. A statute criminalizing possession of a loaded, operable firearm while also in possession of controlled substances did not violate the Second Amendment right to bear arms.

People v. Gonzalez, 75 Cal. App. 5th 907 (4th Dist. 2022)

Facts: A police officer found Daniel Edward Gonzalez asleep in his car parked on the side of the road with a bag of about 0.6 grams of methamphetamine and a loaded, operable firearm at his feet. A jury convicted Gonzalez of three firearm-related crimes, including possession of a controlled substance while armed (Health & Safety Code section 11370.1), and sentenced to six years in prison. Gonzalez appealed, challenging the constitutionality of Section 11370.1.

[1] Based on the officer's mention of these two facts, the Court reasoned that a jury could infer Officer Cabuntala thought he might be called to respond to an incident at the jail as an on-duty officer or specialist.

Held: The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." However, as the United States Supreme Court explained in *District of Columbia v. Heller* (2008) 554 U.S. 570, the Second Amendment does not grant "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." (*Heller*, at p. 626.)

Health & Safety Code section 11370.1 makes it a felony to possess certain controlled substances "while armed with a loaded, operable firearm." (Section 11370.1(a).) In his facial challenge to the constitutionality of the statute, Gonzalez argued the provision impermissibly infringes on the Second Amendment right to bear arms because it targets nonviolent criminals—i.e., those in possession of controlled substances. The Fourth District Court of Appeal noted that based on the provision's legislative history, California courts have concluded the purpose of Section 11370.1 is "to protect *the public and law enforcement officers* and "'stop the growing menace from a very deadly combination—illegal drugs and firearms.'"[2]

Moreover, "[t]he [Supreme] Court said in *Heller* that the Constitution entitles citizens to keep and bear arms for the purpose of *lawful* self-protection, not for *all* self-protection." *United States v. Jackson* (7th Cir. 2009) 555 F.3d 635, 636.) The Fourth District added that it was aware of no court decision holding that the United States Constitution protects a right to carry a gun while simultaneously engaging in criminal conduct, as Gonzalez was found guilty of here. Finally, the Court explained that a large body of federal and out-of-state cases have upheld the constitutionality of similar drug-related firearm restrictions.[3]

The Fourth District thus rejected Gonzalez's facial challenge to the constitutionality of Section 11370.1. The appellate court noted that nothing in *District of Columbia v. Heller* - the relevant binding precedent - suggests the Second Amendment limits a state's ability to separate guns and drugs. Because "there is no constitutional problem with separating guns from drugs" (*Jackson*, *supra*, at p. 636), the Fourth District concluded that Section 11370.1 did not contravene the Second Amendment right to bear arms as interpreted in *Heller*. Accordingly, the Fourth District affirmed.

C. No reasonable suspicion for a traffic stop that resulted in felony charges since defendant did not violate the Vehicle Code and nothing objectively suggested that he did.

People v. Holiman, 76 Cal. App. 5th 825 (1st Dist. 2022)

Facts: In June 2017, rookie Police Officer Laura Bellamy was driving in her patrol car in downtown Vallejo, accompanied by a field training officer.[4] Officer Bellamy noticed a car driven by Andrew Holiman. According to her testimony provided two years later but not provided in her

[2] *In re Ogea*, 121 Cal.App.4th 974, 984 (4th Dist. 2004), italics added, quoting *People v. Pena*, 74 Cal.App.4th 1078, 1082 (5th Dist. 1999).

[3] See, e.g., *U.S. v. Greeno*, 679 F.3d 510 (6th Cir. 2012), which upheld the constitutionality of a sentence enhancement penalizing carrying a dangerous weapon during the commission of a drug offense.

[4] Officer Bellamy had been a member of the police force for only one month, and had not yet completed the traffic phase of her training.

contemporaneous police report, Holiman made a "furtive glance" trying to hide his face as his car passed. Officer Bellamy did a U-turn and began following the car briefly until the two cars reached an intersection with a three-way stop sign. Holiman came to a full stop, and then he proceeded ahead and made the right turn. There, Officer Bellamy testified, Holiman turned on his turn blinker "[j]ust prior" to making the right-hand turn. Officer Bellamy followed Holiman's car for about four more minutes for almost a mile, before initiating a traffic stop. The officer's basis for the traffic stop was that he did not turn on his signal blinker early enough, i.e., for the 100 feet he drove before coming to a stop. She and another officer approached Holiman's car. Holiman disclosed he was on parole and, Officer Bellamy confirmed he was subject to search terms. Holiman was found in possession of illegal drugs and a handgun.

Holiman was arrested, and charged with felony counts for weapons offenses and one drug possession offense. Holiman moved to suppress the evidence seized from the car, arguing that the stop and search violated the Fourth Amendment. However, the trial court denied his motion, ruling that Officer Bellamy had a reasonable suspicion that Holiman had violated the Vehicle Code and thus the stop was lawful. Holiman pled no contest to two felony drug charges and was sentenced to prison. Holiman appealed, arguing in part that the warrantless seizure of the evidence violated the Fourth Amendment because the police lacked an objectively reasonable suspicion that the way he signaled his right-hand turn violated Vehicle Code section 22108.

Held: The First District Court of Appeal stated that to satisfy the Fourth Amendment, "a detention must be supported by reasonable suspicion the person is involved in criminal activity." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 56.) The Court explained that reasonable suspicion means "'the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.'" (*People v. Suff* (2014) 58 Cal.4th 1013, 1054.)

Holiman contended on appeal that the traffic stop violated his Fourth Amendment rights because he did *not* violate the Vehicle Code, and thus Officer Bellamy lacked a reasonable suspicion to believe that he did and, thus, to stop him. Holiman contended, moreover, that it was not objectively reasonable for Officer Bellamy to *think* his right-hand turn violated the law. The People respond there was no Fourth Amendment violation because Holiman *did* violate the law.

Vehicle Code Section 22108 provides: "Any signal of intention to turn right or left shall be given continuously during the last 100 feet traveled by the vehicle before turning." However, the Court explained that section applies *only* if another driver would be affected by the vehicle's movement within the meaning of Section 22107.[5] Section 22107 provides: "No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement."

The First District stated that the narrow question it considered was whether Officer Bellamy had an objectively reasonable basis to believe a turn signal was required *at all* under Section 22107—or, in other words, to believe another vehicle could be "affected by" the right-hand turn that Holiman made. The People argued that Officer Bellamy reasonably could have believed that *her*

[5] *People v. Carmona*, 195 Cal.App.4th 1385, 1394 (4th Dist. 2011).

own patrol car, which was stopped behind Holiman's car, could have been affected by the right-hand turn, thus supplying a reasonable suspicion to stop him when he failed to signal the turn in a manner she reasonably thought the law required (i.e., for the last 100 feet), even if she was mistaken about the law.

The Court rejected the People's contention, noting that the People did not present any evidence or explanation of how Officer Bellamy's patrol car, which presumably also would be stopping at the stop sign, could have been affected by Holiman's turn and thus had shown no violation of the Vehicle Code. More importantly, they presented no objectively reasonable basis for an officer in Bellamy's position to *think* her car could have been affected, and thus had failed to demonstrate an objectively reasonable mistake, whether one of fact or of law. The undisputed dash cam video footage showed that Officer Bellamy's patrol car came to a full stop behind Holiman's car and that, given the width of the road, there was no physical way for the patrol car to have proceeded around Holiman on the right to attempt to make a right-hand turn and potentially collide with Holiman's car while he was making the turn. The Court thus found that Holiman's turn did not violate the Vehicle Code, and no reasonable police officer could think that it did. The traffic stop was not supported by reasonable suspicion that Holiman's turn violated the law. The First District Court of Appeal thus concluded that the trial court erred in denying Holiman's motion to suppress, and accordingly reversed and remanded with directions to the trial court to set aside its order denying the motion to suppress.

QUALIFIED IMMUNITY

A. Detective was not entitled to qualified immunity because it was clearly established at the time of plaintiffs' arrests that an arrest supported by probable cause but made in retaliation for protected speech violates the First Amendment.

Ballentine v. Tucker, 2022 U.S. App. LEXIS 5971 (9th Cir. Mar. 8, 2022)

Facts: Brian Ballentine, Catalino Dazo, and Kelly Patterson ("Plaintiffs") conducted protests by using chalk to write anti-police messages on Las Vegas sidewalks. In June 2013, Plaintiffs were cited for violations of Nevada's graffiti statute after refusing to clean up their chalked messages on the sidewalk in front of the Las Vegas Metropolitan Police Department ("Metro") headquarters. Metro Detective Christopher Tucker investigated the citations, examining Plaintiffs' messages and monitoring Plaintiffs' social media to track their activities. He learned that Plaintiffs were members of the Sunset Activist Collective, a local activist group, and were associated with an activist group critical of law enforcement named CopBlock.

Plaintiffs chalked messages critical of Metro twice more in July 2013. The second time was on the sidewalk in front of the state courthouse after their hearing on the citations.[6] Plaintiffs chalked messages critical of Metro and police, including the statements, "F--- PIGS!" and "F--- THE COPS." Detective Tucker was present at the courthouse while Plaintiffs chalked, and he photographed the messages. He recognized plaintiff Ballentine and asked if Plaintiffs would clean up after themselves. The detective did not stop Plaintiffs or cite them, and no officer told Plaintiffs

[6] The citations were not prosecuted.

to stop chalking. Plaintiffs also indicated that no efforts were made to stop other individuals, including children, from chalking that day. However, later that month, Detective Tucker issued declarations of arrest for the July chalking incidents. He referred in the declarations to Plaintiffs' association with the Sunset Activist Collective and CopBlock, and specified the content of some of their messages, including the statements. A criminal complaint was filed against Plaintiffs which referred to the graffiti as derogatory and profane. Plaintiffs Ballentine and Patterson were arrested, but the District Attorney ultimately dropped all charges.

Plaintiffs subsequently filed an action against Detective Tucker, other officers, and Metro, asserting 42 U.S.C. section 1983 and Nevada law claims. The District Court entered summary judgment for defendants on all claims except Plaintiffs' claim that Detective Tucker violated their First Amendment rights by arresting them in retaliation for chalking anti-police messages on sidewalks. Detective Tucker appealed. The Ninth Circuit Court of Appeals vacated and remanded the case in light of the United States Supreme Court's decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). On remand, the District Court concluded that Detective Tucker was entitled to qualified immunity because Plaintiffs' constitutional rights were not clearly established at the time of their arrests, granted Tucker's motion for summary judgment, and dismissed Plaintiffs' Section 1983 claims based on qualified immunity grounds. Plaintiffs appealed.

Held: The Ninth Circuit Court of Appeals explained that to overcome qualified immunity, Plaintiffs had to show that Detective Tucker (1) "violated a federal statutory or constitutional right" and (2) "the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quotation marks omitted).

Citing *Nieves*, the Court first recognized that plaintiffs bringing First Amendment retaliatory arrest claims must generally plead and prove the absence of probable cause because the presence of probable cause generally speaks to the objective reasonableness of an arrest and suggests that the officer's animus is not what caused the arrest. However, the Supreme Court has also carved out a narrow exception for cases where officers have probable cause to make arrests, but typically exercise their discretion not to do so. Here, Plaintiffs presented objective evidence showing that they were arrested while others who chalked and did not engage in anti-police speech were not arrested. Given that plaintiffs had shown differential treatment of similarly situated individuals, the District Court correctly concluded that a reasonable jury could find that the anti-police content of plaintiffs' chalkings was a substantial or motivating factor for Detective Tucker's declarations of arrest. Accordingly, the panel agreed with the District Court that a reasonable factfinder could conclude from the evidence that Detective Tucker violated plaintiffs' First Amendment rights.

However, the Court held that at the time of Detective Tucker's conduct in July 2013, binding Ninth Circuit precedent gave fair notice that it would be unlawful to arrest plaintiffs in retaliation for their First Amendment activity, notwithstanding the existence of probable cause. The Court explained that to determine if a right was clearly established, "[t]he relevant inquiry is whether, at the time of the officers' action, the state of the law gave the officers fair warning that their conduct was unconstitutional." *Ford v. City of Yakima*, 706 F.3d 1188, 1195 (9th Cir. 2013), *citing Hope v. Pelzer*, 536 U.S. 730, 741 (2002). In November 2006, *Skoog v. County of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006) established the First Amendment right to be free from retaliatory law enforcement action even where probable cause exists. *Ford* subsequently held that *Skoog* clearly

established this right in November 2006.[7] Accordingly, at the time of Detective Tucker's conduct in July 2013, the right was clearly established. A reasonable officer in Detective Tucker's position had fair notice that the First Amendment prohibited arresting plaintiffs. Accordingly, the Ninth Circuit concluded that the District Court erred in granting qualified immunity to Detective Tucker. The Ninth Circuit Court of Appeals accordingly affirmed in part, reversed in part, and remanded.

B. Police officer was not entitled to summary judgment based on qualified immunity because evidence, viewed in the light most favorable to plaintiffs, showed that his use of force was not objectively reasonable.

Estate of Aguirre v. Cnty. of Riverside, 2022 U.S. App. LEXIS 7925 (9th Cir. Mar. 24, 2022)

Facts: In April 2016, Sergeant Dan Ponder of the Riverside County Sheriff's Department responded after receiving radio reports that someone in Lake Elsinore, California, was destroying property with a bat-like object, and had threatened a woman with a baby. Upon arriving, Sergeant Ponder exited the patrol car with his gun drawn and confronted Clemente Najera-Aguirre ("Najera") holding a stick. Key facts were disputed in the record as to what transpired, and eyewitness accounts conflicted. Regardless, Sergeant Ponder shot Najera six times from no more than fifteen feet away without warning and killed him.

Three of Najera's children (collectively, "the Najeras") sued Sergeant Ponder under 42 U.S.C. section 1983, alleging, among other things, that he used excessive force in violation of the Fourth Amendment. The District Court denied summary judgment on the Fourth Amendment claim, thus denying Sergeant Ponder qualified immunity. On interlocutory appeal, he sought to reverse the denial of qualified immunity.

Held: The Ninth Circuit Court of Appeals explained that on interlocutory appeal, the Court reviewed de novo the District Court's denial of qualified immunity and viewed the facts in the light most favorable to the Najeras, the nonmovants here. For the qualified analysis, the Ninth Circuit asked (1) "whether there has been a violation of a constitutional right;" and (2) "whether that right was clearly established at the time of the officer's alleged misconduct."[8] The Court declared the answer to both questions was "yes," and accordingly affirmed the denial of qualified immunity.

The Court of Appeals stated that the touchstone in evaluating an officer's use of force is objective reasonableness. See *Graham v. Connor*, 490 U.S. 386, 397 (1989) (citing *Scott v. United States*, 436 U.S. 128, 137-39 (1978)). The Court added that police shootings, like all Fourth Amendment seizures, must be objectively reasonable—and when a suspect poses no immediate threat to an officer or others, killing the suspect violates his Fourth Amendment rights. The reasonableness of Sergeant Ponder's conduct was assessed by balancing the "nature and quality of the intrusion" on Najera's Fourth Amendment rights against the government's countervailing interest in the force used. *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). The Court noted that deadly force is the most severe intrusion on Fourth Amendment interests and that before using deadly force, law enforcement must, "where feasible," issue a warning. *Garner*, 471 U.S. at

[7] *Ford*, *supra*, 706 F.3d at 1195-96.
[8] *Lam v. City of Los Banos*, 976 F.3d 986, 997 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 77 (2021) (citation omitted).

11-12. The Court noted that nothing in the record suggested it was not feasible for Sergeant Ponder to warn Najera before firing his weapon.

The Court next explained that three factors informed the analysis as to the government's countervailing interest in the force: (1) the level of immediate threat Najera posed to the officer or others, (2) whether Najera was "actively resisting arrest or attempting to evade arrest by flight," and (3) "the severity of the crime at issue." *Graham*, 490 U.S. at 396 (citing *Garner*, 471 U.S. at 8-9). The Court explained that while the suspected crime here was unquestionably severe, that was the only *Graham* factor that weighed clearly in Sergeant Ponder's favor.

Sergeant Ponder maintained that Najera, rather that attempting to flee or evade arrest, was squarely facing him when he fired all six shots. However, the Court observed that this contention conflicted with the coroner's report, which showed that Najera died from gunshot wounds to his back, which strongly suggested that he was turned away from the officer rather than, as Sergeant Ponder claimed, facing him and coming "on the attack." Moreover, although eyewitnesses agreed that Najera was holding at least one bat-like object when he was shot, it was disputed how he held that object. Nothing in the record suggested that Najera was threatening bystanders or advancing toward them when he was killed. Based on plaintiffs' facts, Najera presented no threat at all to the officer—or anyone else—in that moment. The Ninth Circuit thus concluded that on interlocutory appeal, construing the evidence in favor of nonmovant Najera, Sergeant Ponder's conduct was not objectively reasonable, and his use of excessive force violated the Fourth Amendment.

The Court also concluded on the second prong of qualified immunity that the law was clearly established at the time of Sergeant Ponder's conduct. The Court held that although no body of relevant case law was necessary in an "obvious case"[9] like this one, Ninth Circuit precedent also put him on notice that his specific conduct was unlawful.[10]

EMPLOYMENT

A. Where former employee's state law claims also involve union activity claims, the National Labor Relations Act preempts the state employment claims.

Moreno v. UtiliQuest, Ltd. Liab. Co., 2022 U.S. App. LEXIS 7110 (9th Cir. Mar. 18, 2022)

Facts: Cesar Moreno worked for UtiliQuest as a Lead Field Technician responsible for supervising the work of field technicians on job sites. Moreno alleged that in June 2017, UtiliQuest's management asked him to collect signatures from all of his fellow employees to "sign away" their union rights in exchange for a ten percent raise for all signees. After Moreno and the other employees each provided signatures releasing their union rights, UtiliQuest gave Moreno a ten percent raise but did not give a raise to his fellow employees. On multiple occasions, Moreno complained to his managers about his co-workers not receiving the promised raises. Moreno

[9] See *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)).

[10] See *Hayes v. Cnty. of San Diego*, 736 F.3d 1223 (9th Cir. 2013) and *George v. Morris*, 736 F.3d 829 (9th Cir. 2013).

alleged that UtiliQuest retaliated against him because of his advocacy on behalf of the other employees, and terminated his employment in February 2018.

Moreno brought several California state law claims relating to his termination. However, the District Court dismissed the claims because it found that they were preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. section 151 *et seq.* Moreno appealed.

Held: The Ninth Circuit Court of Appeals noted that NLRA Section 7 protects the right of employees "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. section 157. Section 8 bars unfair labor practices by employers and labor organizations and makes it illegal "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the NLRA]." *Id.* at Section 158(a)-(b). The Court explained that "[w]hen an activity is arguably subject to [Section] 7 or [Section] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). *Garmon*'s central concern "is the *potential* for conflict with federal policy." *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 952 (9th Cir. 2014). The Supreme Court acknowledged that it is not always clear whether a particular activity is preempted, but "[e]ven when a court is unsure," it should leave the determination to the National Labor Relations Board (NLRB). *Bassette v. Stone Container Corp.*, 25 F.3d 757, 760 (9th Cir. 1994) (citing *Garmon*, 359 U.S. at 244-45).

The Ninth Circuit explained that although the NLRA does not contain express preemption provisions, the Supreme Court held that state laws that regulate conduct that is either protected or prohibited by the NLRA are implicitly preempted (referred to as *Garmon* preemption). UtiliQuest argued that *Garmon* preemption applied to Moreno's claims related to his termination.

Moreno brought California state law claims relating to his termination for intentional misrepresentation; fraud and deceit; whistleblowing retaliation; and wrongful termination in violation of public policy. The Court of Appeals held that all of these claims arguably implicated NLRA sections 7 and 8, and were subject to *Garmon* preemption.

The Court rejected Moreno's arguments asserting his claims were not subject to preemption under *Garmon*. The Court explained that the risk of interference with the National Labor Relations Board's jurisdiction was sufficient to outweigh the state's interest in Moreno's claims. Moreno argued that his grievances with UtiliQuest were personal in nature and lacked any element of Section 7's "concerted activit[y]" necessary to establish an NLRA violation. The Court held, however, that when Moreno received a raise and other employees did not, the NLRB could consider Moreno's advocacy for his fellow co-workers to be "concerted activity." Also finding against Moreno on his other claims, the Ninth Circuit Court of Appeals accordingly affirmed.

B. The *McDonnell Douglas* burden-shifting analysis is not the proper test for whistleblower claims under the Labor Code and Government Code, and the test under Labor Code section 1102.6 should be used instead.

Scheer v. Regents of Univ. of Cal., 2022 Cal. App. LEXIS 249 (2nd Dist. Mar. 28, 2022)

Facts: In April 2017, Arnold Scheer filed a whistleblower retaliation action against his former employer, the Regents of the University of California ("Regents"), and two of his former supervisors (collectively, "Defendants"). Scheer alleged that as a result of his attempts to properly report and correct patient safety, mismanagement, and many other issues, he was wrongfully terminated from his position as chief administrative officer of the UCLA Department of Pathology and Laboratory Medicine. Scheer brought his whistleblower claims in three causes of action, alleging violations of Labor Code section 1102.5 and two other statutes. The trial court ruled that the burden-shifting analysis established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 governed the three whistleblowing causes of action. Applying that framework, the trial court issued an order granting Defendants' motions for summary judgment.

Scheer appealed. The Second District Court of Appeal deferred consideration of the appeal pending the California Supreme Court's decision in *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703. After *Lawson* was issued in January 2022, the Court of Appeal considered the matter.

Held: The Second District Court of Appeal observed that Labor Code section 1102.5 prohibits an employer from preventing an employee's disclosure of information to a governmental agency. It is a whistleblower statute, the purpose of which is to encourage workplace whistleblowers to report unlawful acts without fearing retaliation. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 287.) Labor Code section 1102.6 is part of the same statutory scheme. It provides that once an employee-whistleblower establishes by a preponderance of the evidence that retaliation was a contributing factor in the employee's termination, demotion, or other adverse action, the employer bears the burden of demonstrating by clear and convincing evidence that it would have taken the same action for legitimate, independent reasons.

Lawson held that Labor Code "[s]ection 1102.6 provides the governing framework for the presentation and evaluation of whistleblower retaliation claims brought under [Labor Code] section 1102.5." (*Lawson*, at p. 718.) *Lawson* held that the "plaintiff need not satisfy *McDonnell Douglas* in order to discharge" the plaintiff's burden under Section 1102.6 to establish by a preponderance of the evidence that retaliation was a contributing factor in the employee's termination, demotion, or other adverse action. (*Id.*)

The *McDonnell Douglas* framework had been the basis of Defendants' summary judgment motion and the trial court's summary adjudication on the Section 1102.5 cause of action. The Court of Appeal concluded that Defendants had failed to employ the applicable framework prescribed by Section 1102.6, and that their motion as to this cause of action should therefore have been denied. The Second District Court of Appeal accordingly reversed and remanded as to this issue.

MISCELLANEOUS

A. Former university student's civil rights claims' limitations period began when the incidents occurred and were therefore untimely.

Bonelli v. Grand Canyon Univ., 2022 U.S. App. LEXIS 6346 (9th Cir. Mar. 11, 2022)

Facts: On February 19, 2017, Kino Bonelli, a student who had transferred to Grand Canyon University ("GCU"), attempted to enter GCU through its main entrance. A campus public safety officer asked Bonelli for his student ID. Bonelli held up his ID card and indicated that he would present the ID to officers standing up ahead. However, a series of heated interactions with campus police officers ensued, and an officer took Bonelli's student ID and denied him entry onto the campus. Although a GCU representative informed Bonelli about a week later that Bonelli was being investigated for the incident, Bonelli's ID was subsequently returned. On July 25, 2017, after Bonelli had completed his undergraduate degree and begun a graduate program at GCU, Bonelli was studying when a GCU public safety officer asked for his ID. Bonelli complied. Five days later, GCU issued a campus-wide "BOLO," or "Be On The Lookout," for Bonelli, describing him as a former student who tried to enter GCU despite not being enrolled. After Bonelli contacted GCU to get the BOLO lifted to attend class, the BOLO was withdrawn. Several days thereafter, GCU notified Bonelli that he had been reported for violations of the student code of conduct for hostile and disruptive behavior and failure to comply with a directive from a school official. In August 2017, GCU issued Bonelli an "Official Disciplinary Warning," which specified that it was Bonelli's "first and only warning" and that, "if additional incidents occur," he risked, among other things, failing grades and expulsion. No further incidents occurred. In August 2018, the disciplinary warning was removed.

In January 2020, Bonelli filed a lawsuit under 42 U.S.C. section 1983, alleging, among other things, violations of his First and Fourth Amendment rights.[11] The District Court found Bonelli's claims untimely and dismissed his complaint with prejudice under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Bonelli appealed.

Held: The Ninth Circuit Court of Appeals considered whether Bonelli's claims were timely, noting that the statute of limitations for federal civil rights claims under section 1983 is "governed by the forum state's statute of limitations for personal injury actions."[12] The parties agreed that, under Arizona law, the limitations period for each of Bonelli's claims was two years.[13] The Court explained, however, that although "state law determines the *length* of the limitations period, federal law determines when a civil rights claim *accrues*."[14] "[T]he accrual date of a [Section] 1983 cause of action is a question of federal law that is *not* resolved by reference to state law."[15]

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[11] Among other things, Bonelli alleged unreasonable seizure of his person and property in February 2017; unreasonable detention in July 2017; and violation of his First Amendment rights stemming from the February 2017 incident, based on the officers allegedly retaliating against Bonelli for his speech and preventing him from complaining about them by seizing his ID.

[12] *Bird v. Dep't of Human Servs.*, 935 F.3d 738, 743 (9th Cir. 2019) (per curiam) (quotation marks and alterations omitted).

[13] *See* Ariz. Rev. Stat. section 12-542.

[14] *Bird*, 935 F.3d at 743 (quotation marks omitted) (Italics added).

[15] *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

Citing *Heck v. Humphrey*, 512 U.S. 477 (1994), Bonelli contended that his claims did not accrue until the university withdrew its disciplinary warning against him in August 2018. The Court rejected Bonelli's argument that under *Heck*, his claims did not accrue until the university rescinded his disciplinary warning. The Court concluded that *Heck* did not apply to plaintiff's claims. *Heck* relied on the principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments, a principle that applies to Section 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement. Here, however, there was no conviction or confinement.

The Court explained that the general rule is that a civil rights claim accrues under federal law "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008) (quotation marks omitted). The Court noted that the Circuit had held that this traditional accrual rule applies to the Fourth and First Amendment constitutional violations that Bonelli asserted here.[16] The Court explained that if the claims accrued when Bonelli knew or had reason to know of his alleged injuries, then his claims were untimely under the applicable two-year statute of limitations. Here, the Court observed that by his allegations, Bonelli knew that he was wrongfully detained, and his student ID wrongfully seized, on the days that each incident occurred. Thus, the statute of limitations on both of his Section 1983 claims premised on Fourth Amendment violations began to run on February 19, 2017 and July 25, 2017, respectively; and his Section 1983 claim alleging First Amendment violations accrued on February 19, 2017.

The Ninth Circuit affirmed, holding that Bonelli's claims were time-barred because he brought his claims more than two years after he was injured, and there was no delayed accrual here based on the university's later review and retraction of plaintiff's disciplinary warning.

B. The trial court erred in excluding a police report as double hearsay because the party-opponent exception and the official records exemption made each level of hearsay admissible.

Jane IL Doe v. Brightstar Residential Inc., 76 Cal. App. 5th 171 (2nd Dist. 2022)

Facts: Jane IL Doe had the mental age of a child when she was in her 20s, with severe autism and other disabilities. Doe lived at Brightstar Residential Incorporated, jointly owned and run by Mary and Norlan Machado, which provided residential care to people with developmental disabilities. In 2011, the Machados hired Ruben Alcala as Brightstar's handyman. Alcala did not have regular hours. He worked as needed and without supervision. In May 2016, Alcala sexually assaulted Doe on the premises. Shortly after the assault, Norlan Machado told responding police officers he knew Alcala had “a history of loitering around the facility and harassing female employees.” One of the

[16] See, e.g., *Belanus v. Clark*, 796 F.3d 1021, 1026 (9th Cir. 2015) (citation omitted) [For Fourth Amendment violations, "federal law holds that a cause of action for illegal search and seizure accrues when the wrongful act occurs . . . even if the person does not know at the time that the search was warrantless."]; and *Canatella v. Van De Kamp*, 486 F.3d 1128, 1133-34 (9th Cir. 2007) (explaining that a First Amendment claim accrued at the time of the alleged injury).

officers recorded Norlan Machado's admission in a police report.

Through her father, Doe sued Brightstar and the Machados for negligence in failing to protect Doe. Brightstar and the Machados moved for summary judgment, arguing Alcala's assault was not foreseeable. Doe countered that the attack was foreseeable and ample evidence showed the defendants had culpable knowledge, relying in part on a police file which included the police report recording Norlan Machado's admission. The trial court excluded this file as inadmissible hearsay and granted the motion for summary judgment, concluding that the attack was unforeseeable. Doe appealed.

Held: The Second District Court of Appeal explained that in civil and criminal cases, police reports are inadmissible when they contain improper multiple hearsay.[17] However, double hearsay is admissible if a justification for admitting the evidence rebuts the hearsay objection at each level. (Evidence Code section 1201; see *Lake v. Reed* (1997) 16 Cal.4th 448, 461–462 [admitting party admission in police report].)

Considering the police file, the Court of Appeal concluded that the trial court incorrectly excluded as inadmissible hearsay evidence that suggested Brightstar and the Machados knew Alcala was a problem. The Second District explained that Section 1220 of the Evidence Code provides a hearsay exception for admissions by party opponents. At level one, Norlan Machado's statement to the officer was the admission of Doe's party opponent. At level two, the officer's police report itself was admissible as an official record. (Evidence Code section 1280; *Lake, supra*, 16 Cal.4th at pp. 461–462.)[18] The Court noted that the official records exception to the hearsay rule is based on the presumption that public officers properly perform their official duties. Due to these justifications rebutting the hearsay objection at each level, the Court determined that Machado's admission was admissible. The Court observed that Brightstar did not contest either the police report's authenticity or the foundational requirements of the official records exception; rather, Brightstar argued that the exception did not reach witness statements in the report.

The Court also found that Norlan Machado's admission to police also was relevant to the foreseeability of Alcala's attack, because a permissible inference of Alcala's "history" (according to Norlan Machado) of harassing women would be that Alcala's conduct had been serious and repeated and that Norlan Machado was not eager to detail it. Thus, the Court concluded that his admission regarding Alcala's history of loitering and harassment properly should have been in the record.

The Court applied the same hearsay levels analysis to a group of statements Brightstar employees made to police about Alcala, finding these statements relevant and admissible. The Second District concluded that the statements allowed an inference that Brightstar knew its company handyman had a history of harassing women and was loitering to groom a disabled woman for assault. In a light favorable to Doe, the admissible evidence would permit, but not require, a fact finder to infer Alcala was a problem waiting to happen. The Court observed that whether the residence or its

[17] See *Alvarez v. Jacmar Pacific Pizza Corp.*, 100 Cal.App.4th 1190, 1204–1206 (2nd Dist. 2002).
[18] See also *People v. Hall*, 39 Cal.App.5th 831, 843–845 (2nd Dist. 2019); and *Donley v. Davi*, 180 Cal.App.4th 447, 461 (3rd Dist. 2009).

owners knew or should have known of this danger was a disputed fact. As summary judgment was thus inappropriate, the Second District accordingly reversed.

C. Courts must apply *In re Humphrey* framework for bail determinations even where defendants are charged with serious, violent felonies and it does not require unusual circumstances to merit its use.

In re Brown, 76 Cal. App. 5th 296 (2nd Dist. 2022)

Facts: Kernell Brown was charged with sexual abuse of children. Brown's bail was initially set at $1.45 million, then increased to $3.45 million. An information was subsequently filed in June 2020, containing three counts of sexual abuse involving two children with the special one strike allegation. In August 2020, Brown's counsel moved to reduce bail. After consulting with the prosecutor, the trial court reduced Brown's bail to $2.45 million.

In its March 2021 decision *In re Humphrey* (2021) 11 Cal.5th 135, the California Supreme Court held conditioning pretrial release from custody solely on whether an arrestee can afford bail is unconstitutional. In May 2021, Brown moved for release on his own recognizance or, alternatively, to have his bail reduced to no more than $1,000. In his motion, he admitted the serious and violent nature of his crimes, but argued he was indigent and would accept nonfinancial conditions of release, including electronic monitoring, community housing, home detention, treatment and education programs, a pretrial case manager and a protective order.

The trial court concluded no unusual circumstances justified a deviation from the bail schedule and denied Brown's motion. Brown petitioned for a writ of mandate to overturn the trial court's order denying his motion, arguing that the trial court had failed to follow *Humphrey*. The Court of Appeal elected to treat Brown's petition as a petition for writ of habeas corpus.

Held: The Second District Court of Appeal explained that the Supreme Court in *Humphrey* held conditioning pretrial release from custody solely on whether an arrestee can afford bail is unconstitutional. *Humphrey* established a general framework for bail determinations. When nonmonetary conditions of release would be inadequate to protect public and victim safety and to ensure an arrestee's appearance at trial and a financial condition is necessary, the trial court "must consider the arrestee's ability to pay the stated amount of bail—and may not effectively detain the arrestee 'solely because' the arrestee 'lacked the resources' to post bail."[19] When no option other than refusing pretrial release can reasonably protect the state's compelling interest in victim and community safety, the *Humphrey* court continued, "a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements."[20]

The Second District first explained that the trial court incorrectly stated *Humphrey* was inapplicable in cases in which the defendant had been charged with a serious or violent felony. Second, regarding the $2.45 million bail amount, the trial court had found that there were "no

[19] *Humphrey*, *supra*, at p. 143.
[20] *Id.*

lesser means of protecting the public" and alleged victims because "the court can't stop family members from seeing the defendant." The Second District stated that the "trial court's use of an unreasonably high, unaffordable bail to protect the public and past victims from the defendant—that is, setting bail knowing full well that it was the equivalent of a pretrial detention order—is directly at odds with the requirements for a constitutionally valid bail determination as articulated in *Humphrey*."

Under *Humphrey*, once an arrestee is deemed a flight risk or a danger to public or victim safety, the court is to consider whether nonfinancial conditions of release – such as those to which Brown stated he was willing to submit - may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial. Here, the Second District stated that there was no evidence proffered in the trial court to support the contention that harm to the public was reasonably likely to occur if Brown were released. Moreover, the trial court did not address any of Brown's proposed specific nonfinancial conditions or why nonfinancial conditions of release (such as a stay away or no contact order, home detention, electronic monitoring or surrender of Brown's class A driver's license) would be insufficient to protect the victims or the public or obviate the risk of flight. Thus, the Second District found the evidence insufficient evidence to support a finding by clear and convincing evidence that less restrictive alternatives to detention could not reasonably protect the public or victim safety. Third, the trial court made no effort to evaluate Brown's ability to secure his release from pretrial custody by posting bail at $2.45 million, despite evidence Brown presented of his limited financial resources. The Second District explained that under *Humphrey*, the amount specified in the bail schedule (or any other amount of bail) is appropriate only if the court first determines the arrestee can afford to post it.

The Court of Appeals concluded that because the trial court failed to comply with *Humphrey*'s requirements by modifying bail to an amount consistent with Brown's financial ability or by adequately addressing the need for a pretrial detention order, Brown was entitled to a new hearing on his motion. The Second District accordingly granted Brown's petition, directed the trial court to vacate its order, and ordered the trial court to hold a new hearing at which it must consider nonmonetary alternatives to money bail, determine Brown's ability to afford the amount of money bail if it is to be set, and follow the procedures and make the findings necessary for a valid order of detention if no conditions for pretrial release would adequately protect the government's interests in the safety of potential victims and the public generally or the integrity of the criminal proceedings as per *Humphrey*.