CPOA CASE SUMMARIES – JUNE 2022

CONSTITUTIONAL LAW

A. The FBI's failure to leave a complete copy of a warrant did not justify suppression of evidence because the error seemed to be a negligent mistake, rather than deliberate disregard for the procedure.

United States v. Manaku, 36 F.4th 1186 (U.S. 9th Cir. 2022)

Facts: The FBI discovered that a device at a particular IP address at the Dela Cruz residence in Waipahu, Hawai'i contained suspected child pornography files. Grant Manaku resided there at that time. The FBI obtained a search warrant for the Dela Cruz residence from a federal magistrate judge. During the nearly six-hour search, Ms. Dela Cruz asked at least three times to see the warrant but was not given any paperwork until the search ended. Her husband who arrived at some point after the search began also asked to see the warrant. He was briefly shown the warrant's first page but never given a copy. He told the agents to make sure to leave a copy of the warrant or to give one to his wife.

Agent Sherwin Chang was supposed to ensure that the warrant and a property receipt were left at the residence or with someone at the residence. Although Chang had personally reviewed the five-page warrant hours earlier, he later testified that he gave Ms. Dela Cruz the single-page copy without realizing that it was incomplete. He did not leave the single-page Attachment A (which described the residence to be searched) and the three-page Attachment B (which described the items to be seized). Agent Chang could not explain why, despite having written an FBI phone number on the back of that single-page copy so that Ms. Dela Cruz could call if she had any questions, he did not notice that it was incomplete. Chang insisted, however, that the error was simply carelessness, he did not intentionally withhold the missing pages, and he was not trying to deceive Ms. Dela Cruz.

As a result of the search, the FBI seized a laptop that contained child pornography and determined that it had been used by Manaku and not others in the Dela Cruz household. Manaku was indicted for possession of child pornography. Before the trial, he moved to suppress the laptop and evidence obtained from it, arguing that the failure to supply a complete copy of the warrant violated Federal Rule of Criminal Procedure 41(f)(1)(C). The District Court denied the motion. After a jury trial, Manaku was found guilty, and was sentenced to 78 months of imprisonment and 10 years of supervised release. Manaku appealed the denial of his pretrial motion to suppress.

Held: The Ninth Circuit Court of Appeals found, and the government conceded on appeal, that the FBI agents violated Rule 41(f)(1)(C) by delivering only the face page of the warrant rather than a complete copy. The Court explained, however, that a Rule 41 violation in the execution of a search warrant, however, does not necessarily mean that the evidence seized during that search must be suppressed. See *United States v. Henderson*, 906 F.3d 1109, 1114 (9th Cir. 2018). Suppression is automatic only for "fundamental" violations of Rule 41, at least without any applicable exception to the exclusionary rule. *Id.* at 1115. The Ninth Circuit explained that "fundamental" violations of Rule 41 had been deemed by the Circuit as "those that result in clear

constitutional violations." *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1283 (9th Cir. 1992). Any other violations of the rule are "technical errors" that "require suppression only if the defendant can show either that (1) he was prejudiced by the error, or (2) there is evidence of 'deliberate disregard of the rule.'" *Henderson*, 906 F.3d at 1115 (quoting *Negrete-Gonzales*, 966 F.2d at 1283). Here, Manaku contended neither that the violation here was fundamental nor that he was prejudiced by it, which left the question of deliberate disregard. The Court of Appeals held that the District Court properly concluded that Manaku had not carried his burden to show a deliberate disregard of the rule. In so holding, the Ninth Circuit found no clear error in the District Court's finding that Agent Chang did not act intentionally, and rejected Manaku's contention that the District Court failed to adequately consider the possibility that another agent had deliberately disregarded Rule 41(f)(1)(C) by unstapling the pages of the warrant and leaving only an incomplete copy. The Ninth Circuit Court of appeals accordingly affirmed.

B. A violation of *Miranda* rules does not provide a basis for a 42 U.S.C. section 1983 claim.

Vega v. Tekoh, 2022 U.S. LEXIS 3053 (June 23, 2022)

Facts: In March 2014, Terence Tekoh was questioned by Los Angeles County Sheriff's Department Deputy Carlos Vega after Tekoh was reported to have sexually assaulted a patient at the medical center where Tekoh worked. During the interrogation, Vega never informed Tekoh of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Miranda* held that during a custodial interrogation, police officers must inform a suspect that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning." *Id.*, at 479. Tekoh eventually provided a written statement apologizing for inappropriately touching the patient's genitals. His written statement was admitted against him at trial. After the jury returned a verdict of not guilty, Tekoh sued Vega under 42 U.S.C. section 1983, seeking damages for alleged violations of his constitutional rights, including his Fifth Amendment right against compelled self-incrimination. After a trial, the jury found in Vega's favor. The Ninth Circuit Court of Appeals held that the use of an un-*Mirandized* statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a Section 1983 claim against the officer who obtained the statement. The United States Supreme Court granted certiorari.

Held: The United States Supreme Court noted that Section 1983 provides a cause of action against any person acting under color of state law who "subjects" a person or "causes [a person] to be subjected . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The Court considered whether a violation of the *Miranda* rules provides a basis for a claim under Section 1983.

The Supreme Court explained that *Miranda* imposed a set of prophylactic rules requiring that custodial interrogation be preceded by the warnings and disallowing the use of statements obtained in violation of these new rules by the prosecution in its case-in-chief. *Miranda*, 384 U. S., at 444, 479. Here, Tekoh argued that a violation of *Miranda* constitutes a violation of the Fifth Amendment right against compelled self-incrimination. The Court disagreed. The Court stated that *Miranda* claimed only that those rules were needed to safeguard that right during custodial interrogation. The Court noted that since *Miranda*, the Court had repeatedly described *Miranda*

rules as prophylactic. The Supreme Court concluded that a violation of *Miranda* does not necessarily constitute a violation of the Constitution, and therefore such a violation does not constitute "the deprivation of [a] right . . . secured by the Constitution" for purposes of Section 1983. The Court expressed that *Miranda* and its progeny provided sufficient protection for the Fifth Amendment right against compelled self-incrimination. Accordingly, the Supreme Court reversed and remanded.

Justice Kagan, joined by Justices Breyer and Sotomayor, dissented. The dissent asserted that *Dickerson* v. *United States*, 530 U. S. 428 (2000) made clear that *Miranda* is a "constitutional rule," and that rule grants a corresponding right: If police fail to provide the *Miranda* warnings to a suspect before interrogating him, then he is generally entitled to have any resulting confession excluded from his trial. The dissent maintained that only one conclusion could follow from these statements - that *Miranda*'s protections are a "right [ ]" "secured by the Constitution" for Section 1983 purposes. The dissent warned that the majority's holding that *Miranda* is not a constitutional right enforceable through a Section 1983 suit would prevent individuals from obtaining any redress when police violated their rights under *Miranda*.

For a more detailed discussion of this case, please see Client Alert Vol. 37, No. 10, available at www.jones-mayer.com.

C. Supreme Court expands Second Amendment rights, striking down New York's "proper cause" requirement for issuance of a CCW.

N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022)

Facts: New York has laws and licensing requirements for the issuance of a Carrying a Concealed Weapon Permit ("CCW"). It is a crime in New York to possess "any firearm" without a license, whether inside or outside the home, punishable by up to four years in prison or a $5,000 fine for a felony offense, and one year in prison or a $1,000 fine for a misdemeanor. Possessing a loaded firearm outside one's home or place of business without a license is a felony. New York law further provides that a license applicant who wants to possess a firearm *at home* (or in his place of business) must convince a "licensing officer"—usually a judge or law enforcement officer—that, among other things, he is of good moral character, has no history of crime or mental illness, and that "no good cause exists for the denial of the license."

If he wants to carry a firearm *outside* his home or place of business for self-defense, the applicant must obtain an unrestricted license to "have and carry" a concealed "pistol or revolver." To secure that license, the applicant must prove that "proper cause exists" to issue it. If an applicant cannot make that showing, he can receive only a "restricted" license for public carry, which allows him to carry a firearm for a limited purpose, such as hunting, target shooting, or employment. No New York statute defines "proper cause," but New York courts have held that an applicant shows proper cause only if he can demonstrate a special need for self-protection distinguishable from that of the general community. The "special need" standard is demanding. For example, living or working in an area noted for criminal activity does not suffice.

The petitioners in this case were law-abiding citizens of New York who applied for, and were denied, unrestricted licenses to have and carry a concealed handgun outside their homes for self-defense purposes. The petitioners challenged the denial of the licenses on Second and Fourteenth Amendment grounds. The District Court dismissed their complaint and the Court of Appeals affirmed.

Held: The United States Supreme Court accepted the case for review. Justice Thomas delivered the opinion of the majority. Justice Thomas stated, "In [*District of Columbia v. Heller*, 554 U. S. 570 (2008)] and [*McDonald v. Chicago*, 561 U. S. 742 (2010)], we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. In doing so, we held unconstitutional two laws that prohibited the possession and use of handguns *in the home*. In the years since, the Courts of Appeals have coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. *Today, we decline to adopt that two-part approach.* In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. *Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation*. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' *Konigsberg* v. *State Bar of Cal*., 366 U. S. 36, 50, n. 10 (1961)." (Emphasis added.)

Justice Thomas observed, "*Heller* and *McDonald* expressly rejected the application of any 'judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."' *Heller*, 554 U. S., at 634 (quoting *id.*, at 689–690 (BREYER, J., dissenting))…. We declined to engage in means-end scrutiny because '[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.' *Heller*, 554 U. S., at 634. We then concluded: 'A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.' *Ibid.*"

Justice Thomas concluded his analysis on this issue by stating, "We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." He further noted, "The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."

In applying this historical analysis test to determine whether the Second Amendment protected the carrying of weapons outside the home for self-defense purposes, the Court stated, "We therefore turn to whether the plain text of the Second Amendment protects [petitioners'] proposed course of conduct—carrying handguns publicly for self-defense. We have little difficulty concluding that it does." The Court further discerned, "Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms."

After engaging in an exhaustive historical analysis of the scope of prior protections and prohibitions concerning the carrying of weapons outside the home for protection, the Court stated, "[W]e conclude that respondents have not met their burden to identify an American tradition justifying the State's proper-cause requirement." Accordingly, the Court held, "*New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.* We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion." (Emphasis added.)

Justice Alito authored a concurring opinion addressing the comments by the three-judge dissent[1] (the dissent focused on statistics concerning mass shootings and gun violence). He noted, "Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald* v. *Chicago*, 561 U. S. 742 (2010), about restrictions that may be imposed on the possession or carrying of guns." In addressing some of the arguments made by the dissent, Justice Alito observed, "Why, for example, does the dissent think it is relevant to recount the mass shootings that have occurred in recent years? [] Does the dissent think that laws like New York's prevent or deter such atrocities? Will a person bent on carrying out a mass shooting be stopped if he knows that it is illegal to carry a handgun outside the home? And how does the dissent account for the fact that one of the mass shootings near the top of its list took place in Buffalo? The New York law at issue in this case obviously did not stop that perpetrator." Justice Alito concluded by noting, "I reiterate: All that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense and that the Sullivan Law, which makes that virtually impossible for most New Yorkers, is unconstitutional."

Justice Kavanaugh also authored a concurring opinion, wherein he emphasized two major points, "*First*, the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense." (Emphasis in the original.) "*Second*, as *Heller* and *McDonald* established and the Court today again explains, the Second Amendment 'is neither a regulatory straight jacket nor a regulatory blank check.' *Ante*, at 21. Properly interpreted, the Second Amendment allows a 'variety' of gun regulations. *Heller*, 554 U. S., at 636." He then quoted portions of the *Heller* opinion, stating, "'[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'"

For a more detailed discussion of this case, please see Client Alert Vol. 37, No. 9 and No. 11, available at www.jones-mayer.com.

[1] Justice Breyer, with whom Justice Sotomayor and Justice Kagan joined, authored the dissent. The dissent focused on statistics concerning mass shootings and gun violence, all of which were addressed by the majority opinion and the concurring opinions.

D. Death Row inmate's constitutional rights were not violated by imposing a stun belt and restraint chair during trial because there was a manifest need based on inmate's extensive violent history.

People v. Poore, 2022 Cal. LEXIS 3534 (June 27, 2022)

Facts: Defendant Christopher Eric Poore had a history of repeated in-custody assaults and weapons violations while incarcerated at various facilities between 1993 and 1998. While housed in Pelican Bay State Prison in 1998, prison authorities had "validated" him as an associate of the Aryan Brotherhood, a white supremacist gang. Poore was later paroled. In November 1999, Poore shot and killed Mark Kulikov. Later that day, Poore told Brian White that the Aryan Brotherhood had ordered him to kill Kulikov. White and another witness called the Palm Springs Police Department to report the murder. Poore was taken into custody.

Before trial, the prosecution moved for Poore to be restrained during the proceedings. To ensure courtroom security, the prosecution urged that Poore wear a REACT stun belt[2] and be shackled to a chair affixed to the floor. The defense opposed all restraints. After the hearing on the motion, the trial court found there was manifest need, based on the totality of the facts and circumstances, to restrain Poore with both the security chair and the REACT belt. Poore was convicted of, among other things, first degree murder and firearm possession by a felon. Poore was sentenced to death. An automatic appeal process followed.

Held: The California Supreme Court initially observed that in general, the "court has broad power to maintain courtroom security and orderly proceedings" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1269). Under California law, "a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 290–291.) The federal "Constitution forbids the use of visible shackles … unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." (*Deck v. Missouri* (2005) 544 U.S. 622, 624, italics omitted.) The California Supreme Court had held that these principles also apply to the use of an electronic stun belt, even if the belt is not visible to the jury. (*People v. Mar* (2002) 28 Cal.4th 1201, 1219.) The Supreme Court also noted that it had, in *People v. Bryant, Smith and Wheeler*,[3] concluded stun belts were permissible in a multidefendant trial to prevent escape attempts and potential assaults against prosecution witnesses.

The Supreme Court found that ample evidence supported the trial court's finding of manifest need, and the trial court had acted within its discretion in selecting the restraints employed during trial. The trial court had heard extensive evidence about Poore's violent and dangerous behavior in custody. He had solicited assistance in having witnesses killed, was repeatedly found with weapons in custody, had slipped his handcuffs while at the county jail, stole dangerous medication, and had hidden a syringe inside a body cavity. Poore had repeatedly assaulted other inmates, with a disciplinary record of over 25 incidents. The Supreme Court found that Poore's in-custody fights and weapons offenses alone constituted a record showing of violence justifying the imposition of

[2] A correctional officer testified that a REACT belt can deliver a painful shock one to two seconds after an initial warning beep.

[3] 60 Cal.4th 335, 391–392 (2014).

restraints. Moreover, the trial court had also heard evidence that Poore had solicited Aryan Brotherhood associates to kill White, who would be one of the primary witnesses against him at trial. Such evidence indicated Poore posed a significant threat to the witnesses testifying against him. The Supreme Court ultimately affirmed.

QUALIFIED IMMUNITY

A. Plaintiff who accomplishes no more than to defeat a defendant's motion for qualified immunity is not entitled to attorney's fees pursuant to 42 U.S.C. 1988(b), because the plaintiff has not yet prevailed on any claim.

Senn v. Smith, 35 F.4th 1223 (U.S. 9th Cir. 2022)

Facts: Linda Senn brought a 42 U.S.C. section 1983 action against Kyle Smith, a deputy sergeant with the Multnomah County Sheriff's Office. Senn alleged that Smith violated her Fourth Amendment right to be free of excessive force by pepper-spraying her without adequate justification. The District Court denied Smith's motion for qualified immunity, and Smith filed an interlocutory appeal. In an unpublished disposition, the Ninth Circuit Court of Appeals affirmed the denial of qualified immunity and remanded for trial.[4]

Senn then filed a motion for attorney's fees sought pursuant to 42 U.S.C. section 1988(b), which generally grants courts discretion to award "a reasonable attorney's fee" to a "prevailing party."

Held: The Ninth Circuit Court of Appeals issued an order denying Senn's motion for fees. The Court explained that Senn was not a "prevailing party" within the meaning of Section 1988(b). The Court stated that it published the order here to reaffirm that a plaintiff who accomplishes no more than to defeat a defendant's motion for qualified immunity is not entitled to attorney's fees pursuant to Section 1988(b), because the plaintiff has not yet prevailed on any claim. The Ninth Circuit Court held that it was bound by its prior decision in *Cooper v. Dupnik*, 963 F.2d 1220, 1252 & n.13 (9th Cir. 1992) (en banc), *overruled in part on other grounds by Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003). Although the Supreme Court later overruled *Cooper* in part, on a different issue, *Chavez*, 538 U.S. at 773, the holding in *Cooper* as to attorney's fees remained good law. Moreover, the Court here noted its agreement with the rule announced in *Cooper*, which comported with Supreme Court precedent (See *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam)) and accorded with holdings by sister circuits in the identical procedural posture. (See, e.g., *Ellis v. Wright*, 293 F. App'x 634, 634 n.1 (11th Cir. 2008) (per curiam) (unpublished) ("Ellis's motion for attorney's fees under 42 U.S.C. section 1988 is denied. Section 1988 only authorizes fee awards to prevailing parties. A party is not a prevailing party until they have prevailed on the merits of at least one of their claims. Ellis has only succeeded on an interlocutory appeal, which will allow her suit to proceed to an adjudication of the merits; therefore, she is not a prevailing party." (internal quotation marks and citations omitted)); *Engel v. Wendl*, 921 F.2d 148, 150 (8th Cir. 1990) (per curiam) (order) ("Although plaintiff was successful in the appeal on the issue of qualified immunity, plaintiff has yet to establish that he is a 'prevailing party' under [S]ection 1988.").

[4] *Senn v. Smith*, 2022 WL 822198 (9th Cir. March 18, 2022) (unpublished).

B. Police officer was entitled to qualified immunity because the law was not clearly established that the officer's use of a roadblock to stop a fleeing bicyclist was a use of excessive force that violated the Fourth Amendment.

Seidner v. De Vries, 2022 U.S. App. LEXIS 18112 (9th Cir. June 30, 2022)

Facts: In February 2020, Officer Jonathan de Vries was on patrol just before midnight in Mesa, Arizona when he saw Preston Seidner riding his bicycle on a well-lit residential street without a front light, in violation of Arizona state law. Officer De Vries pulled ahead of Seidner to confirm the bicycle-light violation and activated his marked patrol car's overhead lights. The officer then stopped the car and opened his door to speak to Seidner. As Officer de Vries exited his car, Seidner continued pedaling past him and began to flee. Officer De Vries got back in his car and pursued Seidner. Seidner cut directly in front of Officer de Vries's patrol car and continued fleeing. Seidner was traveling approximately 15 miles per hour. After following Seidner, Officer de Vries accelerated ahead and pulled his car at an angle across the street and stopped. Seconds later, as the officer started to open his door, Seidner crashed into the patrol car and suffered injuries to his wrist, forearm, head, and chest. When asked why he fled, Seidner responded that he was scared and his bicycle did not have working brakes.

Seidner sued Officer de Vries under 42 U.S.C. section 1983. The District Court construed Seidner's allegations as asserting a Fourth Amendment excessive-force claim. Officer De Vries moved for summary judgment based on qualified immunity. The District Court denied his motion, holding that the officer seized Seidner within the meaning of the Fourth Amendment, and that a reasonable jury could find that Officer de Vries used excessive force by using a roadblock to stop Seidner for a minor bicycle violation. The District Court further held that the law was clearly established at the time of Officer de Vries's actions that his conduct could constitute excessive force. Officer De Vries appealed.

Held: The Ninth Circuit Court of Appeals explained that in deciding whether qualified immunity applies, courts ask two questions: (1) did the officer violate a constitutional right, and (2) was that right "clearly established at the time of the events at issue"? *Monzon v. City of Murrieta*, 978 F.3d 1150, 1156 (9th Cir. 2020). Qualified immunity shields a police officer from civil damages under Section 1983 unless the officer violated a clearly established constitutional right.

As to the first question, the Court noted that the Fourth Amendment protects against unreasonable seizures. *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021). An officer's use of force must be "objectively reasonable in light of the facts and circumstances confronting [hi]m." *Williamson v. City of Nat'l City*, 23 F.4th 1146, 1151 (9th Cir. 2022) (internal quotation marks and citation omitted). Here, the Court noted that Officer de Vries used his patrol car as a roadblock to stop Seidner from fleeing on his bicycle, but it was undisputed that the officer did not hit Seidner with his moving car. Seidner was on a bicycle moving at a relatively low speed, and Officer de Vries's patrol car was visible to him throughout the entire incident. Thus, even if Seidner could not fully stop before hitting the patrol car, it was reasonable for the officer to expect that Seidner could react to the situation by slowing down, turning, or taking other measures to minimize any impact. The Ninth Circuit held that the question of whether Officer de Vries used excessive force against

Seidner by not pulling far enough ahead for Seidner to stop before hitting the car, would be a question for a factfinder. The Court determined that the roadblock was a use of intermediate force that was capable of inflicting significant pain and causing serious injury. Given the circumstances, a jury could conclude that Officer de Vries should have taken additional steps to stop Seidner before using an intermediate level of force given Seidner's minor offense and the lack of any safety risk to Officer de Vries or anyone else.

The Court also concluded, however, that even if Officer de Vries did use excessive force, the law as it existed at the time of the incident did not clearly establish that his actions violated the Fourth Amendment. Seidner had not cited, and the Court could not find, any case that squarely established "beyond debate"[5] that Officer de Vries's actions constituted excessive force, such that the officer should have "underst[oo]d that what he [wa]s doing [wa]s unlawful," *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). Therefore, because both prongs of the qualified immunity test were not satisfied, Officer de Vries was entitled to qualified immunity. The Ninth Circuit Court of Appeals accordingly reversed the District Court's denial of qualified immunity to Officer de Vries.

EMPLOYMENT

A. Employers seeking to dismiss a Labor Code section 1102.5 retaliation claim must show clear and convincing evidence of a legitimate, independent reason for taking the employment action under Section 1102.6.

Vatalaro v. Cty. of Sacramento, 79 Cal. App. 5th 367 (3rd Dist. 2022)

Facts: Cynthia Vatalaro formerly worked with the County of Sacramento ("County"). In 2015, Vatalaro received a promotion from administrative analyst II to administrative services officer ("ASO") III. Vatalaro's new position was probationary for a period of six months. The probationary period did not go smoothly. Vatalaro disagreed with her supervisor and staff on her job duties per her classification, her conduct, and other issues. She complained about working on low-level assignments below her job classification. The supervisor recommended Vatalaro's release from probation. The County informed Vatalaro that she was being terminated from employment as an ASO III and that she would return to her previous job classification of administrative analyst II.

In 2017, Vatalaro sued the County for unlawful retaliation under Labor Code section 1102.5, which protects whistleblowing employees. Vatalaro alleged that, in violation of Section 1102.5, the County retaliated against her after she reported that she was working below her service classification. The County afterward filed a motion for summary judgment. It contended that Vatalaro could not show that she had a reasonable belief, or any belief at all, that the information she disclosed evidenced a violation of any law. The County added that, regardless, Vatalaro's claim still failed because the County had a legitimate, nonretaliatory reason for terminating her—namely, she had been insubordinate, disrespectful, and dishonest. The trial court, agreeing with the County on both these points, granted summary judgment in the County's favor. Vatalaro appealed.

[5] *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 504 (2019).

Held: The Third District Court of Appeal explained that Section 1102.5(b) states, as relevant here: "An employer … shall not retaliate against an employee for disclosing information … to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance … if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." (Section 1102.5(b).)

The Court of Appeal found that the trial court incorrectly relied on the wrong standard when it applied a three-part burden-shifting framework to Vatalaro's retaliation claim under Section 1102.5. In *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, the California Supreme Court had recently explained that this framework for evaluating Section 1102.5 claims here was deeply flawed. The Third District instead looked to Section 1102.6, which "provides the governing framework." (*Lawson, supra*, 12 Cal.5th at p. 718.) Section 1102.6's requirements are as follows: "First, it places the burden on the plaintiff to establish, by a preponderance of the evidence, that retaliation for an employee's protected activities was a contributing factor in a contested employment action. … Once the plaintiff has made the required showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in protected activity." (*Id.*; see also Section 1102.6.)

The Third District requested supplemental briefing on this issue and reviewed the parties' briefing and the record. The Court concluded that the County had met its burden under the clear and convincing evidence standard because it presented sufficient undisputed evidence of insubordinate, disrespectful, and dishonest conduct by Vatalaro to show a high probability that the termination would have occurred for legitimate, independent reasons even if she had not complained about working on low-level assignments below the employee's classification. The Third District accordingly affirmed.

B. A job applicant's pre-employment drug test does not render him an employee or require reimbursement for travel and time spent on the drug test.

Johnson v. WinCo Foods, Ltd. Liab. Co., 37 F.4th 604 (U.S. 9th Cir. 2022)

Facts: WinCo Foods LLC and WinCo Holdings, Inc. (collectively "WinCo") operate a supermarket chain with locations across the western United States, including California. When WinCo hires new employees, a hiring manager calls successful applicants to extend what WinCo terms a contingent offer of employment. The offer includes the job title, the pay, and the job location. The Manager discusses the offer with the applicant, including WinCo's requirement that successful applicants for employment take a drug test of before they can begin the duties of the job.

In August 2017, Alfred Johnson, on behalf of himself and other WinCo employees in California (collectively with Johnson, "Plaintiffs"), filed a class action in state court, claiming compensation as an employee for the time and expense of taking a drug test as a successful applicant for

employment. The case was removed subsequently to federal court. Johnson then filed a first amended complaint seeking reimbursement for the time and travel expenses required to take the drug test. The District Court granted WinCo's motion for summary judgment based on that court's determination that under California law, Plaintiffs were not yet employees when they took the drug test. Plaintiffs appealed.

Held: The Ninth Circuit Court of Appeals observed that the same issues had arisen in several similar cases removed from California state courts to federal district court, and that the other district courts in those cases had also ruled in favor of the employer. However, there has been no authoritative California state court decision on the matter.

Plaintiffs relied on California case law that looks to how much control the putative employer exerts over the putative employee's performance of the job to evaluate whether there was an employment relationship between the two parties. Plaintiffs argued that because the tests were administered under the control of the employer, plaintiffs must be regarded as employees, as California law applies a control test to determine whether an employment relationship existed. See *Martinez v. Combs*, 49 Cal. 4th 35, 64 (2010). The Ninth Circuit rejected this contention, explaining that control over a drug test as part of the job application process is not control over the performance of the job. Here, unlike in *Martinez*, the class members here were not performing work for an employer when they took the preemployment drug test; they were instead applying for the job and were not yet employees. The Ninth Circuit explained that "[d]rug testing, like an interview or preemployment physical examination, is an activity to secure a position, not a requirement for those already employed." Accordingly, the Ninth Circuit Court of Appeals affirmed.

The Court distinguished a case Johnson cited where the plaintiffs were considered employees of the defendant staffing agency because the agency controlled the time, location, and manner of the placement interviews.[6] To the Ninth Circuit, the key difference was that the plaintiffs in that case were doing the employment agency's work when they went to the job interviews (because they were required to report for job interviews as a part of their work for the agency), whereas Johnson and fellow class members were not doing work for WinCo when they took the drug tests.

C. Public Employment Relations Board's failure to consider whether bargaining was required prior to placing measure on ballot that amended law enforcement authority was clear error.

Cnty. of Sonoma v. Pub. Emp't Relations Bd., 80 Cal. App. 5th 167 (1st Dist. 2022)

Facts: The Meyers-Milias-Brown Act ("MMBA"; Government Code section 3500 et seq.) requires public agencies to meet and confer in good faith with recognized employee organizations regarding changes to wages, hours, and other terms and conditions of employment—matters within the scope of the organizations' representation.[7] The Sonoma County Deputy Sheriffs' Association and Sonoma County Law Enforcement Association (collectively, "Associations") filed unfair practice complaints alleging the County of Sonoma ("County") violated the MMBA when its board

[6] *Betancourt v. Advantage Human Resourcing, Inc.*, No. 14-cv-01788-JST, 2014 U.S. Dist. LEXIS 123504, 2014 WL 4365074 (N.D. Cal. Sept. 3, 2014).

[7] Government Code sections 3504, 3506.5(c).

of supervisors ("Board") placed a measure ("Measure P") on the November 2020 ballot. Measure P, which the voters ultimately approved, amended the Sonoma County Code to enhance the investigative and oversight authority of the County's Independent Office of Law Enforcement Review and Outreach ("IOLERO") over the Sonoma County Sheriff-Coroner office ("Sheriff"). The County did not bargain with the Associations before placing Measure P on the ballot. The Associations alleged the Board's decision to place Measure P on the ballot significantly and adversely affected their members' working conditions, such as discipline and investigation criteria and procedures. Therefore, the Associations' asserted, the County was required to bargain prior to placement of the measure on the ballot.

The Public Employment Relations Board ("PERB"), which has jurisdiction over MMBA claims,[8] agreed. It concluded that, before placing the measure on the ballot, the County was required to bargain with the Associations regarding provisions relating to the investigation and discipline of employees. These included provisions granting IOLERO authority to: conduct independent investigations, recommend discipline of employees under investigation, subpoena records or testimony, personally observe Sheriff investigations, and review officer discipline records.[9] PERB declared these provisions void and unenforceable against any employees represented by the Associations. The County filed a petition for writ of extraordinary relief.

Held: The First District Court of Appeal explained that although the MMBA requires public agencies to bargain in good faith with recognized employee organizations regarding matters within the scope of representation, fundamental managerial decisions on "'the *merits, necessity, or organization* of any service or activity provided by law or executive order,'" are outside the scope of representation and not subject to the bargaining requirement. ((*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 631 [employer has the unconstrained right to make fundamental management or policy choices]; see Section 3504.)

In *Claremont*, the Supreme Court of California addressed "whether an employer's action implementing a fundamental decision" was subject to the bargaining requirement by formulating a three-part test. (*Id.* at pp. 628, 632–633, 638.) First, if the management action *does not* have a significant and adverse effect on wages, hours, or working conditions of the bargaining-unit employees, there is no duty to meet and confer. Second, if there is a significant and adverse effect, courts ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If it does not, the meet-and-confer requirement applies. Third, if both factors are present—if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on the wages, hours, or working conditions of the employees—courts apply a balancing test. (*Id.* at p. 638.)

The First District concluded that PERB failed to consider whether the decision to place certain Measure P provisions on the ballot significantly and adversely affected the working conditions of the Associations' members. Having omitted that analysis, PERB erred in determining the decision was a matter within the scope of representation under the MMBA and thereby subject to collective bargaining. The Court further concluded PERB exceeded its authority by issuing a remedial order declaring voter-approved Measure P provisions void and unenforceable. The Court of Appeal

[8] *City of Palo Alto v. Public Employment Relations Bd.*, 5 Cal.App.5th 1271, 1287 (6th Dist. 2016).
[9] Sonoma County Code sections 2-392(d)(2), 2-394(b)(3), (b)(4), (b)(5)(ii), (vii)–(ix), (e)(2) & (f).

annulled PERB's finding that the County violated its decisional bargaining obligations and PERB's remedial order declaring Measure P provisions void and unenforceable. The Court remanded for PERB to consider whether the decision to place the identified Measure P provisions on the ballot significantly and adversely affected the working conditions of the Associations' members. However, the Court affirmed PERB's conclusion that the County violated its duty to bargain regarding the effects of Measure P.[10]

D. Retired employees of University of California were not entitled to pension benefits because the implementation of benefits was conditioned on a specified event, which never occurred during retirees' employment.

Broome v. Regents of Univ. of Cal., 2022 Cal. App. LEXIS 558 (1st Dist. June 27, 2022)

Facts: The University of California Retirement Plan ("UCRP" or "Plan") is a defined benefit plan subject to federal tax laws in the administration of benefits accruing to its members. In response to a federal tax limitation that the University of California ("University") believed could significantly deter recruitment and retention of personnel, the University's governing body, the Regents of the University of California ("Regents") in February 1999 adopted a resolution ("1999 Resolution") to establish a plan to restore benefits earned that might be lost due to the limitation. The 1999 Resolution expressly conditioned the plan's implementation on the concurrence of committee chairs, which never happened.

Anne Broome and William Gurtner ("Plaintiffs"), retired employees of the University sued the Regents on behalf of themselves and similarly situated Plan members who retired between January 1, 2000, and March 29, 2012. Plaintiffs alleged breach of contract and other claims, expressing that Regents violated an obligation to provide them with pension benefits. The trial court granted Regents' motion for summary adjudication in favor of Regents on the contract claim. Plaintiffs appealed, contending the 1999 Resolution created enforceable contractual rights.

Held: The First District Court of Appeal observed that "'the terms and conditions of public employment, unlike those of private employment, generally are established by statute or other comparable enactment (e.g., charter provision or ordinance) rather than by contract.' [Citation.] For this reason, public employees have generally been held to possess no constitutionally protected rights in the terms and conditions of their employment." (*Cal Fire Local 2881 v. California Public Employees' Retirement System* (2019) 6 Cal.5th 965, 977.) However, a "contractual right to receive pension benefits is implied, despite their statutory foundation, because they constitute a form of

[10] The Court explained that under the MMBA, there is a duty to bargain regarding the "effects of a decision that has a foreseeable effect on matters within the scope of representation, even where the decision itself is not negotiable"—known as effects bargaining. (*County of Santa Clara* (2019) PERB Dec. No. 2680-M [44 PERC ¶ 86, pp. 11–12].) (Effects bargaining is distinct from whether a decision must be bargained, i.e., decision bargaining.) An employer must give an exclusive representative reasonable notice and an opportunity to bargain over any reasonably foreseeable effects of a nonnegotiable management decision *before* it implements the decision. (*County of Santa Clara* (2013) PERB Dec. No. 2321-M [38 PERC ¶ 30, p. 30].) An "employer's duty to provide notice and an opportunity to negotiate the effects of its decision … arises when the employer reaches a firm decision" but before it implements that decision. (*Mt. Diablo Unified School District* (1983) PERB Dec. No. 373 [8 PERC ¶ 15017, p. 26].)

deferred compensation…Given their character as deferred compensation, the receipt of legislatively established pension benefits is protected by the contract clause, even in the absence of a manifest legislative intent to create contractual rights." (*Id.*, at pp. 984–985.)

Yet the Court noted that the 1999 Resolution expressly provided that implementation of the benefits was conditioned on an event that never occurred: the Chairs' concurrence in an implementation plan proposed by the University President. Thus, Plaintiffs did not establish a breach of contract regarding pension benefits. The Court explained, "[I]mplied rights to vested benefits should not be inferred without a clear basis in the contract or convincing extrinsic evidence." (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1191.) The First District concluded that Plaintiffs' evidence, construed in their favor, did not clearly show that Regents intended to create contractual rights to restoration benefits even if the Chairs never concurred in a restoration benefit implementation plan. Thus, Regents demonstrated Plaintiffs could not establish breach of contract. The First District Court of Appeal accordingly affirmed.

PUBLIC RECORDS

A. The Governor's correspondence exemption under the Public Records Act applies to all correspondence of and to the Governor and his staff, not just those from private parties.

Rittiman v. Pub. Utils. Com., 79 Cal. App. 5th 1130 (1st Dist. 2022)

Facts: In November 2020, Brandon Rittiman made requests pursuant to the Public Records Act ("PRA"; Government Code section 6250 et seq.) seeking records of all communications between California Public Utilities Commission ("CPUC") President Marybel Batjer and her staff and members of the Governor's staff since mid-August 2019. CPUC notified Rittiman that the records were statutorily exempt from disclosure under Government Code section 6254, subdivision (*l*) - the Governor's correspondence exemption - which excludes from disclosure "[c]orrespondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary." (Section 6254(*l*).) After subsequent communications with CPUC and commencement of CPUC's appeals process, Rittiman sent a letter in mid-April 2021 asserting that Section 6254(*l*) applied only to "communications sent from individuals, companies, and/or groups who are *outside of the government*." Dissatisfied with CPUC's responses, Rittiman[11] filed a petition for writ of mandate arguing that the Governor's correspondence exemption applied solely to correspondence from private parties and therefore was inapplicable to his requests for communications between the Commission President and/or her principle executive staff, and the Governor's staff. He requested immediate access to the disputed records.

The First District Court of Appeal summarily denied the petition. The California Supreme Court transferred the matter back to the Court of Appeal with directions to vacate its denial order and issue an order to show cause ("OSC") to the CPUC. Meanwhile, CPUC denied Rittiman's

[11] The Court of Appeal noted that there were two named petitioners in this case, Rittiman and Tegna, Inc. For simplicity, this summary will refer only to Rittiman, as the Court did not refer to Tegna again in its opinion.

administrative appeal based in part on the Governor's correspondence exemption in Section 6254(*l*). CPUC filed a return to the OSC in the form of a demurrer which asserted, among other things, that CPUC properly denied Rittiman's PRA requests under the Governor's correspondence exemption. Rittiman filed a reply, arguing against CPUC's reasons for dismissal of the writ petition.

Held: The First District Court of Appeal noted that the Governor's correspondence exemption exempts from disclosure "the following records: [¶] … [¶] (l) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary." (Government Code section 6254(*l*).) Rittiman argued that the exemption was limited exclusively to correspondence to the Governor and/or his or her staff from private parties, and thus the exemption did not apply to the CPUC correspondence to the governor's staff.

The Court disagreed, stating, "by its plain terms, [the Governor's correspondence] exemption exempts any communication 'of,' as well as 'to,' the Governor and his or her staff that qualifies as 'correspondence.' The term 'correspondence' is not modified or limited in any respect, let alone to *private party* correspondence and, further, to correspondence *from* private parties. Indeed, we would need to excise existing language from the statute, as well as read limiting language into it, in order to curtail its scope in the manner petitioner advocates." The Court remarked that "'[i]f the [statutory] language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.'"[12] The Court found the statutory language to be "clear and unambiguous" and thus its "task [wa]s at an end, for there [wa]s no need for judicial construction."[13]

Moreover, the legislative history of the exemption reinforced that it should be read and applied as written. The Court added that no California court had held that the Governor's correspondence exemption is limited to correspondence from private parties. The First District therefore concluded that the Governor's exemption in the PRA is not limited to correspondence from private parties, but applies to any writing "of and to" the Governor and his or her staff that qualifies as "correspondence" under the Act. Thus, the records sought in Rittiman's PRA requests were exempt from disclosure under the Governor's correspondence exemption. The First District Court of Appeal accordingly sustained CPUC's demurrer to Rittiman's petition for writ without leave to amend, and dismissed the mandamus proceeding.

B. Report on harassment by an elected sheriff was not protected as confidential under the California Public Records Act because the county board of supervisors was not his employer.

Essick v. Cnty. of Sonoma, 2022 Cal. App. LEXIS 568 (1st Dist. June 29, 2022)

Facts: After a harassment complaint against Mark Essick, the elected sheriff of the County of Sonoma (the "County"), was submitted to the County, independent investigator Amy

[12] *Kaanaana v. Barrett Business Services*, 11 Cal.5th 158, 168 (2021).
[13] *Webster v. Superior Court of San Bernardino County*, 51 Cal.App.5th 676, 680 (4th Dist. 2020), quoting *MacIsaac v. Waste Management Collection & Recycling, Inc.*, 134 Cal.App.4th 1076, 1082–1083 (1st Dist. 2005).

Oppenheimer conducted an inquiry and prepared a written report. A local newspaper, the Press Democrat, requested that the County release the complaint, the report, and various related documents (collectively, the "Oppenheimer Report") pursuant to the California Public Records Act ("CPRA" - Government Code section 6250 et seq.). In January 2020, Sheriff Essick filed a complaint seeking a preliminary injunction to keep the Oppenheimer Report closed to the public for the duration of the trial proceedings. The trial court denied his request for the preliminary injunction. Sheriff Essick appealed, contending the trial court erred in part because the Oppenheimer Report should be classified as confidential under an exemption to the CPRA under Government Code section 6254(k), either as a "peace officer[]", "personnel record[]" (Penal Code sections 832.7(a), 832.8(a)), or because it constituted a "report[] or findings" relating to a complaint by a member of the public against a peace officer (Penal Code sections 832.5(b), 832.7(a)).

Held: The First District Court of Appeal explained that although the basic design of the CPRA favors public records disclosure, the CPRA balances the dual concerns for privacy and disclosure by providing for various exemptions that permit public agencies to refuse disclosure of certain public records. (Government Code sections 6254–6255.) Among these is Section 6254(k) which protects "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Thus, Section 6254(k) "'incorporates other [disclosure] prohibitions established by law.'" (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1283, quoting *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 656.)

Here, Sheriff Essick relied primarily on Penal Code sections 832.7 and 832.8, which are in the statutory scheme known as the *Pitchess* statutes. (Penal Code sections 832.5, 832.7, 832.8.) Read together, Penal Code sections 832.7 and 832.8 protect as "confidential" the "personnel records of peace officers" and "information obtained from these records." (Penal Code section 832.7(a).) "Personnel records" means anything in a file maintained under the officer's name "*by his or her employing agency*" (Penal Code section 832.8(a), italics added) that relates to a variety of subjects in which an officer may have a privacy interest.

The First District found that the County of Sonoma was not Sheriff Essick's "employing agency." The Court explained that the county sheriff is a public official elected by Sonoma County voters, and as such, is ultimately responsible to them—not to the Board of Supervisors or anyone else in county government. (Cal. Const., art. XI, section 1, subd. (b) [requiring elected sheriff].) The Court remarked that not only does the County Board of Supervisors lack power to hire the county sheriff, it lacks power to discipline or fire the county sheriff. The First District added that a county board has "oversight responsibility" as to an elected sheriff but lacks power to direct how he or she performs official duties. (*Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1209–1210.) The Court stated that a central role of the Board of Supervisors, like any other legislative body, is to investigate the conduct of executive officials and thereby shine a light on matters that the voters of the County may wish to know. Here, the voters of the County had ultimate authority over the county sheriff, and they were, the Court explained, entitled to be informed as to that person's strengths, weaknesses, successes, and failures—including the person's ability to model traits of civility and respect for others that might be expected in an official who should embody those values for the public.

Because the County was not Sheriff Essick's employer, confidentiality of his peace officer personnel records under Penal Code sections 832.5(b), 832.7(a), and 832.8(a), did not apply to the Oppenheimer Report and thus did not, under the exemption from the CPRA for records protected under other law in Government Code section 6254(k), bar the county from releasing the report. Accordingly, the First District affirmed the trial court's order denying Sheriff Essick's request for a preliminary injunction.

MISCELLANEOUS

A. Denying prisoner's request to be housed only with other Muslims was the least restrictive means of avoiding equal protection liability that comes with classifying prisoners on their religious beliefs.

Al Saud v. Days, 36 F.4th 949 (U.S. 9th Cir. 2022)

Facts: Shaykh Muhammad Al Saud is a Muslim inmate incarcerated at Arizona State Prison Complex-Eyman, Al Saud sued the Arizona Department of Corrections Rehabilitation and Reentry ("ADCRR") and prison officials (collectively, "defendants") pursuant to the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. section 2000cc *et seq.*, the Free Exercise Clause of the First Amendment, and Arizona state law. He alleged that he was unable to pray five times a day as required by his religion because he was housed with people who harassed him as he prayed. He asked the prison to accommodate his religious practice by housing him exclusively with other Muslims. ADCRR did not respond to his request.

The District Court issued a judgment on the pleadings for defendants, concluding that the infringement on Al Saud's religious practice was justified because the state's action was narrowly tailored to address the compelling interest of avoiding equal protection liability for classifying other prisoners based on their religion.

Held: The Ninth Circuit Court of Appeals explained that RLUIPA protects "institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005). "To state a claim under RLUIPA, a prisoner must show that: (1) he takes part in a 'religious exercise,' and (2) the State's actions have substantially burdened that exercise. If the prisoner satisfies those elements, then the State must prove its actions were the least restrictive means of furthering a compelling governmental interest." *Walker v. Beard*, 789 F.3d 1125, 1134 (9th Cir. 2015) (internal citation omitted).

Defendants contended that they had a compelling interest in avoiding the equal protection liability that comes with classifying and housing prisoners based on their religious beliefs and practices. In order to house Al Saud with only Muslims, defendants would necessarily have to classify and house *other* prisoners based on their religious beliefs and practices. The Court noted that the Equal Protection Clause prohibits the government from classifying people based on suspect classes, unless the classification is narrowly tailored to satisfy a compelling governmental interest (i.e., the

government's action passes strict scrutiny). *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988). Religion is a suspect class. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

The Ninth Circuit held that Al Saud's RLUIPA claim failed because denying his request to be housed only with Muslims was the least restrictive means of furthering a compelling governmental interest. The Court concluded that the outcome of this case was largely controlled by *Walker*, which held that a prison could deny a prisoner's religious accommodation when he sought to be housed with only white people. The Court found that because both race and religion are suspect classes, the likelihood that equal protection liability would flow from housing prisoners based on religion was substantially identical to the likelihood of liability for housing prisoners based on race and, therefore, was sufficient to serve as a compelling interest. Therefore, defendants had no alternative but to deny Al Saud's request because he requested only one thing: to be housed exclusively with Muslims.

The Court held that defendants did not violate Al Saud's First Amendment free exercise rights because denying Al Saud's request was also reasonably related to a legitimate penological interest—avoiding the potential legal liability of housing inmates based on their religious beliefs and practices. Denying the request was rationally related to avoiding liability because by denying Al Saud's requested accommodation, ADCRR completely eliminated its risk of litigation from other prisoners based on that claim. The Ninth Circuit Court of Appeals accordingly affirmed the District Court's judgment on the pleadings.

B. California Highway Patrol was not immune to liability for injuries caused by CHP sergeant responding to an emergency call because the Vehicle Code provides a separate statutory basis for CHP liability.

Silva v. Langford, 79 Cal. App. 5th 710 (2nd Dist. 2022)

Facts: As alleged in the first amended complaint ("FAC"), in October 2019, Danuka Neshantha Silva was attempting to cross the eastbound lanes of traffic on the 101 freeway near Encino when he was struck and killed by the Department of the California Highway Patrol ("CHP") patrol vehicle driven by CHP Sergeant Richard Scott Langford who was responding to an emergency call concerning an altercation on the freeway. Langford was driving at an excessive speed without activating his patrol car's lights and sirens at the time he struck Danuka.

Plaintiffs Marakkalage Tharal D. Silva and Shirin Ramesha Silva ("the Silvas") filed an action on behalf of their deceased son Danuka, asserting, among other things,[14] a cause of action against CHP for public entity liability for the tort of a public employee (Government Code section

[14] The Silvas also asserted negligence and wrongful death claims against a rideshare driver, Uber, Inc., and another organization. Danuka had been a passenger in the rideshare driver's vehicle when the driver pulled into the number one lane of the 101 freeway, abruptly stopped the vehicle, and demanded that Danuka and another passenger get out of the vehicle. The driver refused to drive the vehicle onto the shoulder or to an exit ramp before forcing the passengers to disembark. While Danuka was crossing lanes trying to get to safety, Danuka was struck by the vehicle driven by Sergeant Langford.

815.2(a)), in which they alleged Langford violated Vehicle Code section 22350 (basic speed law), for which CHP was liable under Vehicle Code section 17001 (public entity liability for negligent or wrongful operation of a motor vehicle by a public employee). Sergeant Langford and CHP each demurred to the FAC, arguing the complaint was barred by investigative immunity conferred under Government Code section 821.6.[15] Sergeant Langford also argued the claims against him were barred by emergency responder immunity under Vehicle Code section 17004. CHP asserted the Silvas' claims against it were barred under Government Code sections 821.6 and 815.2(b).

The trial court found the claims against the CHP defendants were barred by investigative immunity conferred under Section 821.6. The trial court sustained without leave to amend the CHP defendants' demurrers to the Silvas' FAC, and subsequently entered a judgment of dismissal in favor of the CHP defendants. The Silvas appealed, arguing that the trial court erred in sustaining the CHP defendants' demurrers

Held: The Second District Court of Appeal first affirmed the trial court's order sustaining Sergeant Langford's demurrer based on the Silvas' concession at oral argument that he was entitled to immunity as an emergency responder under Vehicle Code section 17004, although the trial court had sustained Langford's demurrer based on Section 821.6 investigative immunity. However, the Court of Appeal stated that even if Langford was immune under Section 821.6 (in addition to his immunity under Vehicle Code section 17004), it did not follow that CHP was immune.

The Court observed that Section 821.6 immunity, like Vehicle Code section 17004 immunity, expressly applies only to a "public employee." Government Code section 815.2(b) extends an employee's immunity to the public entity in certain circumstances: "*Except as otherwise provided by statute*, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (Italics added.) The Second District noted that Vehicle Code section 17001 provides: "A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment." The Second District noted that in closely analogous circumstances, the California Supreme Court in *Brummett v. County of Sacramento*[16] rejected a public entity's argument that Section 815.2(b) immunized the entity from liability under Vehicle Code section 17001 for injuries caused by its police officers during a high-speed chase, even though the police officers enjoyed first-responder immunity under Vehicle Code section 17004.

Because Vehicle Code section 17001 provided an independent statutory basis for CHP's liability based on Langford's alleged negligence, the Second District concluded that the trial court erred in sustaining CHP's demurrer without considering CHP's liability under Section 17001. The Court noted that the FAC specifically alleged the CHP was liable under Section 17001. Thus, it was CHP's burden in its demurrer to establish its affirmative defense of governmental immunity.[17] The

[15] Section 821.6 provides, "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

[16] 21 Cal.3d 880 (1978).

[17] The Second District stated that it did not reach the scope and application of Section 821.6 immunity. The Court of Appeal observed that the California Supreme Court has only once considered Section 821.6 immunity in almost 50

Court of Appeal accordingly reversed the judgment as to CHP and remanded for further proceedings.

C. Substantial evidence existed that at the time of the car accident, defendant was impaired from using marijuana and acted with implied malice, supporting the jury's verdict of second-degree murder.

People v. Murphy, 2022 Cal. App. LEXIS 578 (2nd Dist. June 30, 2022)

Facts: In January 2018, 19-year-old Davion Demetrious Murphy was under the influence of marijuana as he drove his car at approximately 88 miles per hour through a red light and collided with a Subaru vehicle, killing three people. During the investigation officers found three marijuana canisters in the Lexus, two of which were empty. The investigators found no skid marks to suggest Murphy tried to brake before the collision. A jury found that Murphy was subjectively aware that his actions endangered human life and acted with implied malice. The jury convicted Murphy of three counts of second-degree murder. The trial court sentenced him to three concurrent terms of 15 years to life in prison. Murphy appealed.

Held: On appeal, Murphy argued that the prosecution did not present sufficient evidence to support his second-degree murder convictions because, based on the evidence that was presented at trial, no reasonable jury could have found he acted with implied malice when he drove through the red light and collided with the Subaru.

The Second District Court of Appeal explained that murder is the unlawful killing of a human being with express or implied malice aforethought. (Penal Code sections 187(a), 188; accord, *People v. Rangel* (2016) 62 Cal.4th 1192, 1220.) Implied malice has both a physical and a mental component. The physical component is satisfied by the performance of an act, the natural consequences of which are dangerous to life. The mental component is the requirement that the defendant knows that his conduct endangers the life of another and acts with conscious disregard for life. (See *People v. Watson* (1981) 30 Cal.3d 290, 300.) That is, "malice may be implied when [the] defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life." (*Id*.) Malice may be found even if the act results in a death that is accidental. (*People v. Superior Court (Costa)* (2nd Dist. 2010) 183 Cal.App.4th 690, 697.) To support a finding of implied malice, the evidence must establish the defendant deliberately committed an act, the natural consequences of which were dangerous to life, with knowledge of the act's danger to life and a conscious disregard of that danger. (*Watson, supra*, 30 Cal.3d at p. 300.) This conscious disregard for the danger to life distinguishes implied malice from gross negligence. Implied malice for vehicular murder may be found based on the totality of the circumstances. (See *People v. Moore* (2nd Dist. 2010) 187 Cal.App.4th 937, 941–942.)

In *Watson*, the leading case on vehicular murder involving implied malice, the California Supreme Court held that sufficient evidence existed to uphold second degree murder counts in the information. *Watson* found the following evidence as sufficient to support a finding that the

---

years, and that the Supreme Court will again consider Section 821.6 immunity in its pending review of *Leon v. County of Riverside* (4th Dist. 2021) 64 Cal.App.5th 837, 841, review granted Aug. 18, 2021, S269672.

defendant acted with conscious disregard for life: the defendant's blood-alcohol level supported a finding that he was legally intoxicated; he drove to the establishment where he was drinking, knowing he had to drive later; he presumably was aware of the hazards of driving while intoxicated; he drove at high speeds on city streets, creating a great risk of harm or death; and he was aware of the risk, as shown by the near-collision and his belated attempt to brake before the fatal collision. (*Id.* at pp. 300–301.) Thereafter, several appellate courts upheld murder convictions in cases where defendants have committed homicides while driving under the influence of alcohol and other controlled substances. These opinions generally relied on what have been called *Watson* factors because they were present there: "(1) blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving." (*People v. Autry* (2nd Dist. 1995) 37 Cal.App.4th 351, 358.)

Here, the Second District considered the *Watson* factors and the appellate cases applying those factors, concluded that sufficient evidence supported the jury's verdict, and affirmed. The Court expressed that although there is not yet a commonly administered and standardized medical test equivalent to the blood-alcohol concentration test that accurately determines a person's level of impairment from lipophilic, psychoactive drugs such as marijuana, there was substantial evidence, including expert and other witness testimony, that at the time of the accident Murphy was impaired from using marijuana.

There was also substantial evidence that Murphy acted with implied malice both when he smoked marijuana with the intent to drive, and when he drove in a manner that demonstrated a conscious disregard for human life. Thus, the evidence was sufficient to support a finding of implied malice because it showed that defendant sped through a red light at nearly 90 miles an hour, that he was impaired from using marijuana, which he had smoked several times in the hours before the accident, and that he had received multiple warnings about the dangers of driving while under the influence through an at-risk youth program, his driver's license application, and marijuana canister evidence that was in his car at the time of the accident.

D. The Private Attorneys General Act does not violate California's separation of powers doctrine and is constitutional.

Cal. Bus. & Indus. All. v. Becerra, 2022 Cal. App. LEXIS 576 (4th Dist. June 30, 2022)

Facts: The Labor Code Private Attorneys General Act of 2004 ("PAGA"; Labor Code section 2698 et seq.) allows California employees to sue their employers and pursue civil penalties on behalf of the state for violations relating not only to themselves, but also to other California employees of the same employer. Plaintiff California Business & Industrial Alliance, a lobbying group representing small and midsized businesses in California, sued Defendant Xavier Becerra, then California's Attorney General, in his official capacity, seeking a judicial declaration that PAGA was unconstitutional under various theories and injunctive relief barring defendant from implementing or enforcing PAGA. Defendant demurred, arguing Plaintiff's causes of action relating to plaintiff's separation of powers arguments failed as a matter of law. The trial court sustained the demurrer without leave to amend, concluding Plaintiff's separation of powers claim was barred by *Iskanian*. The trial court entered judgment for Defendant. Defendant appealed.

Held: California's separation of powers doctrine prohibits the enactment of statutes that "as a whole, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions." (*Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 15.) On appeal, Plaintiff asserted that PAGA violates California's separation of powers doctrine by allowing private citizens to seek civil penalties on the State's behalf without the executive branch exercising sufficient prosecutorial discretion.

The Fourth District Court of Appeal rejected Plaintiff's theory for two reasons. First, the California Supreme Court held in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, that "PAGA does not violate the principle of separation of powers under the California Constitution." (*Id.* at p. 360.) Despite Plaintiff's arguments that the *Iskanian* court's statement was either "dictum" or was limited to a different type of separation of powers challenge, the Fourth District concluded that *Iskanian* was directly on point and controlling.

Second, even if *Iskanian* did not require the conclusion that PAGA did not violate the separation of powers doctrine, the Fourth District stated that it would reach it anyway through application of California's preexisting separation of powers doctrine. Plaintiff contended that PAGA violated the separation of powers doctrine by depriving the executive branch of prosecutorial discretion in PAGA cases, and control over PAGA prosecutions or settlements. Plaintiff argued that PAGA thus prevents the executive branch from performing its core function of enforcing the law by replacing the Attorney General and other prosecutors with private parties and attorneys.

The Fourth District observed, however, that PAGA itself has various provisions which give the executive branch notice of, and discretion to exercise control over, PAGA claims. The Court explained that PAGA is not meaningfully distinguishable from comparable qui tam statutes[18] outside the employment context, including the California False Claims Act,[19] the Insurance Frauds Prevention Act,[20] and many others. Plaintiff and its supporting amici did not produce any case in which any of these statutes had been held to violate California's separation of powers doctrine, nor identify any sufficiently significant distinctions between those statutes and PAGA. Thus, the Court concluded that PAGA was constitutional. Accordingly, the Fourth District Court of Appeals affirmed the judgment of the trial court.

[18] PAGA actions are qui tam actions. A qui tam action is "'[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive.'" (*People ex rel. Allstate Ins. Co. v. Weitzman*, 107 Cal.App.4th 534, 538 (2nd Dist. 2003), internal citation omitted.)

[19] Government Code section 12650 et seq.

[20] Insurance Code section 1871 et seq.