CPOA CASE SUMMARIES – SEPTEMBER 2024

CONSTITUTIONAL LAW/POLICE CONDUCT

A. Because county's online "mugshot lookup," which included detainees' photos and personal information, served as a punishment, it implicated detainee's due process rights.

Houston v. Maricopa, 2024 U.S. App. LEXIS 22564 (9th Cir. Sep. 5, 2024)

Facts: The Maricopa County (Arizona) Sheriff's Office posts photographs of arrestees on its website, accompanied by identifying information, for several days after an arrest. These identified photographs are often gathered by other internet sites and thus remain available after they are removed from the County website, even if the arrestee is never prosecuted or convicted.

In January 2022, Phoenix police arrested Brian Houston and charged him with assault. During Maricopa County's jail booking process, Houston's photo was taken and posted, alongside many others, on the County's publicly accessible "Mugshot Lookup" website. Next to the mugshot photo were Houston's full name, birthdate, and an entry under "Crime Type" describing the category of his alleged offense. Clicking on a "More Details" button would have revealed Houston's sex, height, weight, hair color, eye color, and the specific charges on which he was arrested. The post remained online for approximately three days, pursuant to the Sheriff's Office's regular practice. Houston was never prosecuted on the charges noted on the post, which were later dropped.

In May 2022, Houston filed a putative class action under 42 U.S.C. section 1983 and Arizona law against Maricopa County and Sheriff Paul Penzone (collectively, the "County"). Houston's complaint alleged inter alia that the County's conduct violated due process under the Fourteenth Amendment. Houston alleged that the County's "Mugshot Lookup" post caused him "emotional distress and public humiliation," "permanently damaged" his "business and personal reputation," and "placed [him] at risk of identity theft, fraud and extortion." He asserted that at least one third-party website "scraped" his mugshot and personal information, and that the County was aware such practices occurred. Houston describes Maricopa County as a "scraping" hotspot, such that "the notorious Mugshots.com website[] purports to publish the booking photos and arrest information of close to one million Arizona residents—the vast majority (834,000) from Maricopa County alone."

The District Court granted the County's motion to dismiss the operative complaint and denied Houston's motion for class certification as moot. Houston appealed, seeking review of the dismissals of his substantive due process and other claims.

Held: Houston on appeal asserted, among other things, a substantive due process claim. The Ninth Circuit Court of Appeals initially explained that the Due Process Clause protects pretrial detainees from punishment before adjudication of guilt. See *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). To constitute punishment, a government action must (i) harm a detainee and (ii) be intended to punish him. *See Demery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir. 2004). Courts assess punitive purpose by considering whether the challenged conduct operates as punishment or "whether it is but an

incident of some other legitimate governmental purpose." *Bell*, 441 U.S. at 538.[1]

Considering the first *Bell* prong, the Ninth Circuit observed that in its previous decision in *Demery*, pretrial detainees challenged Maricopa County's installation and use of jail webcams on substantive due process grounds. Using in-jail cameras, the County publicly livestreamed footage of the jail's holding cells, bunkbeds, pre-intake areas, and intake areas. In affirming a preliminary injunction, *Demery* held that *Bell*'s harm prong was satisfied because "[e]xposure to millions of complete strangers . . . as one is booked, fingerprinted, and generally processed as an arrestee . . . constitutes a level of humiliation that almost anyone would regard as profoundly undesirable." *Id.* at 1029-30. Here, Houston alleged (and the appellate court took as true in its review of the District Court's dismissal) that the County's actions had caused and would continue to cause Houston to suffer harm and public humiliation. The Ninth Circuit stated that as in *Demery*, the County's post on its "Mugshot Lookup" exposed Houston's image and the fact of his arrest to the "millions of…strangers" able to access the Sherriff's public website online, triggering discomfort that "almost anyone would regard as profoundly undesirable." *Id.* at 1029-30. The Court observed that unlike the livestreamed footage in *Demery*, the distributed image of Houston identified him personally by name and birthdate, making his "Mugshot Lookup" record immediately searchable. This exposure-based harm, the Court concluded, fell well within—and in one respect exceeded—the humiliation and discomfort recognized as actionable harm in *Demery*.

Moreover, Houston stated that the County "permanently damaged" his business and personal reputation by posting his mugshot and personal information. The Court observed that with the mugshots and personal information posted on the County's public "Mugshot Lookup" page, an "exponential[] . . . number" of viewers worldwide could access the site, including Houston's "friends, loved ones, co-workers and employers" and others who both influence and are influenced by his reputation. *Demery*, 378 F.3d at 1029-30. The Ninth Circuit concluded that under the circuit's case law, Houston's allegations of harms by the County had satisfied *Bell*'s first prong at the pleading stage.

The second *Bell* prong required the Court to determine whether the County's "Mugshot Lookup" posts were intended to punish pretrial detainees. The Ninth Circuit explained that do so, it must decide whether punitive intent could be inferred from the lack of rational relation to a legitimate nonpunitive government interest. See *Bell*, 441 U.S. at 538-39.

The Ninth Circuit observed that the sole reason the County provided to justify its mugshot posting practice, was the County's assertion that its posts promoted "transparency" in the criminal legal system. While the cases the County cited invoked transparency in the context of public safety, the County did not assert that its posting of Houston's arrest record online promoted public safety in Maricopa County. Nor did the County offer examples where transparency alone—absent a connection to public safety—had been accepted as a legitimate nonpunitive interest for *Bell* purposes, much less in a pretrial context. The Court found that this lack of support for the County's purported transparency goal undermined the County's contention that "Mugshot Lookup" posts did not punish pretrial detainees. The Court found that no rational relation existed between

[1] The opinion notes that an additional consideration is whether the government action "appears excessive" in relation to its stated purpose. *Bell*, 441 U.S. at 538 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). Because on appeal, Houston argued only that no legitimate nonpunitive government interest existed, the Ninth Circuit did not address the excessive action consideration.

"displaying images of [Houston] to internet users from around the world," accompanied by personally identifying details, and educating Maricopa County residents about how the government generally, or the criminal legal system in particular, operates. *Demery*, *supra*, at p. 1032. The Court concluded that an inference that the post was motivated by punitive intent was plausible and so precluded dismissal. The second prong of the *Bell* test was therefore satisfied.

The Ninth Circuit thus concluded that Houston adequately pleaded a substantive due process claim based on pretrial punishment under *Bell* and *Demery*. Accordingly, the Ninth Circuit Court of Appeals reversed the District Court's dismissal of Houston's claim that the County violated his right to substantive due process and remanded for further proceedings.

For a more detailed discussion of this case, please see Client Alert Vol. 39, No. 17, available at www.jones-mayer.com.

B. Personal text messages from a public employee regarding a racist image did not constitute a matter of legitimate public concern and therefore were not protected by the first amendment.

Adams v. Cnty. of Sacramento, 2024 U.S. App. LEXIS 22846 (9th Cir. Sep. 9, 2024)

Facts: Kate Adams began working for the Sacramento County Sheriff's Office ("Department") in 1994 and became Chief of Police for the City of Rancho Cordova in March 2020. In 2021, she was forced to resign from that post over allegations that she sent racist messages years earlier. On New Year's Eve in 2013, Adams was having "a friendly, casual text message conversation"[2] with her co-worker and then-friend, Dan Morrissey. At some point in the exchange, Adams sent Morrissey a text message stating, "Some rude racist just sent this!!" along with two racist images that she had received. Morrissey responded, "That's not right." Adams then replied in a message starting with, "Oh, and just in case u [sic.] think I encourage this . . ." but the remainder of the text was not in the record. That same evening, Adams texted the same images to another co-worker and then-friend, LeeAnnDra Marchese.

Over the next seven years, Adams's friendships with Morrissey and Marchese deteriorated. In July 2020, Adams filed a formal complaint of harassment and retaliation against Marchese with the County's Equal Employment Opportunity office. During the investigation, Marchese provided print-outs of the text messages that Adams had forwarded in 2013, but did not provide the surrounding text commentary from Adams. The Department commenced an investigation of Adams. During the investigation, Morrissey provided his cell phone showing the 2013 texts. The Department then gave Adams a choice to either resign or be "terminated and publicly mischaracterized as a racist." Adams chose to resign in September 2021.

In August 2022, Adams filed suit against the County of Sacramento, the Sheriff, and several Does, alleging claims for, *inter alia*, deprivation of the right to free speech under the First Amendment and First Amendment conspiracy. After Adams amended her first complaint, the District Court dismissed the First Amendment claims with prejudice for failure to plead that the text messages

[2] The Ninth Circuit noted that for this interlocutory appeal, it accepted the allegations in Adams's complaint as true.

constituted speech "on a matter of public concern." Adams sought certification of the partial dismissal order for interlocutory appeal, and the District Court granted certification. A motions panel of the Ninth Circuit Court of Appeals granted Adams's petition for permission to file an interlocutory appeal.

Held: The Ninth Circuit Court of Appeals began by explaining that "the First Amendment prohibits government officials from subjecting individuals to 'retaliatory actions' after the fact for having engaged in protected speech." *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022) (quoting *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019)). In analyzing First Amendment retaliation claims brought by government employees, courts use the test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968).[3] In this *Pickering* analysis, "…the threshold inquiry is whether the statements at issue substantially address a matter of public concern." *Roe v. City and County of San Francisco*, 109 F.3d 578, 584 (9th Cir. 1997) (citing *Allen v. Scribner*, 812 F.2d 426, 430 (9th Cir. 1987)) ; *see also City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (per curiam). The Court explained that in the determination of "[w]hether an employee's speech addresses a matter of public concern," courts consider "the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

The Court observed that "[s]peech involves matters of public concern 'when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest."'" *Lane v. Franks*, 573 U.S. 228, 241 (2014) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). "[I]f the communication is essentially self-interested, with no public import, then it is not of public concern." *Roe*, 109 F.3d at 585. "The focus must be upon whether the public or community is likely to be truly interested in the particular expression, or whether it is more properly viewed as essentially a private grievance." *Id.*

The Ninth Circuit stated that speech that complained of only private, out-of-work, offensive individual contact by unknown parties does not involve a matter of public concern. Here, the Court found that Adams's texts and distribution of the images spoke only of her exasperation at being sent the offensive images, which was an issue of personal concern. Whether she was privately sent offensive, racist images outside the workplace, without more, was not a matter of public concern within the meaning of *Pickering*. The Court noted that the content of Adams's private communications to her friends did not protest generally applicable "policies and practices " she "conceived to be racially discriminatory in purpose or effect." *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979). Nor did Adams suggest her receipt of the images was connected to "wrongful governmental activity" in the Department. *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 927 (9th Cir. 2004).

The Court also concluded that the images themselves were not "a subject of legitimate news interest." *City of San Diego*, 543 US at 83-84. There was no suggestion in Adams's complaint that these two offensive images were newsworthy when she forwarded them to Marchese and Morrissey. Adams made no allegation that the images were of note in her community, her job, or

[3] Under the *Pickering* framework, it is the plaintiff's burden to establish that "(1) she spoke on a matter of public concern; (2) she spoke as a private citizen rather than a public employee; and (3) the relevant speech was a substantial or motivating factor in the adverse employment action." *Barone v. City of Springfield*, 902 F.3d 1091, 1098 (9th Cir. 2018). "If [a plaintiff] establishes such a prima facie case, the burden shifts to the government to demonstrate that (4) it had an adequate justification for treating [the employee] differently than other members of the general public; or (5) it would have taken the adverse employment action even absent the protected speech." *Id.*

to the public. Nor did she suggest their circulation to her was the result of broader issues in the police department.

The Court noted that as stated in the complaint, Adams and Morrissey were "engaged in a friendly, casual text message conversation" where they "exchanged Happy New Year's wishes and Ms. Adams shared videos of her children playing." The private texts were directed only to two recipients—an extremely limited audience. Adams intended for the messages to remain private, as they only resurfaced when the recipients revealed them years later. The context—a text exchange among friends discussing their children and the holidays, free of political discourse—reinforced the fact that her texts expressed her personal adverse reaction at being sent the imagery, instead of advancing societal political debate. The form and context of the communications confirmed the Court's conclusion that Adams's private texts were only meant to convey a personal grievance about receiving offensive private texts to her friends in the course of social conversation, not to comment on a matter of public concern.

The Ninth Circuit Court of Appeals concluded that taken together, each *Pickering* factor foreclosed Adams's claim that her speech addressed a "matter of public concern" within the meaning of *Pickering*. Accordingly, the Ninth Circuit affirmed the District Court's dismissal of the First Amendment retaliation and conspiracy claims and remanded for further proceedings.

For a more detailed discussion of this case, please see Client Alert Vol. 39, No. 16, available at www.jones-mayer.com.

C. Officers did not violate Fourth Amendment by calling for canine unit before initiating traffic stop where dog arrived and alerted before initiating officer had finished writing the traffic ticket.

People v. Valle, 105 Cal. App. 5th 195 (1st Dist. 2024)

Facts: In March 2023, Santa Rosa Police Officer Brett Wright was on patrol with his partner at approximately 10:00 p.m. Wright saw Adrian Osvaldo Valle pumping gas at a station, and recognized him from prior investigations as an active gang member. Wright noticed that Valle's vehicle did not have a front license plate, and decided to make a traffic stop on that basis. After Valle's vehicle left the station, Wright and his partner activated their lights and siren, followed Valle's vehicle across an overpass, and detained him at approximately 10:03 p.m. in a parking lot less than one-quarter of a mile from the gas station. Approximately three minutes before Officer Wright and his partner stopped Valle, Wright's partner called a canine officer to assist in the traffic stop.

Wright approached, informed Valle why he was being stopped, and obtained Valle's driver's license and registration. Wright then returned to his patrol car to run a license check. Wright began writing a citation for the missing plate as soon as he received the results of the license check, which arrived very quickly. Valle's driver's license was valid, but he had prior arrests for drugs and firearms and a felony conviction. According to Wright, writing a citation could take him between five to 10 minutes. He had nearly completed the citation when the canine officer arrived at

approximately 10:06 p.m. Officer Wright remained in his patrol car writing the citation. A sniff search began about two to three minutes after the canine unit arrived on the scene. It lasted between 30 seconds and one minute, when the canine alerted to the driver's side door at approximately 10:10 p.m. When notified of the alert, Wright stopped writing the citation and began investigating the possible presence of a firearm in Valle's vehicle. Wright discovered a loaded handgun.

Valle was charged with three felonies, including possession of a firearm by a felon. He pleaded not guilty and moved to suppress the evidence of the handgun obtained as a result of a canine search of his vehicle, arguing that the search violated his Fourth Amendment right to be free from unreasonable searches and seizures. The trial court granted the motion to suppress, stating that the "pretextual stop" should have occurred "[a]t the gas station or immediately thereafter. It was prolonged in order to give time for the dog to come out." The trial court entered an order to dismiss the action. The People appealed.

Held: The California First District Court of Appeal observed that in *Rodriguez v. United States* (2015) 575 U.S. 348, 353, the Supreme Court considered "whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff." The Supreme Court answered the question "no," stating that a "seizure justified only by a police-observed traffic violation…'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." (*Id.* at pp. 350–351, citations omitted.) The First District stated that a traffic stop begins for purposes of the Fourth Amendment when an officer pulls a vehicle over for a traffic infraction.[4]

The First District found no evidence that the that the traffic stop was prolonged to allow for the dog sniff, and accordingly reversed and remanded. The Court explained that the interval between the time Valle was stopped and the time the dog alerted to his vehicle was approximately seven minutes. This was both within the time Officer Wright testified it usually takes him to write a citation, and before he testified that he was actually done writing one for Valle. Officer Wright's partner called for backup before the stop even began. The Court found no evidence that Valle's seizure lasted longer than the time reasonably required to write him the ticket.

The First District observed that the trial court apparently based its decision to grant the motion to suppress on its mistaken belief that Vehicle Code section 2806.5, which was not yet in effect, would make pretext stops illegal. The Court of Appeal explained, however, that Section 2806.5 does not prohibit "pretext stops" otherwise meeting Fourth Amendment standards. The First District stated that the United States Supreme Court has long held that, under the Fourth Amendment, "the constitutional reasonableness of traffic stops" does not depend "on the actual motivations of the individual officers involved." (*Whren v. United States* (1996) 517 U.S. 806, 813.) This is because "[w]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting [him or her] at the time,' [citation], and not on the officer's actual state of mind at the time the

[4] See *People v. McDaniel* (2021) 12 Cal.5th 97, 129–130; accord, *People v. Ayon* (6th Dist. 2022) 80 Cal.App.5th 926, 936; *id.* at pp. 937–938 ["the relevant time frame started from the point at which the car was first pulled over and ended once the dog alerted to the presence of drugs in the car"].) The First District thus found that the trial court thus erred in including in its calculus the time between when the police first observed Valle at the gas station and when he was pulled over.

challenged action was taken." (*Maryland v. Macon* (1985) 472 U.S. 463, 470–471.) Moreover, "the lack of a front license plate has long been recognized as a legitimate basis for a traffic stop." (*People v. Saunders* (2006) 38 Cal.4th 1129, 1136.)

D. Defendant's guilty plea to resisting arrest did not preclude his excessive force claim where his guilty plea did not specify which acts of resistance were the basis of the plea.

Martell v. Cole, 2024 U.S. App. LEXIS 24087 (9th Cir. Sep. 23, 2024)

Facts: In September 2020, San Diego County Deputy Sheriffs investigating a report of domestic violence at the home of Ronald Martell found him in a hallway and ordered him to "get on the ground." Instead of complying with this order, he knelt on one knee without looking at the deputies. About ten seconds after the deputies ordered Martell to get on the ground, they pushed him to the floor. According to Martell's complaint, the deputies used excessive force and injured him when they pushed him to the floor. Martell alleged that he was thrown face first down to the ground and his arms wrenched so severely that doctors diagnosed him with a dislocated shoulder and rotator cuff tear.

One minute after Martell was pushed to the ground, the deputies instructed Martell to roll onto his side so he could stand and leave the home with them. Martell did not comply with the instruction. Instead, he attempted to bring his legs under his body. The deputies forced him back onto his stomach in response. Martell was then instructed by the deputies to sit up and bring his knees to his chest, but Martell refused to comply. Several minutes later, because of Martell's continuing failure to cooperate, the deputies placed him in a full-body restraint device and carried him out of the home.

Martell pleaded guilty to battery and to resisting or obstructing a peace officer in violation of Penal Code section 148(a)(1). In setting forth the factual predicate for his Section 148(a)(1) conviction, Martell's plea agreement recited the elements of the offense without specifying which act (or acts) of resistance or obstruction was (or were) the basis of the conviction. Martell later brought suit under 42 U.S.C. section 1983, claiming that the San Diego County Deputy Sheriffs who arrested him used excessive force. The District Court dismissed Martell's complaint as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). Martell appealed.

Held: The Ninth Circuit Court of Appeals initially explained that under *Heck*, a Section 1983 action cannot be maintained by a plaintiff who has been convicted of a crime if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. A conviction under Section 148(a)(1) requires that the criminal defendant resist or obstruct lawful conduct by an officer. *Lemos v. County of Sonoma*, 40 F.4th 1002, 1006 (9th Cir. 2022) (en banc). A subsequent Section 1983 action for excessive force is therefore barred by *Heck* if the force that the plaintiff challenges as unlawful *is the same force* that the plaintiff was convicted of resisting. *Id.* at 1007, emphasis added. "[I]f the alleged excessive force occurred *before* or *after* the acts that form the basis of the [Section] 148(a) violation, even if part of one continuous transaction, the [Section] 1983 claim doesn't 'necessarily imply the invalidity of [the] criminal conviction under [Section] 148(a)(1).'" *Sanders v. City of Pittsburg*, 14 F.4th 968, 971 (9th Cir.

2021) (emphasis in original) (quoting *Smith v. City of Hemet*, 394 F.3d 689, 696 (9th Cir. 2005) (en banc)). The Court added that a Section 1983 suit is not barred by *Heck* even when the allegedly excessive force and the obstructive act that is the basis of the plaintiff's conviction occur "in a single continuous chain of events lasting a very brief time." *Hooper v. County of San Diego*, 629 F.3d 1127, 1131 (9th Cir. 2011).

Here, Martell engaged in multiple acts of resistance or obstruction that could serve as a factual predicate for his Section 148(a)(1) conviction, both before and after the use of force he claimed was excessive (the deputies pushing him down to the floor). His guilty plea did not specify which act was the basis of his conviction. The Ninth Circuit thus found that success in his Section 1983 lawsuit therefore would not undermine his guilty verdict under Section 148(a)(1) because the verdict could be based on any one of his acts of resistance or obstruction. Because "[a]n action under [S]ection 1983 is barred if—but only if—success in the action would undermine the [guilty verdict] in a way that 'would *necessarily* imply or demonstrate that the plaintiff's earlier conviction was invalid'" (*Id.* at 1006 (emphasis in original) (quoting *Smith*, 394 F.3d at 699)), the Court concluded that *Heck* did not bar Martell's suit. Accordingly, the Ninth Circuit Court of Appeals reversed the dismissal of Martell's complaint and remanded.

A dissenting judge stated that he would have held that Martell's Section 1983 action was barred by *Heck*, and would have affirmed the lower court's dismissal. He wrote that the majority opinion improperly sliced a fleeting incident into multiple isolated events—even though Martell's entire interaction with the deputy sheriffs was a single, inseverable event—to evade the *Heck* bar.

QUALIFIED IMMUNITY

A. District Court properly denied qualified immunity to officer where reasonable factfinder could conclude that officer violently retaliated against protester for peacefully exercising First Amendment rights.

Sanderlin v. Dwyer, 2024 U.S. App. LEXIS 22411 (9th Cir. Sep. 4, 2024)

Facts: In the summer of 2020, millions took to the streets to protest the death of George Floyd at the hands of a Minneapolis police officer. In late May 2020, Derrick Sanderlin attended an afternoon protest in San Jose. While in attendance, Sanderlin was struck in the groin by a 40mm foam baton round, fired directly at him by San Jose Police Department Officer Michael Panighetti. Panighetti later claimed that Sanderlin purposefully placed himself in front of officers to block two subjects hiding behind a dumpster that Panighetti believed were poised to throw paint cans at police officers. According to Sanderlin's declaration, he was merely standing with his hands over his head, imploring the officers to stop shooting other protestors. Sanderlin asserted that after Panighetti shot him, he fell to the ground immobile, and no officers rendered aid. His wife found him lying alone and helped him stand and walk away. Sanderlin suffered severe injuries that required emergency surgery.

Sanderlin sued Panighetti under 42 U.S.C. section 1983, alleging that Panighetti's use of force was retaliatory in violation of the First Amendment and was excessive in violation of the Fourth

Amendment. Panighetti moved for summary judgment, arguing that he was entitled to qualified immunity. The District Court rejected Panighetti's arguments and denied his motion, concluding that genuine disputes of material fact existed as to whether Panighetti violated Sanderlin's clearly established rights. Panighetti filed an interlocutory appeal.

Held: The Ninth Circuit Court of Appeals observed that "[q]ualified immunity shields an official from damages in a civil suit unless the plaintiff can make the showing that the official's actions violated a constitutional right, and that the right was 'clearly established' at the time of the violative conduct." *Nelson v. City of Davis*, 685 F.3d 867, 875 (9th Cir. 2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The Court noted that in reviewing the denial of summary judgment on qualified immunity grounds, it must "decide de novo whether the facts, 'considered in the light most favorable to the plaintiff,' show that qualified immunity is warranted." *Hopson v. Alexander*, 71 F.4th 692, 697 (9th Cir. 2023) (quoting *Ames v. King County*, 846 F.3d 340, 347 (9th Cir. 2017)).[5]

Considering Sanderlin's First Amendment argument, the Court explained that to establish a claim for retaliatory violation of the First Amendment, Sanderlin must show (1) that he was engaged in a constitutionally protected activity; (2) that Panighetti's actions would "chill a person of ordinary firmness from continuing to engage in the protected activity;" and (3) that "the protected activity was a substantial or motivating factor in [Panighetti's] conduct." *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827 (9th Cir. 2020).

Panighetti argued that there were no genuine disputes of material fact as to the first and third elements. According to Sanderlin, he was merely standing peacefully on the sidewalk holding the sign. Construing the evidence in the light most favorable to Sanderlin as required at this stage of the proceedings, the Court concluded that Sanderlin was engaged in protected First Amendment activity. The Court stated that whether or not Sanderlin was in fact obstructing officers, rather than engaging in the protected activity of peacefully protesting, would turn on whether a factfinder eventually credited Panighetti's description of the circumstances surrounding the shooting. As to the third element, the Court found that if a factfinder concluded that there was no legitimate justification for Panighetti's actions, they could reasonably infer that those actions were motivated by retaliatory animus. The Court concluded that Panighetti's acts violated clearly established law because it was clearly established that police officers may not use their authority to retaliate against individuals for protected speech. See *Ford v. City of Yakima*, 706 F.3d 1188, 1195 (9th Cir. 2013), *abrogated on other grounds by Nieves v. Bartlett*, 587 U.S. 391, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019).

The Court of Appeals next considered Sanderlin's Fourth Amendment claim of excessive force, observing that a Fourth Amendment seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989). The Court held, that viewing the evidence in the light most favorable to Sanderlin,

[5] The Court noted that at this stage, its jurisdiction was "limited to resolving a defendant's 'purely legal . . . contention that [his or her] conduct did not violate the [Constitution] and, in any event, did not violate clearly established law.'" *Est. of Anderson v. Marsh*, 985 F.3d 726, 731 (9th Cir. 2021) (alterations in original) (quoting *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir. 2018)). The Court added that it lacked jurisdiction over any argument "that the evidence is insufficient to raise a genuine issue of material fact." *Id.*

genuine disputes of material fact existed as to whether Panighetti's use of force was excessive in violation of the Fourth Amendment because (1) Panighetti's act of firing a projectile at Sanderlin constituted a seizure under the Fourth Amendment, (2) a triable issue of fact existed as to the reasonableness of the force used by Panighetti, and (3) although subsequent legal developments narrowed the scope of seizures under the Fourth Amendment, the right violated was clearly established at the time of the incident.

Because it found that genuine disputes of material fact existed as to whether Sanderlin's First and Fourth Amendment clearly established rights were violated, the Ninth Circuit Court of Appeals affirmed the District Court's denial of qualified immunity.

B. An officer's use of force, placing his weight on a handcuffed, previously resisting suspect, was not covered by qualified immunity.

Spencer v. Pew, 2024 U.S. App. LEXIS 23463 (9th Cir. Sep. 16, 2024)

Facts: In March 2018, Mesa Police Department ("MPD") Officers Aaron Pew and Jacob Rozema pulled over a vehicle for having made an unsafe and illegal traffic maneuver. Plaintiff Cole Spencer was in the front passenger seat, and appeared visibly nervous. When asked to identify himself, Spencer provided a false name. An immediate records check indicated that Spencer did not match the DMV photograph for the false name. Rozema asked Spencer to step out of the vehicle and to put his hands behind his back. Rozema told Spencer that he was under arrest. As Spencer stepped out of the vehicle, Rozema grabbed and twisted Spencer's wrist. Spencer then "pushed Rozema with his left shoulder," hitting him in the chest. Spencer was knocked to the ground, and a struggle ensued. During the struggle with the officers, Spencer was tased at least four times and struck repeatedly by the officers. Spencer was told repeatedly to give up his hands but he did not do so. Spencer was not successfully handcuffed until after approximately three-and-a-half minutes of struggling with the officers and Maricopa County Sheriff's Office ("MCSO") deputies who arrived at some point after the struggle began.

After Spencer was handcuffed, he was face down. Given the slack in his double-handcuffs,[6] he was able to move his hands toward his side. One of the officers said, "Stop! We're going to f**k you up unless you put your hands behind your back." Pew knelt on Spencer, placing his full body weight onto Spencer's upper back and neck as other officers held him down. Except for a few seconds in which he briefly knelt next to Spencer, Pew had one or both knees on Spencer's back for nearly three minutes. During that time, Spencer complained that he could not breathe at least four separate times. At one point, Pew simultaneously had his right knee on Spencer's head and his left knee on Spencer's back for more than 10 seconds.

Six months after his arrest, Spencer pleaded guilty to aggravated assault for pushing Officer Rozema as well as to additional unrelated charges. While incarcerated, Spencer filed a pro se complaint pursuant to 42 U.S.C. section 1983 alleging in part excessive force in violation of the Fourth Amendment against Officer Pew. The District Court granted summary judgment to Pew based on qualified immunity. Spencer appealed.

[6] The officers were unable to bring Spencer's hands close enough to secure him in a single set of handcuffs, so they chained two sets of handcuffs together in order to connect Spencer's left and right hands.

Held: The Ninth Circuit Court of Appeals explained that to defeat the defense of qualified immunity, the plaintiff must satisfy a two-pronged burden: (1) the plaintiff must allege or show (depending upon the stage of the litigation) sufficient facts to "make out a violation of a constitutional right"; and (2) the plaintiff must demonstrate that "the right at issue was 'clearly established' at the time of defendant's alleged misconduct."[7] Because "[u]se of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' . . . police officers are entitled to qualified immunity unless existing precedent '*squarely governs*' the specific facts at issue." *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (emphasis added) (citation omitted).

Spencer alleged that Officer Pew violated his clearly established Fourth Amendment rights by kneeling on his upper back and neck and by continuing to do so after he protested that it was difficult for him to breathe. The Ninth Circuit observed that in its previous decision in *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), officers responding to a call found Drummond in a parking lot hallucinating and in an agitated state. While awaiting an ambulance, they decided to take him into custody "for his own safety." Drummond offered no resistance and was handcuffed after being knocked to the ground. One officer put his knees into Mr. Drummond's back and placed the weight of his body on him, while a second officer also put his knees and placed the weight of his body on him, except that he had one knee on Mr. Drummond's neck. The officers continued to kneel on Drummond's back and neck despite his pleas that he could not breathe and that they were choking him. Drummond was subsequently placed in a "hobble restraint," and one minute later he fell unconscious. Although he was revived after several minutes, he remained in a permanent vegetative state. The Ninth Circuit held the force was excessive, holding that any reasonable officer "should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable." *Id.* at 1059.

Here, the Court agreed with Spencer that, with respect to Pew's conduct after Spencer was handcuffed, *Drummond* was not "*materially* distinguishable" and that it therefore "govern[ed] the facts of this case." *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021) (emphasis added). The Court stated that while the two cases presented very different facts prior to the handcuffing of the detainee, they were materially similar in the relevant respects post-handcuffing. As in *Drummond*, Pew "continued to press [his] weight on [Spencer's] neck and torso as he lay handcuffed on the ground and begged for air." 343 F.3d at 1056. Viewing the facts in the light most favorable to Spencer, the Ninth Circuit concluded that Pew's conduct violated clearly established law. Accordingly, as to Officer Pew's conduct after Spencer was handcuffed, the Ninth Circuit Court of Appeals reversed the District Court's grant of qualified immunity to the officer, and remanded for further proceedings.

FIREARMS/SECOND AMENDMENT

Ninth Circuit affirms in part and reverses in part District Court orders preliminary enjoining the implementation or enforcement of several provisions of California law that

[7] *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citation omitted).

prohibits persons with concealed-carry permits from carrying firearms onto various types of property.

Wolford v. Lopez, 2024 U.S. App. LEXIS 22698 (9th Cir. Sept. 6, 2024)

Facts: In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 30 (2022), the United States Supreme Court provided specific guidance on how to determine what kinds of places qualify as "sensitive places" such that firearms may be prohibited at those places under the Second Amendment. *Id.* at 30-31.

In 2023, the California legislature enacted Senate Bill 2, codifying, as relevant here, Penal Code section 26230. The law generally prohibits a person with a concealed-carry permit from carrying a firearm onto more than two dozen types of property. Section 26230(a). California also generally prohibits the carry of firearms onto private property that is open to the public unless the owner allows it by clearly posting a sign at the entrance to the premises indicating that licenseholders are permitted to carry firearms onto the property. Section 26230(a)(26). Other forms of permission, such as oral or written consent, do not suffice under this private property default rule.

Plaintiffs, individuals with concealed-carry permits who live in California and various gun-related organizations whose members hold concealed-carry permits, brought two separate actions under 42 U.S.C. section 1983 against Defendant Rob Bonta, in his official capacity as Attorney General of the State of California, alleging that many provisions of the new law violated their Second Amendment right to keep and bear arms. Plaintiffs moved for a preliminary injunction, seeking to enjoin many portions of Section 26230.

The District Court issued an opinion addressing the motion and granted in full the requested injunctive relief. Specifically, the District Court enjoined Defendant from implementing the law concerning California's ban on concealed carry in hospitals; playgrounds; public transit; parks and athletic facilities; property controlled by the Parks and Recreation Department; bars and restaurants that serve alcohol; gatherings that require a permit; libraries; casinos; zoos; stadiums and arenas; amusement parks; museums; places of worship; banks; and all parking lots adjacent to sensitive places, including sensitive places unchallenged by Plaintiffs. The District Court also enjoined the new default rule for private property held open to the public in Section 26230(a)(26). Defendant appealed.

Held: The Ninth Circuit Court of Appeals initially noted that to warrant the extraordinary relief of a preliminary injunction, Plaintiffs must show a likelihood of success on the merits, irreparable harm in the absence of preliminary relief, a favorable balance of the equities, and favorable public interest in an injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Because the government was a party, the "last two factors merge[d]." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

The Court of Appeals noted that in *Bruen*, the Supreme Court announced the appropriate general methodology for deciding Second Amendment challenges to state laws: "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." 597 U.S. at 24. *Bruen* observed that when confronting cases implicating unprecedented societal concerns or dramatic technological changes involving present-day firearm regulations, "this historical inquiry that courts must conduct will often involve reasoning by analogy . . . . [D]etermining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'" See *Id.* at 27-29 (citation omitted).

The Ninth Circuit stated, "Our Nation has a clear historical tradition of banning firearms at sensitive places. See *Bruen*, 597 U.S. at 30; *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion); *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). *Heller* stated that "…nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ." *Id.*

The Ninth Circuit concluded that the proper approach for determining whether a place is sensitive is as follows: For places that have existed since the Founding, it suffices for government defendants to identify historical regulations similar in number and timeframe to the regulations that the Supreme Court cited as justification for designating other places as sensitive. For places that are newer, government defendants must point to regulations that are analogous to the regulations cited by the Supreme Court, taking into account that it is illogical to expect a government to regulate a place before it existed in its modern form. Historical regulations need not be a close match to the challenged law; they need only evince a principle underpinning our Nation's historical tradition of regulating firearms in places relevantly similar to those covered by the challenged law.

The Court of Appeals then applied these principles to the specific challenges here. the Court addressed the injunctions with respect to: (1) parks and similar areas; (2) playgrounds and youth centers; (3) bars and restaurants that serve alcohol; (4) places of amusement; (5) parking areas connected to sensitive places; (6) the default rule on private property; (7) places of worship; (8) gatherings that require a permit; (9) financial institutions; (10) hospitals and other medical facilities; and (11) public transit.

For the challenges as to which Plaintiffs failed to show a likelihood of success, the Court of Appeals reversed the preliminary injunction. For the challenges as to which Plaintiffs had shown a likelihood of success, the Court considered the remaining two *Winter* factors and, for those challenges, ultimately affirmed the preliminary injunction. The Court explained that it reviewed for abuse of discretion the grant of a preliminary injunction; each claim alleged a violation of a constitutional right, which strongly suggested that the remaining *Winter* factors were met; and finally, the injunction here merely preserved the status quo before each law was set to go into effect. The Court did not find the District Court abused its discretion in granting preliminary relief for the challenges as to which Plaintiffs had shown a likelihood of success.

In sum, the Ninth Circuit Court of Appeals affirmed the injunction with respect to hospitals and similar medical facilities, public transit, gatherings that require a permit, places of worship, financial institutions, parking areas and similar areas connected to those places, and the new default rule as to private property. The Court otherwise reversed the preliminary injunction, thereby reversing the injunction with respect to bars and restaurants that serve alcohol, playgrounds, youth centers, parks, athletic areas, athletic facilities, most real property under the control of the

Department of Parks and Recreation or Department of Fish and Wildlife, casinos and similar gambling establishments, stadiums, arenas, public libraries, amusement parks, zoos, and museums; parking areas and similar areas connected to those places; and all parking areas connected to other sensitive places listed in the statute. More specifically, the Ninth Circuit affirmed the injunction insofar as it enjoined the Attorney General from implementing or enforcing Penal Code sections 26230(a)(7), (8), (10), (22), (23), and (26). The Court reversed the injunction insofar as it enjoined Defendant from implementing or enforcing Penal Code sections 26230(a)(9), (11), (12), (13), (15), (16), (17), (19), and (20) and insofar as it enjoins Defendant from implementing or enforcing Penal Code section 26230(a) with respect to parking areas connected to sensitive places.

For a more detailed discussion of this case, please see Client Alert Vol. 39, No. 15, available at www.jones-mayer.com.

MISCELLANEOUS

Administrative per se hearing violated due process where record indicated DMV hearing officer had acted as adjudicator and advocate despite stating she was only acting as trier of fact.

Clarke v. Gordon, 104 Cal. App. 5th 1267 (4th Dist. 2024)

Facts: In September 2020, a California Highway Patrol officer arrested George Loy Clarke after conducting field sobriety tests which, along with other factors, led the officer to conclude that Clarke was driving under the influence. In September 2022, Clarke had a Department of Motor Vehicles ("DMV") administrative per se ("APS") hearing before Hearing Officer ("HO") Wallace. HO Wallace reimposed a suspension of Clarke's driver's license. At the start of the hearing, Clarke's counsel asked HO Wallace to clarify how the hearing would be conducted in light of the *California DUI Lawyers Assn. v. Department of Motor Vehicles* (2nd Dist. 2022) 77 Cal.App.5th 517 decision. HO Wallace responded that she would be acting as an adjudicator, but not an advocate. Clarke objected to proceeding in that manner, but the HO overruled the objection and the hearing continued. HO Wallace did not find Clarke's testimony as to the traffic stop and thereafter credible, and Clarke's driver's license was suspended. Clarke's petition for a writ of mandate challenging the decision to suspend his license was denied. Clarke appealed from the judgment.

Held: The California Fourth District Court of Appeal initially noted that "[a] driver's license is 'property' that … may not [be seized by the state] without satisfying the requirements of the due process guarantee of the Fourteenth Amendment." (*Mackey v. Montrym* (1979) 443 U.S. 1, 20.) Article I, section 7 of the California Constitution contains a similar provision.

The Fourth District observed that in *California DUI Lawyers Assn. v. Department of Motor Vehicles* (2nd Dist. 2022) 77 Cal.App.5th 517, the Second District Court of Appeal ruled that the DMV's policy of assigning a single employee to act as both the DMV's advocate and the adjudicator in an APS hearing violated due process under the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution. (*Id.*, at p. 532.) In

Knudsen v. Department of Motor Vehicles (5th Dist. 2024) 101 Cal.App.5th 186, 193, the Fifth District considered the sufficiency of the due process provided by a DMV APS hearing in the wake of *DUI Lawyers*, and concluded it was once again inadequate. The *Knudsen* court indicated the relevant issue to be determined in assessing a due process claim in this context is not the title applied to the DMV employee; it is the function actually performed by that employee during the APS hearing. More specifically, it must be determined whether the DMV hearing officer (HO) acted as both an advocate and an adjudicator during the hearing. If the HO performed both roles, the hearing failed to satisfy due process requirements. (*Knudsen, supra*, 101 Cal.App.5th at p. 193.)

Applying that analysis to the case here, the Fourth District concluded that the DMV employee's effort to separate her role as the case adjudicator from her role as an advocate for the DMV was unsuccessful. The Court explained that the HO marshalled, identified, and offered into evidence the DMV's exhibits. HO Wallace then overruled Clarke's objections and admitted those exhibits. The HO thereafter rigorously cross-examined Clarke. Considering her performance in its totality, the Court concluded HO Wallace assumed the prohibited dual roles of both adjudicator and advocate. When the HO thereafter suspended Clarke's driver's license, his right to receive due process was violated. The Fourth District consequently found Clarke suffered a due process deprivation. Moreover, the Fourth District agreed with *Knudsen* that this due process violation constitutes structural error. The Court therefore reversed the trial court's denial of Clarke's petition for a writ of mandate and on remand directed the trial court to grant his petition.