



# The Public Lawyer

## NEVADA SUPREME COURT CASES

***Douglas Disposal, Inc. v. Wee Haul, LLC***, 123 Nev. Adv. Op. No. 51 (November 8, 2007) “In this appeal, we examine whether a county is authorized, under its governmental police powers, to regulate construction waste, and particularly whether Doug-

las County properly enacted an ordinance granting an exclusive franchise to appellant Douglas Disposal, Inc., for construction waste collection and disposal within the county. Since we conclude that construction waste regulation falls within the County’s

police powers, we next examine whether an exclusive franchise agreement for construction waste collection and disposal violates the dormant Commerce Clause of the United States Constitution. Because we conclude that such an

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## 10th Circuit: No Break for Pre-operative Transsexual Bus Driver

**By Judith Ann Moldover SHRM**  
The 10th U.S. Circuit Court of Appeals affirmed dismissal of the Title VII and Equal Protection claims of a pre-operative male-to-female transsexual bus driver terminated because her employer feared liability arising from her

use of women’s public restrooms. The court held that under the plain language of Title VII, “sex” means simply “male” or “female”; therefore, transsexual individuals are not protected by the statute. In addition, the court declined to extend sex-stereotyping analysis

to the use of single-sex public restrooms by persons of the opposite sex. The Equal Protection claims failed for the same reasons as the Title VII claims. Krystal Etsitty was born a male but had begun the transition to being a woman. She presented herself

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agreement comports with the dormant Commerce Clause, we reverse the district court's order denying the franchisee injunctive relief, and remand the matter for the district court to grant an injunction precluding respondents from collecting and hauling construction waste within the franchise area."

*Nelson v. State*, 123 Nev. Adv. Op. No. 50 (November 8, 2007) "In this appeal, we consider the constitutionality of NRS 484.348(3)(b), which prohibits drivers from operating a motor vehicle in such a manner as to endanger other persons or property while fleeing a police officer who has signaled for the driver to stop. Appellant Anthony Tyrell Nelson contends that the term 'endangers' as contained in NRS 484.348(3)(b) is vague. Although NRS 484.348(3)(b) does not define specific acts that are prohibited under the statute, we conclude that the statute is not unconstitutionally vague because individuals of ordinary intelligence can easily discern whether their operation of a vehicle while fleeing from a police vehicle places life or property in danger. Further, we determine that Nelson's additional claims are without merit. We therefore affirm the district court's judgment of conviction."

*Staccato v. Valley Hospital*, 123 Nev. Adv. Op. No. 49 (November 8, 2007) "At issue in this appeal is whether a physician is qualified to testify as to the proper standard of care in a malpractice action against a nurse when the allegedly negligent act implicates the physician's realm of expertise. We conclude that a physician or other medical care provider is qualified to testify as to the ac-

*"... individuals of ordinary intelligence can easily discern whether the operation of a vehicle while fleeing from a police vehicle places life or property in danger."*

cepted standard of care for a procedure or treatment if the physician's or provider's experience, education, and training establish the expertise necessary to perform the procedure or render the treatment at issue. In so concluding, we clarify that a medical expert witness need not have the same credentials or classification as the defendant medical care provider. Instead, in accordance with Nevada's

statutory scheme governing expert witness testimony, and in furtherance of sound public policy, the proper measure for evaluating whether a witness can testify as an expert is whether that witness possesses the skill, knowledge, or experience necessary to perform or render the medical procedure or treatment being challenged as negligent, and whether that witness's opinion will assist the jury.

In this case, the district court entered a directed verdict for the defense after disqualifying appellant's proposed expert witness, an emergency room physician, on the basis that the physician was not qualified to testify against a nurse who allegedly administered an intramuscular injection (a procedure for which the physician sufficiently demonstrated his expertise) in a manner contrary to the acceptable standard of care. Because the district court's decision was based on an incorrect legal standard, we reverse its judgment and remand this matter so that appellant's malpractice action may proceed."

*Boulder Oaks Cmty. Ass'n v. B & J Andrews*, 123 Nev. Adv. Op. No. 46 (November 1, 2007)

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“This case involves a provision of NRS Chapter 116, Nevada’s Common-Interest Ownership Act. The provision at issue—NRS 116.003—provides that “unless the context otherwise requires,” words used in a common-interest community’s governing documents are given their statutory definition. In this case, the common-interest community’s conditions, covenants and restrictions (CC&Rs) utilize a definition of ‘declarant’ that differs from the statutory definition supplied in NRS 116.035. As NRS 116.003 permits this modification, we conclude that the definition of ‘declarant’ in the CC&Rs controls.

The CC&Rs also prohibit the community homeowners’ association from amending the CC&Rs without the declarant’s consent. As respondent falls within the CC&Rs’ definition of declarant, we affirm the district court’s order enjoining the homeowners’ association from amending the CC&Rs without respondent’s consent.”

*Dewey v. State*, 123 Nev. Adv. Op. No. 47 (November 1, 2007) “In this opinion, we consider whether the assertion of the Fifth Amendment right to remain silent under, by itself, is sufficient to also invoke the right to counsel that *Miranda*

established as an additional means of securing and protecting the Fifth Amendment privilege against self-incrimination. We conclude that unless a suspect’s assertion of the right to remain silent includes a clear, unequivocal, and unambiguous request for an attorney, it is not an invocation of the right to counsel under *Miranda*; thus, a suspect’s exercise of the right to remain silent under *Miranda*, without more, does not operate as a request for counsel. We also conclude that the police

“... a suspect’s exercise of the right to remain silent under *Miranda*, without more, does not operate as a request for counsel.”

may resume questioning a suspect who has invoked her right to remain silent only if they have ‘scrupulously honored’ the suspect’s prior exercise of her right to terminate questioning and issue a new set of *Miranda* warnings prior to reinitiating further interrogation.”

*Matter of Halverson*, 123 Nev. Adv. Op. No. 48 (November 1, 2007) “Under the Nevada Constitution, the Commission has discretion to impose an interim

suspension; accordingly, we review the Commission’s decision for an abuse of that discretion. Purely legal issues, however, are reviewed de novo. With respect to whether a judge’s conduct justifies an interim suspension in order to protect the public or the administration of justice, the misconduct upon which the suspension is based must pose a current threat of harm. In determining whether a current threat exists, the Commission should consider the totality of the circumstances, based on the information available to it. This consideration may include a wide array of past misconduct. Past misconduct not demonstrating a current threat of harm does not, however, form an appropriate basis for an interim suspension.

Additionally, the Commission is authorized to impose an interim suspension during any stage of its proceedings, both before and after issuance of a formal statement of charges. Thus, the Commission’s temporary suspension of Judge Halverson before formal proceedings were commenced was permissible. Further, the statutory standard applicable to this matter, permitting a temporary suspension when a judge poses a ‘substantial threat of serious

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harm to the public or to the administration of justice,' is neither vague nor ambiguous.

As the Commission's procedures thus far have accorded Judge Halverson due process, we reject her challenges to the suspension on this basis. We caution the Commission, however, that it must remain mindful of the time that passes after a temporary suspension is imposed and before a full hearing on formal proceedings takes place, for procedural safeguards that are adequate in light of the provisional nature of a temporary suspension will not suffice when that suspension takes on the attributes of more permanent discipline. "



## Four in Five of All U.S. Adults Go Online

Nov 6, 2007, News Report  
According to the latest Harris Poll, the number of adults who are online at home, in the office, at school, library or other locations continues to grow at a steady rate. In the past year, the number of online users has reached an estimated 178 million, a ten percent increase.

In research among 2,062 U.S. adults surveyed by telephone in July and October, 2007, Harris Interactive found that 79 percent of adults are now online. This is a steady rise over the past few years, from 77 percent in February/April 2006, 74 percent in February/April 2005, 66 percent in the spring of 2002, 64 percent in 2001 and 57 percent in Spring of 2000. When Harris Interactive first began to track Internet use in 1995, only nine percent of adults reported they went online.

The amount of time that people are spending online has also risen. The average number of hours per week that people are spending online is now at 11 hours, up from 9 hours last year and 8 hours in 2005.

The proportion of adults who

are now online at home has risen to 72 percent, up from 70 percent in 2006 and 66 percent in the spring of 2005. The percentage of those online at work has also risen, now at 37 percent, up from 35 percent in 2006. The largest increase is among those adults who are online at a location other than their home or work as this has risen from 22 percent in 2006 to 31 percent today. It appears people who do not have access at home or work are increasingly turning to other outlets to get online.

As Internet penetration continues to grow, the demographic profile of Internet users continues to look more like that of the nation as a whole. It is still true that more young than older people, and more affluent than low-income people, are online. However, nine percent of those online are now age 65 or over (compared to 16 percent of all adults who are 65 or over), 39 percent of those online (compared to 47 percent of all adults) did not attend at least some college and 13 percent have incomes of less than \$25,000 (compared to 17 percent of all adults).



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as a male when she was hired; at the end of the training period, she told her supervisor that she was a transsexual and would start to present herself as a woman at work. Her supervisor assured her that this would not be a problem. Etsitty had been on the job for about 10 weeks without incident when an operations manager heard that a male driver was wearing makeup.

Etsitty explained to the operations manager that she was a transsexual living as a woman. However, because she could not afford sex reassignment surgery, she still had male genitalia. Like other drivers, she used public restrooms along her bus route; as part of her sex-reassignment regime, she used women's restrooms.

The operations manager expressed concern that the use of women's restrooms by an anatomical male could expose the employer to criticism and legal liability. Etsitty was terminated solely because her bathroom needs could not be accommodated, and was eligible for rehire after sex reassignment surgery.

The lower court granted the employer's summary judgment motion. It rejected Etsitty's ar-

gument that transsexuals are protected by Title VII, citing the clear language of the statute and decisions by appellate courts.

The court likewise rejected her alternative argument that she was a victim of unlawful sex stereotyping, pursuant to a U.S. Supreme Court ruling (*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)) that rejection of a female account-ant for



part-nership because she was "too masculine" was sex discrimination. The district court distinguished nonconformity with gender stereotypes from presenting oneself as the opposite sex, pointing out that the manager's concerns over an anatomical male's use of a female restroom raised genuine concerns about "privacy, safety, and propriety."

In affirming the lower court, the 10th Circuit agreed that the plain language of Title VII does

not protect transsexuals. The appeals court did leave open the possibility that developments in biology and the social sciences might someday permit a more expansive definition of "sex."

The court held further that use of a restroom designated for members of the opposite sex goes beyond failing to conform to gender stereotypes. But even if a valid sex-stereotyping claim had been made, the court held that the employer had articulated a valid, nondiscriminatory reason for the discharge: concern that Etsitty's use of public restrooms might result in liability.

While questioning whether the employer had used good judgment in terminating Etsitty before any complaints had been lodged, the court found no evidence of pretext because defendant's managers had been consistent that the only reason for the termination was their concern over her use of public restrooms. The court went out of its way to note that its conclusion that transsexuals are not protected by Title VII should not be taken as a license to discriminate against them.

*Etsitty v. Utah Transit Authority*, 10th Cir., No. 05-4193 (Sept. 20, 2007).

## 1st Circuit: Bus Trip Results In \$2 Million Award Against Union

**By Chris Arbery SHRM**

The 1st U.S. Circuit Court of Appeals affirmed a \$2 million verdict against a police union for claims of sexual harassment and retaliation based on incidents during a bus trip sponsored by the union.

In October 1998, Vanessa Dixon, a female police officer and member of Local 382 of the International Brotherhood of Police Officers (IBPO), joined a union-sponsored bus trip to participate in a gubernatorial campaign rally. With the exception of the bus driver, Dixon was the only female on board. Over the course of the trip, male union members allegedly ridiculed Dixon and made profane and aggressive comments concerning her attire, sexual history and reputation. The president of Local 382, Gerald Flynn, organized the trip and was on the bus, but allegedly did nothing to stop the members' behavior.

Soon after Dixon filed sexual harassment charges, the IBPO's national president, Kenneth Lyons, allegedly made disparaging statements regarding Dixon in defense of the officers on his local union-sponsored television show.

In 2001 Dixon brought suit in federal district court against Lo-

cal 382, the IBPO and some of the individual officers, alleging discrimination and retaliation under Title VII and Massachusetts law, among other claims. The jury awarded Dixon over \$2 million against Local 382 for discrimination and against the IBPO for retaliation. The defendants appealed to the 1st Circuit.

On the sex discrimination claim, the federal appellate court rejected the union's argument that Flynn, and thus Local 382, "did not supervise or control the officers on the trip." The appeals court held that Flynn's involvement in organizing and executing the trip was in the context of his position as president, and the union members' discrimination was "under [his] supervision and acquiescence." Accordingly, Flynn's involvement in the trip, in conjunction with the undisputed fact that the trip was union-sponsored, rendered the trip "union activity," such that the union could be held liable for the alleged misconduct.

With regard to the retaliation claim against the IBPO relating to Lyons's statements on television, the 1st Circuit rejected the IBPO's argument that Title VII and the state law did not apply because the adverse actions pertained to her union membership

and not her employment. The appeals court held that "both Title VII and the Massachusetts antidiscrimination statute cover retaliation claims against unions which cause harm in the workplace and outside of it." Additionally, in response to the IBPO's argument that Lyons's speech could not support a retaliation claim, the court held that the limits on what constitutes retaliatory speech do not apply to threatening or intimidating statements "meant to prevent the plaintiff from bringing her [discrimination] claim."

*Dixon v. Int'l Bhd. of Police Officers*, 1st Cir. No. 06-1210 (Sept. 28, 2007).



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*Calderon v. IBEW Local 47*, No. 05-56937 (November 13, 2007) “Where the rules do not authorize service by email, counsel has no obligation to check his email on a regular basis for possible orders from the court. He is entitled to assume that orders will be served by mail. When the rules change, so as to make electronic notice sufficient, counsel will then be on notice that they need to check their emails just as carefully as they now check their regular mail. Because plaintiff’s counsel was not on notice that orders would be served by email, he can’t be deemed to have received notice of the show cause hearing. Neither he nor his client may be sanctioned for his failure to attend the hearing.

The district judge’s unseemly haste in dismissing this case, and his failure to heed the perfectly plausible (and meritorious) explanation proffered by plaintiff in his motion for reconsideration, has cost the parties significant money and delay in pursuing this wholly unnecessary appeal. Justice suffers when judges act in such an arbitrary fashion. We apologize to the parties and admonish the district judge to exercise more care and patience in the future.”

*Doran v. 7-Eleven, Inc.*, No. 05-56439 (November 9, 2007) “In summary, we hold that the district court properly granted summary judgment to 7-Eleven on the issues of whether the store’s aisle width and the store’s refusal to allow him to access the employees-only restroom violated the ADA. However, we also hold that Doran had standing to challenge the barriers to his wheelchair access in the 7-Eleven store that he learned about through his expert’s site inspection. Accordingly, we vacate the portion of the district court’s order granting summary judgment to 7-Eleven on those claims. Because those alleged ADA violations may give rise to a justiciable dispute between Doran and 7-Eleven, we also vacate the district court’s order declining supplemental jurisdiction, and we remand the case for further proceedings. Each party shall bear its own costs on appeal.

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

DUFFY, District Judge, dissenting:  
I respectfully dissent.

Today the majority holds that an ADA plaintiff has standing to sue for things that did not injure

him. In holding that a plaintiff who has encountered or has specific knowledge of one barrier at a facility may sue for any unknown barrier on the premises related to his disability, the majority reasons that ‘[i]t makes no sense to require a disabled plaintiff to challenge, in separate cases, multiple barriers in the same facility, controlled by the same entity, all related to the plaintiff’s specific disability. We do not believe Congress would have intended such a constricted reading of the ADA which could render the benefits it promises largely illusory.’ The majority’s approach compromises longstanding constitutional principles for the sake of convenience, and ignores the fact that no one—not even Congress—can preempt the Constitution and confer standing to a party for things that have not injured him.”

*State of Alaska v. EEOC*, No. 07-70174 (November 8, 2007) “The State of Alaska, Office of the Governor (the Governor’s Office) appeals the remand order of the United States Equal Employment Opportunity Commission (the EEOC) in a suit against the State of Alaska brought by two discharged members of the Governor’s Office. We hold that the suit is barred by the Eleventh Amend-

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ment and direct its dismissal.”

“No modern governor could run his government without

the assistance of the sort provided in Alaska by the Director of the Governor’s Office in Anchorage and by the Special Staff Assistants. Being a governor is not a one-person job. The governor acts by his policymaking assistants. To treat these assistants as subject to federal legislation is tantamount to holding that the highest elected official in a state is bound by GERA. We do not believe that GERA is a proportionate response to a widespread evil identified as the predicate of this legislation. Accordingly, we grant the Governor’s Office’s appeal and remand to the EEOC with directions to dismiss the suit.”

*In re: Lewis*, No. 06-35255 (November 5, 2007) “Whether the district court correctly ruled that the retroactive amendments govern appellant’s student loans is the single issue of law before this court on appeal. Appellant’s central argument is that he had a



right to rely on the statute of limitations in effect at the time he incurred his obligation

because (a) the statute of limitations was an implicit term of the contract he signed, (b) his contract created a property right to discharge his student loans after the prescribed statutory period, and (c) any government action to impair his contractual right violates his Fifth Amendment right to due process.

We reject his challenge. Bankruptcy is a legislatively created benefit, not a right, that Congress may alter or withhold at its discretion. It did exactly that in 1998 when it amended 11 U.S.C. § 523(a)(8)(A) to eliminate, retroactively, the dischargeability of student loans such as appellant’s that have been in repayment for seven years or more. Congress left in place an undue hardship exception to nondischargeability, which appellant does not claim. Through its power to legislate on bankruptcies, Congress has the power to impair contractual

obligations, even retroactively, and appellant has no superseding right to a discharge in bankruptcy.”

*United States v. Cope*, No. 06-50441 (November 5, 2007) “In conclusion, although we uphold the district court’s sentence of a lifetime term of supervised release, we vacate the sentence and remand to permit the district court: (1) to provide notice to the parties of any special condition of supervised release not contemplated by the Sentencing Guidelines; (2) to articulate specific, medically informed findings on the record regarding the need for Cope to undergo plethysmograph testing and take medications that implicate particularly significant liberty interests; and (3) to clarify that any condition requiring Cope to take all prescribed medications is limited to those medications reasonably related to sex offender treatment.”

*United States v. Gooch*, No. 06-30645 (November 1, 2007) “Defendant-Appellant Kenneth Dale Gooch appeals his conviction and sentence for felon in possession of a firearm under 18 U.S.C. § 922(g)(1). Gooch’s appeal focuses primarily on the district court’s denial of his motion to suppress. He contends that the initial entry into his

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residence, an entry that led to the issuance of a search warrant where evidence supporting Gooch's conviction was obtained, exceeded the bounds of the Fourth Amendment because that entry was made to execute a misdemeanor bench warrant for failure to appear in Court. Consistent with the decisions of other federal courts to consider the issue, we hold that police possessing a valid bench warrant for the arrest of a person who has failed to appear may enter that person's residence to the extent necessary to execute the warrant. We also reject as meritless Gooch's arguments related to trial and sentencing errors and **AFFIRM.**"

***Outdoor Media Group, Inc. v. City of Beaumont***, No. 05-56620 (November 1, 2007) "Outdoor Media Group appeals the district court's dismissal of its 42 U.S.C. § 1983 complaint under Federal Rule of Civil Procedure 12(b)(6). Outdoor Media asserts that the City of Beaumont's billboard ordinance violates the First and Fourteenth Amendments. Beaumont repealed the challenged ordinance and replaced it with a new ordinance that specifically bans new billboard construction. The district court then dismissed Outdoor Media's claims for injunctive and declarative relief as

moot, and dismissed its damages claim on the merits. The district court had jurisdiction under 28 U.S.C. § 1331. This court has jurisdiction over the appeal under 28 U.S.C. § 1291. We reverse in part and remand for consideration of whether the old ordinance created an unconstitutional preference for commercial over non-commercial speech or impermissibly distinguished among categories of noncommercial speech, and whether this alleged infirmity gives rise to OutdoorMedia's damages claim."

*"... cases requiring us to decide whether and to what extent an outdoor advertising company has standing to challenge the constitutionality of a municipal sign ordinance."*

***Get Outdoors II LLC v. City of San Diego***, No. 05-56366 (November 1, 2007) "This appeal is the first of three unrelated but similar cases requiring us to decide whether and to what extent an outdoor advertising company has standing to challenge the constitutionality of a municipal sign ordinance. In this opinion, we will outline

the general legal principles applicable to all three cases and decide the appeal in the challenge to the San Diego ordinance. We affirm the district court's order granting summary judgment to the City of San Diego."

"The 'irreducible minimum' of standing under Article III of the Constitution is 1) an injury in fact which is 'actual, concrete, and particularized'; 2) a causal connection between that injury and the defendant's conduct; and 3) a likelihood that the injury can be redressed by a favorable decision of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The federal courts have supplemented this requirement of "constitutional standing" with the doctrine of 'prudential standing,' which requires us to ask whether the plaintiff's claim is sufficiently individualized to ensure effective judicial review. *See Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). We employ the prudential standing doctrine to avoid usurping the legislature's role as the policymaking body in our separation of powers. *See Prime*

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*Media v. City of Brentwood*, 485 F.3d 343, 353 (6th Cir. 2007).

When a plaintiff states an overbreadth claim under the First Amendment, however, we suspend the prudential standing doctrine because of the special nature of the risk to expressive rights. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). While the prudential standing doctrine typically prevents us from hearing lawsuits on the basis of injuries to non-parties, the overbreadth doctrine operates as a narrow exception permitting the lawsuit to proceed on the basis of ‘a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.’ *Broadrick*, 413 U.S. at 612. In other words, a plaintiff challenging a law as overbroad argues that the law is constitutionally valid as applied to him, but unconstitutional as to others. See, e.g., *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383 (1988); *New York v. Ferber*, 458 U.S. 747 (1982).

Even when raising an overbreadth claim, however, we ask whether the plaintiff has suffered an injury in fact and can

satisfactorily frame the issues on behalf of these non-parties. See *Munson*, 467 U.S. at 958; *Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 554 (9th Cir. 2003). Without this bare minimum of standing, the overbreadth exception would nullify the notion of standing generally in First Amendment litigation. We therefore agree with a string of recent decisions in other circuits holding that the three *Lujan* ele-

***“This appeal requires us to decide whether a developer may state a claim for relief based on the allegedly arbitrary and irrational denial of a permit application.”***

ments still apply in the overbreadth context.

In this case, Get Outdoors II challenges the off-site ban, as well as the rest of the sign code, on the basis of the harm it causes to other potential speakers, specifically noncommercial speakers. Get Outdoors II must still show, however, that it meets the *Lujan* requirements for each of the provisions it wishes to challenge as overbroad.”

***Beck v. United Food and Commercial Workers Union, Local 99***, No. 05-16414 (November 1,

2007) “Local 99 of the United Food and Commercial Workers Union appeals from the district court’s determination that Local 99 violated Title VII and breached its duty of fair representation in connection with the termination of one of its members, Cheryl Beck. Local 99’s appeal requires us to consider the proper role of comparative evidence in a Title VII case against a union and the framework that must be applied to a member’s claim that the union breached its duty of fair representation. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm the district court’s decision.”

***Crown Point Devel., Inc. v. City of Sun Valley***, No. 06-35189 (November 1, 2007)

“This appeal requires us to decide whether a developer may state a claim for relief based on the allegedly arbitrary and irrational denial of a permit application. The district court said not, relying on our decision in *Armenariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), which held that the Fifth Amendment’s Takings Clause subsumes or ‘preempts’ substantive due process claims. Accordingly, it dismissed the complaint by Crown Point Development, LLC (Crown Point) against the City of Sun Valley

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and members of the City Council. Crown Point appeals, arguing that it may proceed despite *Armendariz*, because the United States Supreme Court ruled in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 532 (2005), that a property owner's challenge to a regulation that does not substantially advance legitimate interests is grounded in due process, not the Takings Clause. We agree that *Armendariz* has been undermined to the limited extent that a claim for wholly illegitimate land use regulation is not foreclosed. However, the record is undeveloped on this point. Having clarified that *Armendariz* does not block the way altogether, we leave it to the district court on remand to flesh out the parameters of Crown Point's claim. We also leave questions of a stay, or abstention, for the district court's consideration."

"Applying the *Lewis* rule to land use, the Fifth Amendment would preclude a due process challenge only if the alleged conduct is actually covered by the Takings Clause. *Lingle* indicates that a claim of arbitrary action is not such a challenge. Rather, it identifies three basic categories of regulatory action that generally will be deemed a taking for Fifth Amendment purposes: where government

requires an owner to suffer a permanent physical invasion of property, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); where a regulation deprives an owner of all economically beneficial use of property, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and where the *Penn Central* factors are met, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). To the extent a property owner's complaint falls within one of these categories (or some other recognized application of the Takings Clause), *Lewis* suggests that the claim must be analyzed under the Fifth Amendment whether or not it proves successful; but to the extent that the conduct alleged cannot be a taking, *Lewis* and *Lingle* indicate that a due process claim is not precluded. *Lingle*, 544 U.S. at 542 ('[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.')

### MORE BILLBOARDS



*Desert Outdoor Advertising, Inc. v. City of Oakland*, No. 05-15501 (October 30, 2007)  
"Desert Outdoor Advertising, Inc., wants to display three bill-

boards, each of which would be primarily viewed from a freeway, in Oakland, California. The City of Oakland has refused to permit the signs, citing specific City ordinances. Desert filed this action to challenge those ordinances on First Amendment grounds, seeking injunctive relief and money damages. In particular, Desert argues that Oakland Municipal Code § 1501, which generally prohibits advertising signs designed to be seen from a freeway, favors commercial over noncommercial speech and imposes content-based restrictions on noncommercial speech. Desert also contends that Oakland Planning Code § 17.148.050(A), which limits advertising signs more generally, provides City officials with unbridled discretion to permit or deny the display of signs. Finally, Desert challenges the specific application of these ordinances to the signs it erected or attempted to erect. The district court concluded that one provision of § 1501 was a content-based regulation of noncommercial speech in violation of the First Amendment. It severed this provision and held that the remainder of that ordinance, as well as § 17.148.050(A), was constitutional. Desert appeals. We affirm."

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*United States v. Banks*, No. 05-10053 (October 25, 2007)

“Leland Devine Banks was convicted of violence in aid of a racketeering enterprise (‘VICAR’), use of a firearm in a crime of violence, and possession of a firearm by a convicted felon. He was sentenced to a total of 450 months in prison.”

“We have jurisdiction under 28 U.S.C. § 1291, and we REVERSE his VICAR convictions and sentences on the basis that the district court’s instructions to the jury were erroneous. We AFFIRM the district court in all other respects.”

“Leland Banks had issues with Kenny Gilmore. For starters, they belonged to rival Crips gangs in Las Vegas: Banks was a member of the Rolling 60s, and Gilmore belonged to the Valley View Crips. But Banks also had, or thought he had, a personal score to settle with Gilmore. Banks had once overheard Gilmore’s girlfriend use the word ‘crab,’ apparently one of the most disrespectful names a Crips member can be called, and thought she was referring to him. Banks told Gilmore to “check his bitch,” but Gilmore only retorted, ‘my baby’s mama ain’t no bitch.’ Banks, perhaps hoping to restore his honor, challenged Gilmore to a fight,

but Gilmore declined.

Banks then initiated what he described as an ‘ongoing battle’ with Gilmore. Banks launched the first disastrous salvo a couple of weeks after the perceived insult. Banks, high on PCP, saw Gilmore playing dice. Banks pulled his gun, but somebody, apparently a friend of Gilmore’s, approached Banks from behind and pistol-whipped him, sending him into a coma.

Banks, however, was not easily deterred. Shortly after being discharged from the hospital, Banks tried shooting Gilmore again but missed. Banks then sought reinforcements, enlisting his ‘little homies’ to beat and shoot at Gilmore. This rather one-sided battle finally culminated on January 6, 2004, when Banks saw Gilmore in the neighborhood, grabbed his broken-stocked .22 caliber rifle, and climbed to the rooftop of the Kimberly Place Apartments, which offered him a clear line of sight to Gilmore, who was standing across the street in front of a 7-Eleven. Banks fired several shots at Gilmore but again missed his target. Gilmore and the store clerk fled into the store, where they stayed hidden with several customers until the police arrived.

Banks remained on the rooftop where he was discovered by Officer Garness of the Las Vegas Metropolitan Police Department, who was flying overhead in a police helicopter. The police ordered Banks off the roof; after placing something near the air conditioner, he complied and was arrested. The police found the .22 caliber rifle hidden on the roof near the air conditioner.”

*United States v. Soltero*, No. 06-50257 (October 19, 2007)

“Dean Harlon Soltero appeals the sentence imposed following his guilty plea to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He argues that the district court erred by failing to verify that he had read his presentence report and had discussed it with his attorney, as well as by imposing three particular conditions of supervised release. We affirm in part, and vacate and remand in part.”

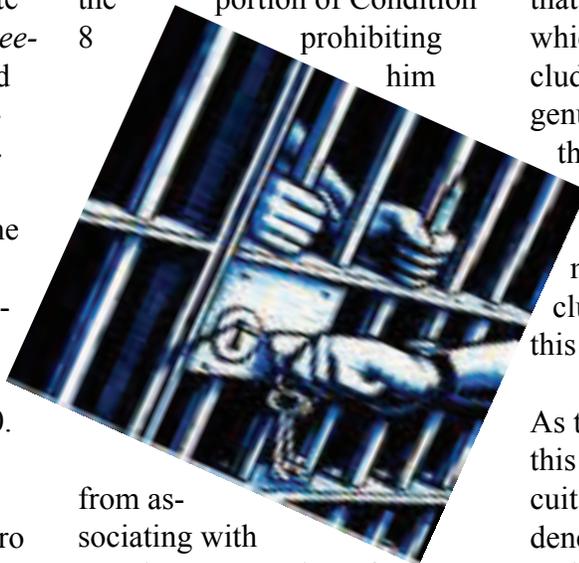
“The portion of Condition 8 forbidding Soltero from ‘associat[ing]’ with ‘any known member of any criminal street gang . . . , specifically, any known member of the Delhi street gang,’ is also permissible. As explained above, the term ‘Delhi street gang’ is sufficiently clear, as is the slightly

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more ambiguous—but not unconstitutionally so—term ‘criminal street gang.’ The term ‘associate’ is also not, as Soltero argues, impermissibly vague. The Supreme Court has held that “incidental contacts”—such as those Soltero fears he would be punished for inadvertently engaging in—do not constitute ‘association,’ *Arciniega v. Freeman*, 404 U.S. 4, 5(1971), and we hold that, with this limitation, ‘men of common intelligence’ need not guess at the meaning of ‘association’ in the context of Condition 8. Once again, that portion of this condition meets the criteria set forth in 18 U.S.C. § 3583(d). See *Bolinger*, 940 F.2d at 480.

Condition 8 crosses the line, however, in prohibiting Soltero from associating with ‘any known member of any . . . disruptive group.’ As Soltero points out, the term ‘disruptive group’ has a broad meaning and could reasonably be interpreted to include not only a criminal gang, but also a labor union on strike, a throng of political protesters, or a group of sports fans celebrating after their team’s championship victory. It is not immediately apparent to us—and the government makes no effort to explain—how prohibiting Soltero from associating with the latter three ‘disruptive

groups’ is ‘reasonably related’ to a permissible goal of supervised release, such as protection of the public or Soltero’s own rehabilitation. See 18 U.S.C. § 3583(d); *Sales*, 476 F.3d at 735. Accordingly, the substantial encroachment upon Soltero’s First Amendment rights created by the portion of Condition 8 prohibiting him



from associating with ‘any known member of . . . any disruptive group’ is without sufficient justification and must be stricken.”

***United States v. Salcido***, No. 06-10546 (October 19, 2007) “The principal issue in the case is raised by Salcido’s second argument—that the government’s evidence is insufficient to prove the videos and images depicted an actual minor. In *Ashcroft v. Free Speech Coalition*, the Supreme Court held that possession of ‘virtual’ child pornography cannot constitute a

criminal offense. 535 U.S. 234, 239-40, 258 (2002). As a result, the government has the burden of proving beyond a reasonable doubt that the images were of actual children, not computer-generated images. *United States v. Rearden*, 349 F.3d 608, 613 (9th Cir. 2003). Salcido argues that the only evidence from which the jury could have concluded the images depicted genuine child pornography were the images themselves, and he asserts that the government was required to present more evidence, perhaps including expert testimony, on this issue.

As the Sixth Circuit noted, ‘at this time, it appears that no circuit requires that expert evidence be introduced to prove the reality of children portrayed in pornographic images.’ *United States v. Farrelly*, 389 F.3d 649, 654 n.4 (6th Cir. 2004), *abrogated on other grounds by United States v. Williams*, 411 F.3d 675, 678 n.1 (6th Cir. 2005); see also *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 437 (1st Cir. 2007). We agree with every other circuit that has ruled on the issue that expert testimony is not required for the government to establish that the images depicted an actual minor.

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With respect to the quantum of evidence necessary to support a conviction, there seems to be general agreement among the circuits that pornographic images themselves are sufficient to prove the depiction of actual minors.”

***Acosta v. Hill***, No. 05-56575 (October 17, 2007) “Bouncers physically removed Acosta from Murphy’s Club, a bar in San Diego’s Qualcomm Stadium. Stadium security was notified, and two security guards approached Acosta. She refused to show the guards identification or accompany them to the security office. San Diego police officers then intervened. Officer Hill told Acosta that she had been ejected from the stadium. After he told Acosta at least three times that she would be arrested if she didn’t leave the stadium, Acosta kicked a security guard and Officer Hill. Officer Hill then placed her in a carotid restraint hold. Acosta became compliant without losing consciousness, and she was handcuffed. Soon, however, the rumbustious Acosta began kicking again, so Officer Hill slammed her to the ground and tied her legs together. She was then taken to the holding area by Officers Krouss and Stafford.

Acosta filed a 42 U.S.C. § 1983

claim against the security guards, police officers and the City of San Diego, alleging various constitutional violations including unconstitutional use of deadly force under the Fourth Amendment. The jury was given an excessive force instruction based on a reasonableness standard—but not a separate deadly force instruction. The jury found for defendants. Acosta appeals, arguing that the jury should have been given a separate deadly force instruction. We have jurisdiction under 28 U.S.C. § 1291.

*Scott v. Harris*, 127 S. Ct. 1769 (2007), forecloses Acosta’s deadly force argument. *Scott* held that there is no special Fourth Amendment standard for unconstitutional deadly force. *See id.* at 1777-78. Instead, ‘all that matters is whether [the police officer’s] actions were *reasonable*.’ *Id.* at 1778 (emphasis added). Here, the jury was given an excessive force instruction and found for Officer Hill; it must therefore have determined that the officer acted reasonably. Under *Scott*, that is the end of the inquiry. The district court didn’t err by refusing to give a separate deadly force instruction.

We had previously held that ‘[a]n excessive force instruction

is not a substitute for a . . . deadly force instruction.’ *Monroe v. City of Phoenix*, 248 F.3d 851, 859 (9th Cir. 2001). We reached this conclusion based on the observation that ‘the Supreme Court . . . established a special rule concerning deadly force.’ *Id.* at 860 (quoting *Vera Cruz v. City of Escondido*, 139 F.3d 659, 661 (9th Cir. 1997)). *Scott* explicitly contradicts that observation. 127 S. Ct. at 1777-78. *Scott* controls because it is ‘intervening Supreme Court authority’ that is ‘clearly irreconcilable with our prior circuit authority.’ *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). *Monroe*’s holding that an excessive force instruction based on the Fourth Amendment’s reasonableness standard is not a substitute for a deadly force instruction is therefore overruled. *See Miller*, 335 F.3d at 900.

Acosta’s remaining arguments are addressed in the accompanying memorandum disposition.”

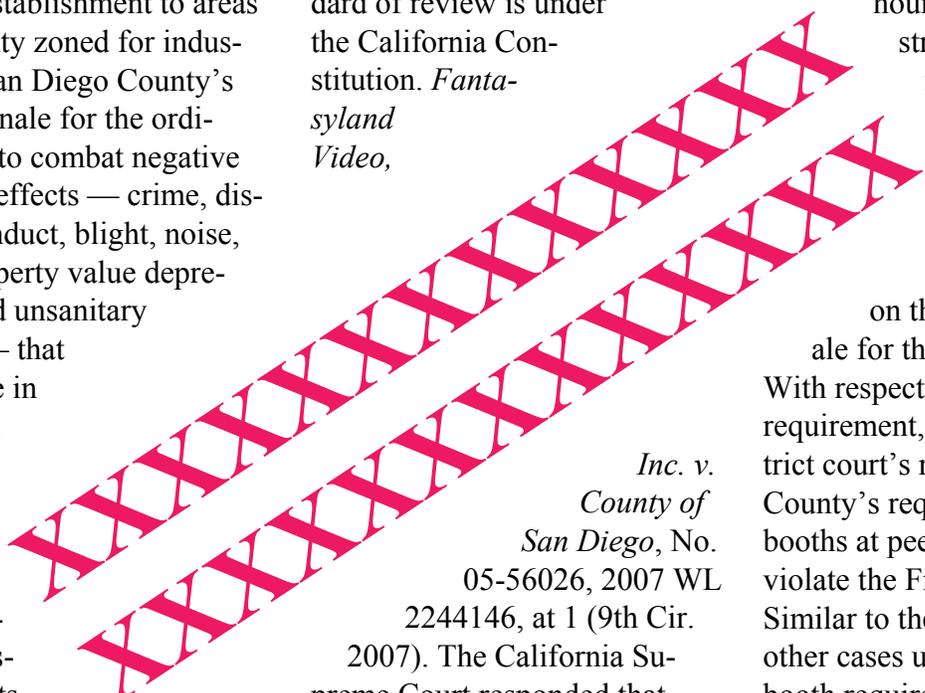
***Fantasyland Video, Inc. v. County of San Diego***, No. 07-55033 (October 15, 2007) “In June 2002, the San Diego County Board of Supervisors adopted a comprehensive zoning ordinance to govern the operation of adult entertainment businesses within its jurisdic-

## NINTH CIRCUIT CASES

tion, which covers the unincorporated portions of the county. The ordinance restricts the hours in which such businesses can operate, requires the removal of doors on peep show booths, and limits adult entertainment establishment to areas of the county zoned for industrial use. San Diego County's stated rationale for the ordinance was to combat negative secondary effects — crime, disorderly conduct, blight, noise, traffic, property value depreciation, and unsanitary behavior — that concentrate in and around adult businesses. The two adult entertainment establishments presently operating in the unincorporated portions of San Diego County filed suit. (The City of San Diego and the other incorporated municipalities in the County are not governed by this ordinance.) In this appeal, the operator of one of the establishments, Fantasyland Video, Inc., appeals the district court's decision to uphold the ordinance's hours restriction and open booth requirement. In its briefing to us, Fantasyland also contended

that the hours of operation restriction violated both the First Amendment and the California Constitution. After oral argument, we certified to the California Supreme Court the question of what the proper standard of review is under the California Constitution. *Fantasyland Video, Inc. v. County of San Diego*, No. 05-56026, 2007 WL 2244146, at 1 (9th Cir. 2007). The California Supreme Court responded that hours of operation ordinances for adult businesses are subject to intermediate scrutiny. *Fantasyland Video, Inc. v. County of San Diego*, No. 05-56026, S155408 (Cal. Sept. 25, 2007) (order denying request to decide a question of California law). In the meantime, Fantasyland advised us of its decision to withdraw its claim that the hours of operation restriction violates the First Amendment, while retaining its claim under the California Constitution. The

federal issue has thus been taken off the table regarding the hours restriction, but it remains a basis for the challenge to the open-booth requirement. We affirm the district court's decision to uphold the ordinance's hours-of-operation restriction as surviving intermediate scrutiny under the California Constitution. Fantasyland fails to cast direct doubt on the County's rationale for the hours restriction. With respect to the open-booth requirement, we affirm the district court's ruling that the County's requirement of open booths at peep shows does not violate the First Amendment. Similar to the ordinances in other cases upholding open-booth requirements, the County's open-booth ordinance is supported by evidence of the nexus between closed booths and adverse secondary effects such as prostitution and pandering, matters in which the County has a substantial interest in regulating. Further, the ordinance is narrowly tailored. The content, number, and availability of peep shows are untouched; the ordinance deals only with the doors. We further reject Fantasyland's argument that the provision is invalid un-



## INSUBORDINATION

der Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). That concurrence is not applicable to open-booth requirements."

***United States v. Saeteurn***, No. 06-10401 (October 15, 2007)

"This case deals with sentencing practice. Specifically, is the sentencing judge required to resolve disputes regarding facts recited in the Presentence Investigation Report, when those facts do not affect the term of imprisonment imposed, but may affect how the sentence is served, including a possible early release from prison? We hold that there is no such requirement upon the sentencing judge. We also consider whether the sentencing judge imposed a reasonable sentence in this case. We conclude that he did."



### HR Solutions- Insubordination By Amy Maingault

Employers often have policies prohibiting insubordination but may not have guidelines defining which behaviors will be regarded as insubordination.

Insubordination can be divided into two categories: unwillingness to carry out a directive from a manager or supervisor, and disrespectful behavior toward a manager or supervisor.

Unwillingness to carry out a directive can manifest itself as a verbal refusal, a nonverbal refusal or an unreasonable delay in completing work. Disrespectful behavior can include cursing at a supervisor, verbally or physically intimidating a manager or supervisor, or speaking loudly or argumentatively to or about a supervisor. Employers who face insubordination usually handle the situation using their normal disciplinary procedures. While insubordination can be addressed with warnings and suspensions, extreme examples of insubordination may warrant immediate dismissal.

Although employers do not want to act hastily in disciplinary matters, delaying disciplinary action or ignoring insubordination can give employees the

impression that disrespectful behavior is acceptable.

When addressing a situation involving insubordination, the employer should consider the circumstances in which the incident took place. For example, if cursing is common "shop talk" in the workplace, the employer should consider whether the language used by the employee was unusual enough to be considered abusive.

Further, managers may incite insubordination through abusive or abrasive behavior of their own. In such situations, the manager may need performance coaching or even disciplinary action.

In addition, a refusal to carry out an order may result from a misunderstanding of instructions or a fear of unsafe work. In certain circumstances, the U.S. Occupational Safety and Health Administration protects a worker who refuses to perform work if the employee believes in good faith that performing the work would put the employee in imminent danger.

An employee's refusal to do something that is illegal, unethical or a violation of company policy would not be considered insubordination.

## HAPPY THANKSGIVING

### Center for State and Local Government Excellence

Researcher Stuart Greenfield assesses the state of the public sector workforce and finds that:

34.2 percent of state government workers and 36.1 percent of local government workers are 50 years of age or older. Only 23.9 percent of the private sector workforce is over 50.

About half the public sector workforce has at least a college degree, while only a quarter of those in the private sector have finished college. Private sector workers who have post-secondary education earn more than their counterparts in the public sector -- a disparity that increases along with level of education -- although public sector workers who have less than a college degree earn more than their peers in the private sector.

Almost 70 percent of public sector employees are classified as knowledge workers, while only 32 percent of private sector workers fall in this category. Knowledge workers in state and local governments earn between 20 and 25 percent less than knowledge workers in the private sector.

