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2020-21 Survey of Local Government Law

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This outline contains a review of selected Colorado, Tenth Circuit, and U.S. Supreme Court appellate decisions of interest to municipal attorneys in Colorado, reported between October 1, 2020 and September 30, 2021.

Campaigns and Elections
Employment
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Police Civil Liability/Fourth Amendment
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CAMPAIGNS AND ELECTIONS

SCOTUS: Analysis of time-place-manner election regulations under Title II of the VRA; "ballot harvesting" restrictions upheld

- *Brnovich v. Democratic National Committee*, 141 S.Ct. 2321 (2021).

With dozens of "voter suppression" cases brewing across the county, the U.S. Supreme Court laid down the precedent that will likely control everything to come. The high court has rendered many decisions on racial discrimination claims brought under Title II of the Voting Rights Act and grounded in a "vote dilution" theory, e.g. challenges to race-based gerrymanders. Remarkably, however, until now the court has never applied Title II to basic time, place and manner regulations in state election laws. In *Brnovich v. Democratic National Committee* a 6-3 majority of the court upheld two Arizona statutes against claims that the statues had a discriminatory effect on certain racial groups. The court refused to adopt a *per se* "disparate impact" rule and instead applied Title II according to its language and legislative history, which focuses on the twin principles that elections must be "equally open to participation" and not afford "less opportunity" to a members of a protected class.

Most interesting was the court's blessing of a 2016 statute prohibiting "harvesting" of mail-in ballots by parties, candidates or others. Many states, including Arizona, have made voting more convenient in recent years by establishing early voting periods and making it much easier for citizens to utilize mail-in ballots. But these reforms have brought forth questions about how ballots may lawfully be returned. In Arizona, besides the USPS or an election official, the only others who can help a voter cast a mail-in ballot are family, other household members or caregivers. (In Colorado, anyone is allowed to collect and cast up to ten ballots per election, regardless of their relationship to the voter. C.R.S. 1-7.5107 (4)(b)(I).) There was some evidence in the record that the GOP-dominated legislature limited ballot harvesting practices simply because "Democrats were better at it." But purely partisan motivations for an election law do not constitute a violation of the VRA.

Fake signature on mail ballot can lead to felony conviction

- *People v. Curtis*, 2021 WL 3412620 (Colo. App., August 5, 2021)

A former chairman of the Colorado Republican Party was convicted for forging his ex-wife's signature on a mail ballot return envelope during the 2016 general election. The conviction was affirmed by the Colorado Court of Appeals on August 5 in the case of *People v. Curtis*. The defendant was nailed based on complaints from the ex-wife when she herself tried to vote, testimony from a handwriting expert, and DNA from the defendant's saliva when he sealed the envelope. It is no exaggeration to say that the lynchpin of Colorado's "gold standard" system of mail balloting is a reliable system of signature verification to ensure that a ballot is actually cast by the registered elector who received the ballot in the first place. This decision on a question of first impression is important for establishing that signature fraud

can be prosecuted both as a misdemeanor under the mail ballot statute, and as felony forgery under the Colorado Criminal Code.

General assembly cannot interfere with work of independent redistricting commissions

- *In re: Interrogatories on Senate Bill 21-247*, 488 P.3d 1008 (Colo. 2021)

The Colorado Supreme Court held that the General Assembly cannot interfere with the work of the independent commissions formed via two 2018 constitutional amendments to manage congressional and state redistricting. A 5-2 majority held that only the commissions, not the state legislature, can decide whether to use preliminary census data in drawing their maps. Then all seven members of the court agreed that the General Assembly has no business whatsoever dictating a "substantial compliance" standard of review if the actions of the commissions are challenged in court. Only the supreme court itself can articulate the appropriate standard of review for constitutional challenges. The holdings in this case echo earlier decisions construing the independence of the Colorado Independent Ethics Commission created via a 2006 constitutional amendment.

Challenge to municipal campaign finance ordinance fails for lack of standing

- *Rio Grande Foundation v. City of Santa Fe*, 7 F.4th 956 (10th Cir. 2021)

In 2017 the City of Santa Fe conducted a vote on a "soda tax." Amazingly, "several million dollars" were spent on the pro and con campaigns. The Rio Grande Foundation, a free-market advocacy group based in Albuquerque spent $7,700 in opposition to the tax but failed to report it, and then was targeted by a campaign finance complaint that they resolved by finally filing a report. Subsequently, the Foundation filed a federal court action seeking to have the reporting requirement invalidated, particularly the part of the ordinance requiring organizations to list by name "donors who earmarked their contributions (to the organization) for that particular campaign." However, the Foundation botched their claim that the ordinance chilled their First Amendment rights by failing to plead that the ordinance effectively precluded them from any participation in future city elections, thus failing to allege an injury that might have established standing.

District Court enjoins portion of new Aurora campaign finance ordinance

Early in the year Aurora Mayor Mike Coffman sued his own city, claiming that a portion of a recently adopted campaign finance ordinance was unfairly targeted at him and denied his First Amendment speech and association rights. The ordinance restricted the ability of city candidates to coordinate efforts with other city candidates or ballot issue campaigns. In late May, Arapahoe County District Judge Peter F. Michaelson granted Coffman a preliminary injunction based upon a finding that the Mayor's claims would likely succeed on the merits. Later in the summer, the Aurora City Council amended the ordinance to moot-out the claims in the lawsuit.

Two notable district court rulings on municipal recall procedures

- *Westminster Citizens for Responsible Government v. Parker,* 2021 CV 30004, Adams County District Court; *Town of Avon v. Avon Recall Committee*, 2020 CV 30264, Eagle County District Court

City of Westminster: Petition defects assessed under "substantial compliance" standard. Petitioners upset over rising water rates originally targeted the mayor and three council members for removal from office. The clerk rejected 80 petition sections because the petitions improperly included a cover page designed to provide instructions to circulators. When the petitioners challenged these rejections in court, it was undisputed that the inclusion of the cover page technically violated state and city laws because it was not allowed per the form of petition originally approved by the clerk, and because the instruction page did include the standard "WARNING" admonition to petitioner signers in violation of a Westminster ordinance. However, Adams County District Court Judge Kyle Seedorf sided with the petitioners under the "substantial compliance" standard of review, primarily due to the lack of evidence that any petition signers actually saw the cover page, and because each signature page contained the required "WARNING" regardless. Ultimately, the signature count on the petitions were enough to force a recall election for only one of the councilmembers, and voters in a July special election rebuffed the recall.

Town of Avon: Calculation of signatures when multiple at-large town board members are targeted. The Colorado Constitution Article XXI and C.R.S. 31-4-502(1)(d) provide that "every public officer of the state of Colorado may be recalled from office at any time . . . by a petition signed by registered electors . . . equal in number to *twenty-five percent of the entire vote cast* at the last preceding election." (Emphasis added). The statute goes on to provide that, in elections where multiple at-large candidates are being elected at the same time, the twenty-five percent is applied to the total "vote cast" in the election, divided by the number of offices filled. In a recent recall effort targeting two at-large town board members, Avon took the position that the term "entire vote cast" includes undervotes or an uncounted ballot due to an elector not voting or not casting a vote for as many at-large candidates as the previous ballot allowed. The Town filed a declaratory judgment action to confirm its position. Eagle County District Court Judge Russell S. Granger disagreed with the Town's position, holding, "Applying the plain and ordinary meaning to the term 'entire vote cast' includes votes cast; not those withheld, undervotes, or otherwise not cast." Under this standard, the signatures to recall the two board members were deemed sufficient, and a recall election is scheduled for November 2.

EMPLOYMENT

Municipalities can be sued for compensatory damages under CADA in employment discrimination cases; governmental immunity is no defense

- *Denver Health and Hospital Authority v. Houchin,* 477 P.3d 149 (Colo. 2020); *Elder v. Williams*, 477 P.3d 694 (Colo. 2020)

In 2013 the Colorado Anti-Discrimination Act (CADA) was amended to add remedies in employment discrimination cases that were similar (but not identical) to the remedies available to plaintiffs in Title VII cases filed under federal law. The new remedies included compensatory damages and front pay. However, the legislation was drafted with the assumption that damages could *not* be asserted against public employers unless the immunity provisions of the Colorado Governmental Immunity Act (CGIA) were waived. In the final version of the 2013 legislation, the immunity from damages was indeed waived for claims against the state, *but not local governments*.

In a pair of 4-3 decisions rendered on December 21, 2020 the Colorado Supreme Court construed the 2013 amendments to CADA for the first time, ruled for the plaintiffs in both cases, and addressed several questions of first impression. One case involved a claim of discrimination on the basis of sexual orientation by an employee of the Denver Health and Hospital Authority (a statutory political subdivision of the state). The other addressed an age discrimination claim in the El Paso County sheriff's office. These decisions could have a serious long-term impact on all sorts of litigation involving municipalities, going well beyond the employment discrimination context, for two reasons.

First, even though the CGIA is supposed to govern any claim that lies in tort or "could lie in tort," the majority held that other statutes (e.g. CADA) that serve "greater purposes" deemed to be in the "public interest" can create private damage remedies against public entities that exist outside the scope of governmental tort immunity.

Second, even though the wording in the 2013 legislation evinced an intention to make a distinction for damage claims against the "state" as contrasted with political subdivisions of the state, the majority construed the term "state" to include local governments. Of course, numerous statutes impose requirements on the state government and the departments and agencies of the state. Until now it has been commonly understood that if a statute is also intended to apply to local governments, the statute must explicitly say so.

ADA claim is justiciable even without "adverse employment action."

- *Exby-Stolley v. Board of County Commissioners*, 979 F.3d 784 (10th Cir. 2020); *cert. denied* (2021)

On a 7-6 vote, the Tenth Circuit issued an *en banc* decision definitively holding for the first time in the circuit that an ADA employment discrimination claim can be based purely on a failure to offer "reasonable accommodations" to a disabled employee, even in the absence of

any other adverse employment action. The plaintiff, a county health inspector, was having difficulty performing her job due to the after-effects of a broken arm. At trial, the evidence showed that the employer never offered an accommodation, because the employer thought the parties were still in the "iterative process" when the employee resigned. A jury ruled for the county, after having been instructed that an adverse employment action is necessary to win an ADA claim. Among many other things, the majority *en banc* decision reversing and favoring the employee turned on the fact that, unlike Title VII discrimination provisions, the ADA not only forbids employers from discriminating, it also affirmatively requires them to provide accommodations in order for disabled people to fully participate in the workforce.

State statutes protect public employees from disciplinary action imposed due to court testimony

- *Butler v. Board of County Commissioners for San Miguel County,* 491 P.3d 506 (Colo. App. 2021)

An ongoing dispute in the San Miguel County road and bridge department has generated some new law on two questions of first impression. The case centers on the demotion of Jerud Butler, a supervisor in the department, after Butler testified voluntarily in a child custody case in favor of his sister-in-law, who happens to be the ex-spouse of one of his co-workers. The county takes the position that the testimony "reflected poor managerial judgment and allowed his family dispute to disrupt the workplace." Two years ago Butler failed with a First Amendment retaliation claim in federal court. See: *Butler v. Board of County Commissioners*, 920 F.3d 651 (10th Cir. 2019); *cert. denied* (2019).

Now the Colorado Court of Appeals has evaluated two state law claims. First, the court held that the demotion did not violate Colorado's Lawful Activities Statute, C.R.S. 24-34-402.5, because that statute proscribes the "termination" of employees who engage in lawful off-duty activities, not lesser forms of discipline. Conversely, the court held that Butler may have an actionable claims under the Freedom of Legislative and Judicial Access Act, C.R.S. 8-2.5-101, which provides that employees cannot be disciplined for giving testimony in a judicial proceeding at the "request" of the court. Curiously, testimony given at the "request" of a court (as opposed to one of the parties) is something that rarely happens in the real world. And there was no such "request" in this case. Nevertheless the court honored the spirit of the law by saying that a witness with a "legitimate reason" to go before a court at the request of one of the parties could be protected by the statute.

FIRST AMENDMENT

First Amendment right to video record police officers in action?

- *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021)

As long ago as 2007 the City and County of Denver began to train its police officers that citizens have a right to video record officers in public places as long as the citizen is not obstructing or interfering with the officers. The training was based upon a trend in First Amendment case law around the country, albeit the Tenth Circuit had never ruled on the issue.

Notwithstanding this training, in a 2014 arrest incident when a bystander recorded the incident (and then lied to the officers about having done so) an officer seized the recording device briefly and tried to retrieve the video. The bystander sued both the officers and the city, claiming First Amendment retaliation. The city was relieved of any *Monell* liablity, of course, because its own policies and training supported the rights of bystanders to record. Then the appellate court held that, notwithstanding their training, the officers are shielded by qualified immunity on the retaliation claims because a First Amendment right to record officers was not clearly established in the Tenth Circuit in 2014. (In a footnote, the court refused to opine on whether this right is clearly established in this circuit even today.) In sum, the defense of qualified immunity turns solely on whether a constitutional rights has been clearly articulated by the courts, regardless of how the municipality may train officers on the subject. Given the ubiquity of bystander recordings of police behavior in high profiles cases throughout the U.S., it is no surprise that this case has drawn major national attention. A total of forty-five media and civil liberties organizations from around the country appeared as *amicus curiae* in the case on behalf of the plaintiff. A petition for certiorari to the U.S. Supreme Court is pending.

Lower courts weigh-in on First Amendment right to record video

- *Irizarry v. Yehia*, 2021 WL 2333019 (D. Colo. 2021); *Kerr v. City of Boulder*, 2021 WL 2514567 (D. Colo. 2021)

After the circuit opinion in Frasier v. Evans, federal courts in Colorado weighed in on the issue in two more cases. On June 8, U.S. Magistrate Judge Nina Wang considered the same issue in *Irizarry v. Yehia*, a case involving the Lakewood Police Department, and held that it well-established throughout the U.S.at this point that police cannot retaliate against citizens for taking video of their actions in public places. However, Judge Wang granted the officer's motion to dismiss on the facts of this case, because the officer's actions essentially consisted only of standing in between the videographers and his fellow officers who were making an arrest. He never laid a hand on the videographers. Judge Wang could find no precedent anywhere for the proposition that this sort of passive intervention constituted First Amendment retaliation.

Then on June 18, Magistrate Judge Kristin Mix dismissed a multitude of claims filed against Boulder Police officers by two men who, wearing ski-masks, trespassed on the grounds of the Boulder County Jail to take video on their smart phones for no apparent reason other than "personal use." Toward the beginning of the video, one of the men was heard to say, "Gonna do a public audit, First Amendment rights. See if they respect our right to film in public." Judge Mix observed that jail property is not traditional public forum space in any event, and there is no clearly established First Amendment right to film on jail property regardless.

Disruptive speech in non-public forum is not protected by First Amendment

- *Fenn v. City of Truth or Consequences,* 983 F.3d 1143 (10th Cir. 2020).

In Truth or Consequences, New Mexico, a local gadfly resented the fact that a senior center was converted by the city into a visitor center for Spaceport America ("The World's First Purpose-Built Commercial Spaceport"). The citizen engaged in years of disruptive protest activity at the site, culminating in a trespass charge by local police. The citizen then sued, alleging violation of his First Amendment rights. Dismissal of the case was affirmed for two primary reasons. First, this municipally-owned property was not "public forum" space once it was leased to private tenants. Second, the trespass charge was supported by probable cause, and thus could not support a First Amendment or malicious prosecution claim against the police officer who filed the charge.

Mayor can decry "hate speech" without running afoul of the First Amendment

- *VDARE Foundation v. City of Colorado Springs,* 11 F.4th 1151 (10th Cir. 2021)

In March of 2017, the VDARE Foundation, a right-wing group that reportedly subscribes to white nationalism among other extremist views, scheduled an event to occur at the Cheyenne Mountain Resort in Colorado Springs later that year. On August 12 of 2017, deadly mayhem erupted between white supremacist demonstrators and counter-protestors in Charlottesville, Virginia. On August 14, Colorado Springs Mayor John Suthers issued a statement decrying "hate speech" and urging the Resort and other local businesses to "be attentive to the types of events they accept." The next day, the resort cancelled its booking agreement with VDARE. The Foundation sued the mayor and the city claiming that the mayor's statement led to a deprivation of their First Amendment rights to assemble and speak.

In the case of *VDARE Foundation v. City of Colorado Springs* a divided panel of the Tenth Circuit affirmed a dismissal of the lawsuit. In sum, the First Amendment claims as set forth in the complaint failed for four fundamental reasons: (1) failure to establish nexus between the mayor's statement and the resort's decision to cancel (i.e. no "state action"); (2) no plausible threat of legal sanctions by the city against VDARE; (3) under the "government speech" doctrine city officials engage in protected speech, too, and are allowed to have a point of view (i.e. the mayor's statement "didn't need to be neutral"); (4) allegations by the plaintiffs that their ability to meet and speak in Colorado Springs have been "chilled" were merely conclusory and not supported by any evidence.

El Paso County sheriff denied qualified immunity in speech retaliation case

- *Duda v Elder*, 7 F.4th 899 (10th Cir. 2021)

The Tenth Circuit opinion in *Duda v. Elder* added to the long line of cases in which the court has been called upon to analyze First Amendment retaliation claims filed by law enforcement officers against their employers, particularly elected county sheriffs. Because the hazards associated with speech retaliation are so clearly established in the circuit, El Paso County sheriff Bill Elder was denied qualified immunity under the alleged facts of this case for two primary reasons. First, to the extent the sheriff's department had a policy prohibiting politicking on the job, there was evidence in the record that the policy was not consistently enforced against persons supporting versus opposing the reelection of the sheriff—thus constituting classic "viewpoint discrimination" in violation of the First Amendment. Second, when a deputy who supported the sheriff's political opponent granted a newspaper interview on a matter of public concern (alleged sexual harassment within the department), the sheriff erred in immediately moving to terminate the deputy, in the absence of any evidence that the interview had disrupted or threatened to disrupt the operations of the department.

SCOTUS: Sanctioning vulgar speech on social media went too far

- *Mahoney Area School District v. B.L.,* 141 S.Ct. 2038 (2021)

An 8-1 majority of the court concluded that a school district violated the First Amendment rights of a tenth grader when the district suspended the student from the junior varsity cheerleading squad after the student wrote a snapchat post laced with F-bombs criticizing the squad and the school. Although the case focuses entirely on the standards for evaluating First Amendment claims mounted by students against schools, it includes some helpful analysis of the role that "disruption" plays in determining whether speech deserves First Amendment protection. In similar cases where a municipality may be inclined to discipline employees for private social media posts related to their job duties, the potential for the speech to cause "disruption" in the workplace is also a part of the analysis.

More guidance on "true threats" on social media

- *People v. Counterman*, 2021 WL 3085519 (Colo. App., July 22, 2021)

Last year in its landmark decision in *People in Interest of R.D.*, 464 P.3d 717 (Colo. 2020) the Colorado Supreme Court issued its first comprehensive analysis of when and whether harassing or threatening communication over social media enjoys First Amendment protection from prosecution.

This year the Colorado Court of Appeals applied this precedent in another case, *People v. Counterman*, and upheld the conviction of a defendant for a violation of C.R.S. 18-3-602(1)(c), "stalking – serious emotional distress." The case centered on the pattern and content of hundreds of Facebook posts and instant messages directed by the male defendant against a female "local musician and public figure." Like last year's case, context and persistence of the harassing communications was pivotal to the analysis of whether the speech constitutes a "true threat" that is undeserving of First Amendment protection. It does not matter if the harasser actually intends to carry out the threat; instead the pivotal question

is whether the sender intended that the recipient perceive it as a threat. Most troubling to the court were several specific messages that clearly crossed the line. "These messages, although they don't explicitly threaten C.W.'s life, imply a disregard for her life and a desire to see her dead."

Disturbing the peace ordinance survives First Amendment challenge

- *Harmon v. City of Norman,* 981 F.3d 1141 (10th Cir. 2020)

In a case arising out of Norman, Oklahoma, a Tenth Circuit panel affirmed the denial of preliminary injunction where anti-abortion protestors were attempting to challenge a city ordinance that states: "No person shall disturb the peace of another by . . . playing or creating loud or unusual noises." The protestors were accused of violating the ordinance by making loud noises (including simply yelling and shouting) on the public sidewalks outside an abortion clinic when the noises were audible inside the clinic and allegedly disrupted the business of the clinic. Surviving both an as-applied and a facial challenge, the ordinance was deemed to be content-neutral and a legitimate time, place and manner regulation under the reasoning of *Ward v. Rock Against Racism.*

Tenth Circuit strikes down statute designed to protect agricultural businesses from harm by animal rights activists

- *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021)

In the hotly contest case of *Animal Legal Defense Fund v. Kelly* a divided Tenth Circuit panel held that the Kansas Farm Animal Field Crop and Research Facilities Protection Act violates the First Amendment. The law was designed to prevent persons from engaging in fraud or deception to gain access to farms or other agricultural facilities "with the intent to damage the facility," e.g. by gathering information from clandestine videos to disseminate to the public, the media, or government regulators.

In a nutshell, the majority held that, even though the use of deception to trespass on private property may not be "protected speech" under the First Amendment, the statute was nevertheless unconstitutional because it affected speech while engaging in viewpoint discrimination. The statute only applied to persons bent on harming the enterprise. Incidentally, portions of the opinion reaffirm the principle that "speech gathering activity" (like recording a video) for the purpose of disseminating information to others is generally protected by the First Amendment. This principle is important to bear in mind as municipalities continue to encounter "First Amendment auditors" and others seeking to record video of public officers and employees.

SCOTUS: Termination of city contract with Catholic service provider violated Free Exercise clause

- *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021)

When the City of Philadelphia terminated a longstanding contract with Catholic Social Services for placement of foster children based on the organizations refusal to place children in households with married same-sex parents, the church took their First Amendment grievance to the highest court in the land. The court unanimously held that under the specific contract language at issue in this case, the city violated the Free Exercise clause of the First Amendment in terminating the contract, because the language allowed for discriminatory targeting of faith-based service providers. The decision in *this case* is perhaps more important for what the court did <u>*not*</u> do. In granting cert, the court had indicated it might revisit its landmark 1990 decision in *Employment Division, Department of Human Service of Oregon v. Smith,* a decision of huge importance to state and local governments. In *Smith*, the court held that state and municipal laws that incidentally burden religion are not subject to strict scrutiny as long as they are "neutral and generally applicable." (Think basic zoning laws, or perhaps crowd restrictions in a global pandemic). Six justices were willing to leave *Smith* intact for now, because the language in the contract was patently non-neutral.

A cautionary note about forcing anyone to receive government services from a faith-based service provider

- *Janny v. Gamez*, 8 F.4th 883 (10th Cir. 2021)

Municipalities struggling to deal with homeless encampments are familiar with the argument that enforcement of trespass and other laws against homeless individuals may constitute cruel and unusual punishment in violation of the Eighth Amendment unless the municipality is willing and able to direct the individual to shelter or housing. This theory was laid out by the Ninth Circuit in the watershed 2018 case of *Martin v. City of Boise* (although it has not yet been formally adopted in the Tenth Circuit or by any Colorado appellate court).

The *Martin* decision included an important corollary: Consistent with the Establishment Clause, a municipality cannot compel a homeless person, under threat of prosecution, to take shelter in a facility where participation in religion-based programs is compulsory. The Tenth Circuit ruled in the case of *Janny v. Gamez* on a similar issue when a parole officer directed a parolee to take up residence at the Ft. Collins Rescue Mission and abide by the "house rules" or else go back to jail. The Mission imposes multiple requirements to attend various religious activities as a condition of residency. The appellate court reversed a grant of summary judgment in favor the parole officer and the operator of the facility, and remanded the case for a trail on the question of whether the parolee's First Amendment rights had been violated.

Churches succeed in challenging COVID-19 public health orders that discriminated against religious gatherings

- *Denver Bible Church v. Azar*, 494 F.Supp.3d 816 (D.Colo. 2020);
- *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S.Ct. 63 (2020)

Throughout the COVID-19 pandemic, multiple churches and religious organizations throughout the Tenth Circuit and elsewhere in the U.S. sued to enjoin public health orders that allegedly violate their First Amendment rights to assemble and worship. Most of these lawsuits were quickly dismissed on the principle that health and safety laws of general applicability may indeed be applied to churches. But on October 15, 2020 Federal Judge Dan Domenico held that Colorado's then-current public health orders on "gatherings" and "face coverings" actually discriminate against churches by granting exceptions to secular activities but not religious activities. The state appealed the ruling, but then the appeal was mooted when the U.S. Supreme Court adopted essentially the same reasoning as Judge Domenico a month later.

The high court granted an injunction to Catholic and Jewish congregations in New York City on the theory that the capacity limits imposed by the governor violated their right to free exercise of religion. Both the Colorado and the New York rulings primarily were grounded in the fact that state public health orders allow secular activities that are deemed to be "essential" to operate at higher capacity limits than the restrictions that are imposed on churches, thus discriminating against religion. In NYC, the restrictions specifically limited religious gatherings to 10 or 25 persons in certain color-coded risk zones. Under the then-current Colorado "Safer at Home Dial," indoor religious gatherings were capped at 50 persons maximum (regardless of how large the sanctuary or other gathering space may be), while "essential" retail stores are allowed to operate at 50% of the store's "posted occupancy limit." The Supreme Court signaled that public health orders can be applied to religious activities in a purely neutral way, but not in a discriminatory way.

GOVERNMENTAL IMMUNITY

Boulder sidewalk liability dispute pending in the Colorado Supreme Court

On January 19, 2021 the Colorado Supreme Court granted a petition for certiorari in the case of *Maphis v. City of Boulder*, which may have important operational ramifications for every municipality in the state. The CGIA has always waived immunity for injuries arising from a dangerous physical condition of a municipal sidewalk, but only when the condition constitutes an "unreasonable risk" to the public. As is true in many other older cities, "uneven sidewalks are commonplace in Boulder." However, to its credit the City of Boulder proactively inspects sidewalks and prioritizes repairs when defects are discovered. In this case, a city inspector spotted a two-and-one-half inch displacement on a sidewalk in a quiet residential neighborhood and marked the hazard with paint. A few weeks later, city crews fixed the sidewalk, but in between the inspection and the repair the plaintiff tripped and injured herself.

In an unpublished court of appeals decision issued on June 25, 2020, a 2-1 majority of the court sided with Boulder by applying the reasoning in the key 2018 roadway liability decision of the supreme court, *City and County of Denver v. Dennis*. As in *Dennis*, the majority held that it would be unreasonable and impractical to a standard of perfection in terms of the physical condition of their sidewalks. Budgets are limited and work must be prioritized. Moreover, if cities were required to immediately repair every tripping hazard the moment it was discovered, it would disincentivize cities from inspecting their sidewalks at all. Now the supreme court will again plumb the meaning of the term "dangerous condition" in the CGIA.

CGIA is no defense to CDPHE enforcement orders

- *Board of County Commissioners of the County of La Plata v. Colorado Department of Public Health and Environment,* 488 P.3d 1065 (Colo. 2021)

In this case, a unanimous Colorado Supreme Court reached the unremarkable conclusion that the Colorado Government Immunity Act does not prevent CDPHE from enforcing state environmental regulations against local governments. A regulatory enforcement action is simply not a tort (although the county tried in vain to analogize it to a private nuisance abatement action, which is a kind of tort). The case centered on an order by CDPHE for La Plata to address groundwater contamination at an abandoned county landfill in the Town of Bayfield. La Plata also mounted an argument that, due to some ambiguous wording in the relevant statute, La Plata and other counties were not "persons" subject to the jurisdiction of the CDPHE in regard to landfill clean up requirements. The court was incredulous that the General Assembly would have intended to exempt counties—the most common type of landfill operators in Colorado traditionally—from the regulatory regime.

Expansion of public entity liability for motor vehicle accidents under the CGIA

- *Teran v. Regional Transportation District*, 477 P.3d 799 (Colo. App. 2020)

On a question of first impression, a division of the court surprisingly held that a public entity can be a liable for an injury arising from the operation of a motor vehicle by a public employee (in this case an RTD bus driver), even when a jury has found that the driver did not act negligently. Adopting what sounds like a strict liability standard, the court said, "The pertinent question (of public entity tort liability), to be addressed on a case by case basis, is simply whether an injury is sufficiently attributable to the operation of a motor vehicle to have 'resulted from it" regardless of the proof of any negligence in the case.

Slip-and-fall claim against Denver International Airport dismissed due to two-day delay in filing the case

- *Morin v. ISS Facility Services, Inc*., 487 P.3d 1289 (Colo. App. 2021)

The statute of limitations for all negligence claims (and indeed all claims against public entities) is two years from the date of the alleged injury. When the plaintiff this case sued for a slip and fall injury sustained at DIA, the two-year anniversary date of the injury fell on a Saturday, but her attorney filed the complaint on the following Monday. The court of appeals upheld a dismissal of the untimely complaint, and reaffirmed that when a deadline is expressed in years, such as a statute of limitations, the complaint must be filed on or before the anniversary date, not on "the next business day" when the courts might be "open." Among other things, the court noted that the new world of E-filing means pleadings can be filed 24/7, and the Denver County District Court has mandated E-filing since 2010. Curiously, however, the court of appeals did not touch upon C.R.S. §2-4-108, which lays down the principle that any statutory deadline falling on a weekend or holiday can be met on the next day that is not a weekend or holiday.

MARIJUANA

Marijuana laws do not impair freedom of religion

- *People v. Torline*, 487 P.3d 1284 (Colo. App. 2020); *cert. denied* (2021)
- *Aguilera v. City of Colorado Springs*, 834 Fed.Appx. 665 (10th Cir. 2020)

Two court decisions rendered in November of 2020 addressed situations where a person claims that cultivation, possession or distribution of marijuana was a component of their religious practice, and thus any attempt to enforce marijuana laws against them violated their First Amendment rights. Remarkably, this was a question of first impression in the Colorado appellate courts. The court of appeals joined ten other U.S. jurisdictions in confirming that state marijuana laws, like any other law of general applicability that is not targeted at religious beliefs or practices, are perfectly constitutional. The case involved a "ganja minister" with the Hawaii Cannabis Ministry and a congregation of approximately thirty people in Grand Junction. The "minister" was arrested and successfully prosecuted for growing and distributing marijuana out of his garage.

Coincidentally, in a second case decided a week later in the Tenth Circuit, the court issued an unpublished decision ruling against a "High Priestess" for the "GreenFaithMinistry" located in Colorado Springs. The "Priestess" unsuccessfully attempted to argue that a city fire inspector and police officer violated her right to free exercise of religion by attempting to check for an illegal marijuana grow operation in a building owned by the "ministry."

First decision interpreting 2017 law capping marijuana plants in residences

- *People v. Garcia-Gonzalez,* 478 P.3d 1288 (Colo. App. 2020)

Prior to 2017, C.R.S. 18-18-406(3)(a) made it a *felony* for anyone to cultivate a marijuana plant on any "land" outside of a licensed marijuana cultivation facility. Via the adoption of HB 17-1277, the General Assembly added provisions to the same statute that specifically added caps on marijuana plants grown inside any residential structure; however, violation of the newer law was defined merely as a *petty offense*. The 2017 legislation was designed to provide a statewide standard for permissible marijuana cultivation in residences, as prior to that time the only caps were those provided by ordinances in some municipalities.

In a case involving 36 plants growing in a residential garage in Pueblo, the Colorado Court of Appeals held that only the more specific provision added to the statute in 2017 applies when the offense occurs in a residence. In other words, cultivation of marijuana in a residential structure can only be prosecuted as a petty offense under C.R.S. 18-18-406(3)(a), not as a felony. But if there is evidence of other criminal violations, e.g. cultivation with intent to distribute, a defendant may still be prosecuted for the violation of more serious offenses.

Statutes cannot narrow medical marijuana defense to criminal prosecution

- *People v. Cox*, 493 P.3d 914 (Colo. App. 2021)

State constitutional Amendment 20 of 2000 "legalizing" personal possession and use of medical marijuana dramatically differed from the 2012 amendment addressing retail or recreational marijuana. Among other things, only the latter expressly provided for a regulated commercial system of marijuana distribution, while the earlier MMJ amendment was entirely focused on the personal right to grow, possess and use MMJ without fear of criminal prosecution. Nevertheless, there has been a trend in recent years to harmonize state criminal and regulatory laws relating to both categories of marijuana, for example requiring all cultivation to occur in an "enclosed and locked space."

In a brief but potentially far reaching opinion, the Colorado Court of Appeals held that the state has no authority to qualify or narrow the constitutional affirmative defense to criminal prosecution of persons in possession of MMJ. For example, if a criminal defendant claims to be cultivating and supplying RMJ to multiple "patients" as a "primary care-giver" to those patients, he need *not* comply with various regulatory requirements on MMJ (like the enclosed locked space requirement) in order to avoid a criminal conviction.

OPEN RECORDS/OPEN MEETINGS

Public body can reveal only one "finalist" for executive positions

- *Prairie Mountain Publishing CO. L.L.P. v. Regents of the University of Colorado,* 491 P.3d 472 (Colo. App. 2021); *cert. denied* (2021)

In the 1990s the Colorado General Assembly amended the Colorado Open Records Act and the Colorado Open Meetings Law to require public entities to reveal "finalists" who apply for the position of "chief executive officer" of the entity, and to do so well before actually making a selection. In the municipal context, this means applicants for city manager or town administrator positions to be appointed by the governing body. From the very beginning this legislation has been ambiguous, circular, and difficult to interpret and administer, the classic "lawsuit waiting to happen."

In 2020 district court judges in both Boulder and El Paso County held that a public entity cannot name a sole "finalist" in order to keep all of the other applications confidential under CORA. The Boulder case addressed the appointment of Mark Kennedy as CU President by the Board of Regents. In March of this year, a divided panel of the Court of Appeals reversed the trial court and held that the Regents were within their rights to name only one "finalist" even though the board had interviewed six persons before making the selection. The majority was almost apologetic in rendering their decision, castigating the terrible ambiguities in the statutes, and admitting that their conclusion does not advance the "sunshine" principles espoused by CORA and the OML.

Not coincidentally, at the time the decision was rendered, there is already a bill pending in the General Assembly, HB 21-1051, that was introduced in response to the district court decisions from last year. This bill was ultimately adopted into law and clarifies that CORA and the OML do indeed allows a public body to publicize the name of only one "finalist." The legislation is expressly based on the principle that it is hard to attract a pool of highly qualified applicants if they know their name might be publicized even if they do not land the job.

Expanded access to police internal investigation files

- *People v. Sprinkle*, 489 P.3d 1242 (Colo. 2021)

Prior to 2019, anyone seeking to review records in a police internal investigation file would make a request under the "balance of public and private interests" test that governs any request for law enforcement records under the Colorado Criminal Justice Records Act. In 2019 the CCJRA was amended by HB 19-1119 to make it easier for anyone to access such files of completed investigations as relates to a "specific, identifiable incident." Different law enforcement agencies interpreted this phrase in different ways, and sometimes denied requests that were not specific enough. Thus, criminal justice reformers and media interests

successfully lobbied this year to include a last-minute amendment to HB 21-1250 striking the words “specific, identifiable” from the CCJRA.

Then on June 28 in the case of *People v. Sprinkle*, a 5-2 majority of the Colorado Supreme Court held that the burden never was on the requestor to tailor his or her request to specific incidents under the original 2019 statute. Instead, the language in the statute was intended to describe only the kinds of investigatory files the police agency would be required to disgorge. In the words of dissenting Justice Samour, this interpretation of the statute allows “fishing” requests where someone may be seeking access to all concluded investigations in the department or all investigations related to a particular officer.

Colorado Independent Ethics Commission is exempt from CORA and OML

- *Dunafon v. Krupa,* 477 P.3d 785 (Colo. App. 2020)

The 2006 state constitutional amendment that created the Independent Ethics Commission was fundamentally ambiguous about how and where the IEC would fit into the overall structure of state government, and how it would interrelate with the judicial branch. Implementing legislation for the IEC codified at C.R.S. 24-18.5-101, addressed some of this ambiguity, but perhaps with unintended consequences. For example the statute places the IEC in the judicial branch of state government, which the court of appeals now has explained automatically exempts the IEC from the Colorado Open Meetings Law. Moreover, the language in the implementing statute has the effect of exempting the IEC from the Colorado Open Records Act as well since the entity is treated as neither a state nor a local agency to which CORA applies. The greatest import of the language in the statute, however, is that it effectively shields the IEC from any judicial oversight of the commission’s operational decisions. The only action of the IEC that this subject to judicial review is an “enforcement action” against a state or local official who has been found guilty of violating state ethics laws. A related Glendale case challenging this final determination is the subject of a pending petition for certiorari that CML is supporting.

POLICE CIVIL LIABILITY/FOURTH AMENDMENT

Cases in which officers were held be potentially liable for civil claims

Use of excessive force on arrestee who no longer poses a threat. In a case involving a Montrose County sheriff's deputy, a Tenth Circuit panel affirmed the denial of qualified immunity when the deputy allegedly loosed his dog on a criminal suspect who was already subdued and in custody. The court reaffirmed that the law is well-established in the Tenth Circuit that a use of force is deemed excessive under the Fourth Amendment once a person has already been taken into custody and no longer poses a threat to anybody, regardless of the fact that none of the prior decisional law in the circuit precisely involved K-9 units. Another instructive aspect of the opinion was the way the panel utterly rejected the deputy's assertion that there was a lack of proof at the trial court level due to the *pro se* plaintiff's failure to produce any factual assertions beyond the allegations in the complaint. The appellate court reaffirmed that factual allegations in a verified complaint, standing alone, can suffice to support a denial of qualified immunity at the summary judgment stage without the need for any additional affidavits. *Vette v. K-9 Deputy Sanders*, 989 F.3d 1154 (10th Cir. 2021)

Death following prone restraint. *Lombardo v. City of St. Louis* was the latest in a long, long list of cases in which the federal courts have analyzed Fourth Amendment excessive force claims when a death results from law enforcement officers placing a person face down on the floor or the ground and apply pressure from above. In this 6-3 per curiam opinion, the U.S. Supreme Court expressed concerns that the lower court seemed to apply a *per se* rule in dismissing the Fourth Amendment claim: i.e. as long as the person on the ground is displaying any resistance, the prone restraint is "objectively reasonable" without regard to any surrounding facts and circumstances. The court remanded the case for more fulsome application of the "objectively reasonable" test as minted in the seminal case of *Graham v. Conner* (1990). *Lombardo v. City of St. Louis*, 141 S.Ct. 2239 (2021)

Prisoner in medical distress. In the Tenth Circuit, it is clearly established law that a pre-trial detainee enjoys a constitutional right to medical care under the Due Process clause of the Fourteenth Amendment. While much of the exposure to liability obviously falls on county jails, any custodial arrest by municipal police of a person suffering a medical or mental health crisis can lead to this kind of claim. There seems to be an increasing number of claims under this theory in federal and state courts recently; coinciding with a heightened emphasis by many police departments on the need for improved health interventions in addition to or in lieu of arrest. The case of *Lance v. Morris* is the latest example, albeit one with very unusual facts. In violation of county jail policies, Lance ingested a pill obtained from another inmate. The pill caused Lance to have "an erection that would not subside," a serious medical condition known as priapism. Jailers ignored Lance's complaints of severe pain and requests for medical attention for three days. By the time Lance finally received care, he had suffered permanent injury and a lifetime of impotence. Several jailers were denied qualified immunity by the appellate court based upon evidence of deliberate indifference, and the sheriff himself was likewise potentially liable on the theory that jail policies were inadequate to ensure timely medical attention for prisoners in distress. *Lance v. Morris*, 985 F.3d 787 (10th Cir. 2021)

Arrestee in medical distress. Under the CGIA and Colorado's Peace Officers Act, police officers like other public employees have always been potentially liable for the consequences of their willful and wanton behavior, and state law completely absolved public employers from any obligation to indemnify their employees for their willful and wanton acts or omissions. (This changed with the adoption of SB 21-217, which imposed a much broader indemnification obligation on the employers of peace officers.) Specifically, "knowledge and conscious disregard of a health danger to another is sufficient" to qualify as willful and wanton behavior. This principle was demonstrated again in December pf 2020 in an unpublished Tenth Circuit opinion. When a CSP trooper arrived at an accident scene and contacted the driver who was disoriented and struggling, but with no other proof of alcohol or drug intoxication, the trooper failed to call for medical assistance and simply arrested and jailed the driver for DUI-D. It turned out the driver suffered from a rare liver condition that eventually required him to be hospitalized for three days. The court held that the allegations set forth in the complaint should survive a motion to dismiss, and could support a willful and wanton claim for which the trooper would have no immunity under the CGIA. *Schmitz v. Colorado State Patrol*, 841 Fed.Appx. 45 (10th Cir. 2020)

U.S. Supreme overturns Tenth Circuit in failure to de-escalate case; officers deserved qualified immunity

- City of Tahlequa, Oklahoma v. Bond, 595 U.S. ___ (2021)

In a brief per curiam opinion published on October 18, the Supreme Court overruled a decision in which the Tenth Circuit denied qualified immunity to police officers in the case described below. The high court said this of the circuit panel: "Not one of the decisions relied upon by the Court of Appeals . . .comes close to establishing that the officers' conduct was unlawful."

Echoing a 2019 decision involving Thornton police officers, *Estate of Ceballos v. Husk,* the Tenth Circuit ruled in December of 2020 that "officers' reckless and deliberate conduct in creating a situation requiring deadly force may result in a Fourth Amendment violation." In the new case, officers responded to a call from a woman who wanted her drunken ex-husband removed from the garage of her home. The officer's cornered the man in the garage, but proceeded slowly and kept a safe distance and did not immediately move to lay hands on the suspect. When the man raised a hammer over his head in a threatening manner, the officers shot him dead. "(T)he arming and perceived offensive movements (by the suspect) were in direct response to the officers' conduct. Thus a jury could reasonably determine that the officers here . . . unreasonably escalated a non-lethal situation into a lethal one through their own deliberate or reckless conduct." But the Tenth Circuit precedents cited by the court involved much more rapid and aggressive actions by responding officers leading to successful Fourth Amendment claims against the officers, nothing like the facts of this case.

Colorado Springs prevails in false arrest, malicious prosecution case

- *Metzler v. City of Colorado Springs,* 841 Fed.Appx. 94 (10th Cir. 2021)

In this unpublished decision, the Tenth Circuit demonstrated once again that, "a botched police investigation, even one leading to the arrest and confinement of an innocent man, does not necessarily violate the constitution. When an officer has neither proffered "deliberate falsehoods" nor engaged in a "knowing and reckless disregard for the truth" when seeking an arrest warrant, and the warrant is supported by "probable cause," there is simply no Fourth Amendment violation. In this case, the "botched investigation" primarily consisted of jumping to a conclusion that a mobile phone to which an incriminating phone number was traced was, in fact, Metzler's phone.

SCOTUS: Excessive force violates Fourth Amendment even if suspect is not immediately captured by police

- *Torres v. Madrid*, 141 S.Ct. 989 (2021)

In a case arising out of the Tenth Circuit and the New Mexico State Patrol, a 5-3 majority of the U.S. Supreme Court reaffirmed that "the application of physical force to the body of a person with intent to restrain is a seizure" for purposes of the Fourth Amendment. The majority referred to this as the "mere touch" rule as derived from English Common Law, and held that the rule applies even if the person evades immediate capture. In this case, the patrol officers fired into the moving vehicle of a suspected felon fleeing the scene and struck the suspect, but the suspect escaped capture and arrest until later. Equally as important as the holding in the case were these disclaimers by Justice Roberts writing for the majority: "the application of the common law rule does not transform every physical contact between a government employee and a member of the public into a Fourth Amendment seizure. A seizure requires use of force with *intent to restrain*. Accidental force will not qualify. Nor will force intentionally applied for some other purpose satisfy this rule." Having resolved the threshold question of the applicability of the Fourth Amendment, the case was remanded for a determination of the reasonableness of the shooting and the potential applicability of qualified immunity.

Police cannot engage in continuous video surveillance of a fenced backyard

- *People v. Tafoya*, 494 P.3d 613 (Colo. 2021)

In this case, the Colorado Supreme Court considered the Fourth Amendment warrant requirement in the context of sophisticated 21st century technology. Colorado Springs police discreetly mounted a small, remote-controlled video camara atop a utility pole, designed to continuously monitor the comings and goings at the residence of some suspected drug

dealers. The camera was capable of peering into a part of the backyard and garage of the property surrounded by a privacy fence and gate. Under the facts of this case, the supreme court unanimously determined that the existence of the fence created a legitimate expectation of privacy in the part of the home's "curtilage" surrounded by the fence, at least insofar as continuous video surveillance for a period of three months was concerned. The court analogized this situation to the act of continuous GPS monitoring of an individual's movements over a long period of time without a warrant, a tactic the U.S. Supreme Court had previously disapproved in the 2012 case of *U.S. v Jones*. Based on this analysis, Tafoya's conviction on drug charges was overturned.

SCOTUS: Standards for warrantless entry into a home based on hot pursuit of suspected misdemeanant

- *Lange v. California*, 141 S.Ct. 644 (2021)

In this case the high court clarified for the first time that there is no categorical rule allowing a warrantless entry into a home when a person is suspected of a misdemeanor and the person eludes police by retreating into his home. The mere fact that the suspect was fleeing does not automatically qualify as an exigent circumstance allowing the police to follow him into his home. Federal and state courts have been split on this issue (although the Tenth Circuit already reached the same conclusion in *Mascorro v. Billings*, 656 F.3d 1198 (CA10 2011)). For misdemeanor pursuits, a case by case evaluation of the exigencies is required. Writing for the majority, Justice Kagen noted, "That approach will in many, if not most, cases allow a warrantless home entry" even in the absence of a categorical rule.

SCOTUS: Community caretaking exception to warrant requirement applies only to motor vehicles, not homes

- *Caniglia v. Strom,* 141 S.Ct. 1596 (2021)

Since 1973 the Supreme Court has allowed police departments, in some circumstances, to impound vehicles and conduct a warrantless inventory search under a "community caretaking" theory. This year the court issued a 4-page unanimous opinion in the case of *Caniglia v. Strom* stating that the community caretaking doctrine does not apply at all to a warrantless search of a residence. While exigent circumstances often justify a warrantless entry into a home, the community caretaking doctrine does not. This case is also notable for its facts, as it involved the seizure of firearms from a potentially suicidal individual. In Colorado, of course, this scenario is now covered by the extreme risk protection order statute adopted in 2019.

Municipal policies for impoundment and search of motor vehicles under the microscope

For the past several years, both state and federal courts have been reviewing and often overturning convictions of defendants when evidence was revealed due to an impoundment and warrantless search of a motor vehicle under the "community caretaking doctrine. Prior to this year, earlier cases analyzed impoundment policies in Aurora and Greeley. *People v. Brown*,

415 P.3d 815 (Colo. 2018); *People v. Allen*, 450 P.3d 724 (Colo. 2019). Four more published opinions on this topic occurred in 2021.

Arvada case. The Colorado Court of Appeals analyzed the impoundment and search of a vehicle by an Arvada police officer under a city policy which states: "Whenever the driver of a vehicle is arrested, the officer will have the vehicle towed unless a properly licensed driver authorized by the vehicle owner is readily available to take control of the vehicle." A driver was stopped initially for rolling through a stop sign; was determined to have an outstanding warrant; and a tow truck was called to impound the vehicle, even though the vehicle was legally parked on a quiet residential street and the defendant's wife lived nearby. An inventory search of the vehicle revealed meth and illegal weapons, leading to additional criminal charges. The court of appeals held that the impoundment and search was not justified under the community caretaking doctrine because the district attorney failed to offer any "particularized" evidence that the vehicle was at any "unusual" risk of theft or vandalism if it were just left parked where it was until the wife could retrieve the vehicle. *People v. Thomas,* 488 P.3d 1191(Colo. App. 2021).

Lakewood case. A divided panel of the Tenth Circuit overturned the conviction of a defendant on drug charges, finding that the defendants vehicle had been impounded and searched by Lakewood police officers in violation of the Fourth Amendment. The court held that Lakewood officers are guided by sufficiently objective impoundment policies set forth in the city code and departmental policies. But under the facts of this case, the majority held that the impoundment was not justified by a reasonable, non-pretextual community caretaking rationale, primarily because the officers failed to exhaust "alternatives to impoundment." After a traffic stop which led to an arrest of the driver on an outstanding traffic warrant, the vehicle was parked in a private motel parking lot where it was not causing a public safety hazard. The majority mainly faulted the officers for not asking whether the motel owner cared if the vehicle remained parked there overnight, combined with insufficient effort to locate the registered owner of the vehicle. *U.S. v. Venezia*, 995 F.3d 1170 (10th Cir. 2021)

Tulsa case. Yet another divided panel of the Tenth Circuit ruled that an inventory search conducted by the Tulsa police department violated the Fourth Amendment in the case of *U.S. v. Woodard*, resulting in a reversal of the conviction of the defendant on drug charges. The case turned on two key findings. First, the impoundment and search violated the plain language of Tulsa's own impoundment policy. Furthermore, the search was deemed to be "pretextual" based on a host of factors (not the least of which was one officer being caught on body cam saying he wanted to "friggin' light (Mr. Woodward) up with whatever we can" as the warrantless search of the vehicle commenced). Like the earlier Lakewood decision, the court again addressed the failure of the officers to consider alternatives to impoundment (such as allowing the defendant to call a friend to retrieve the vehicle or asking the property owner whether the owner cared if the vehicle remained parked on the property.) The officers failure to consider alternatives contributed to the conclusion that the search was pretextual. *U.S. v. Woodard*, 5 F.4th 1148 (10th Cir. 2021)

Wheat Ridge case. Finally, at least one vehicle search is upheld on appeal. The most recent case, *U.S. v. Kendall*, decided on September 28 involved the Wheat Ridge police department and, like all the others, involved a search following a routine traffic stop that

revealed illegal drugs and/or weapons in the vehicle that led to a criminal conviction of the driver. This time, the court upheld the impoundment and search, applying a two-part analysis. First, the impoundment was justified under the community caretaking doctrine when the vehicle was parked in the public right-of-way and "no one could have legally operated the vehicle that night (due to a defective tail light and lack of any proof of insurance on the vehicle). Second, the scope of the inventory search was reasonable under the facts of this case. The drugs were stashed in the center console with an obvious false bottom; the stolen firearm was tucked in loose panel beneath the glove box. *U.S. v. Kendall,* 2021 WL 4434206 (10th Cir., September 28, 2021)

Equal Protection for domestic violence victims (including victims who are married to police officers)

- *Dalton v. Town of Silver City*, 2 F.4th 1300 (10th Cir. 2021)

The Silver City, New Mexico Police Department had a mandatory-arrest policy for alleged perpetrators of domestic violence, under which the alleged abuser was arrested 96% of the time when a complaint was made. But the department had a different policy if the alleged abuser was one of the city's police officers, a process under which any allegation would be referred to an outside agency for investigation in lieu of an immediate arrest. When an officer who had demonstrated a series of warning signs and committed a series of arrestable offenses ultimately murdered his wife (before turning the gun on himself) the victim's parents sued. They asserted that their daughter's rights to Equal Protection had been violated by the department's policies and by the actions (or inactions) of individual officers. In the case of *Dalton v. Reynolds*, a Tenth Circuit panel affirmed a denial of qualified immunity for the officers involved in this tragic sequence of events. The court held that the law is clearly established in this circuit: domestic violence victims have a right to law enforcement efforts and policies that are applied equally without discrimination against any particular sub-class of victims, such as the spouses of police officers.

Judge in Greeley case holds that new police liability law (SB20-217) cannot be applied retrospectively

- *Barnum v. Klassen* 2020 CV 30762, Weld County District Court

Since SB 20-217 was adopted in June of 2020, creating an entirely new cause of action against police officers for monetary damages arising out of any violation of Article II of the Colorado Constitution, a couple of plaintiffs have tested the dubious theory that the new statute might apply to incidents occurring before the adoption of the statute. In March of this year, Weld County District Judge Todd Taylor applied well-settled state constitutional

principles and decisively ruled that the statute cannot be applied retrospectively, even if the General Assembly had intended to do so. Municipalities are shielded from retrospective laws by two distinct provisions of the Colorado Constitution; Art. II, Sec. 11 and Art. XV, Sec. 12.

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PUBLIC WORKS AND UTILITIES

Tenth Circuit rejects host of constitutional claims linked to "radio frequency emissions" from telecom facilities

- *Santa Fe Alliance for Public Health and Safety v. City of Santa Fe*, 993 F.3d 802 (10th Cir. 2021).

Section 704 of the Telecommunications Act of 1996 (TCA) prohibits local governments from nixing or even regulating cell towers and the newer generation of small cell facilities on the basis of the radio facility emissions (RF) from those facilities. This preemption has not stopped local citizens from continuing to beseech municipalities to stop the tide of cellular deployment on the theory that RF causes all sorts of health problems or even death.

In March of this year the Tenth Circuit ruled against plaintiffs in Santa Fe who mounted a myriad of constitutional claims and sued the federal and state government for imposing this preemption, as well the City of Santa Fe for acquiescing to it. Among the more creative arguments was a Fifth Amendment takings claim, as the plaintiffs asserted that they had "fled their homes" and "abandoned their businesses" to escape the RF. The circuit panel held that the plaintiffs failed to show their injuries would not have occurred but for the adoption of the federal and state preemption statutes; *i.e.* cellular deployment may have occurred regardless. The plaintiffs also unsuccessfully pled First Amendment violations, for example a claim that the combined effect of the state and federal preemption statutes was to deny Santa Fe citizens the right to petition their municipal government for redress of grievances in regard to the hazards of RF. The court reiterated that the First Amendment right to petition does not include a guarantee that any particular petition will be granted.

Denial of Larimer County 1041 permit for Thornton water pipeline upheld by District Court

- *City of Thornton v. The Board of County Commissioners of Larimer County*, 2019 CV 30339, Larimer County District Court

Several battles are brewing around the state, pitting county 1041 powers against municipal water supply projects. Via HB 1041 of 1974, counties along with municipalities earned the power to regulate "areas and activities of state concern" within their jurisdictional boundaries, including utility projects. This power has been used most decisively by counties to control or stop extraterritorial water projects proposed by municipalities and other governments. In 2019 the Larimer County Board of County Commissioners denied a 1041 permit for a water pipeline proposed by the City of Thornton as part of a long-planned project to deliver Poudre River water south to the city. The BOCC found that the application and the project failed to meet several of the county's permitting requirements. Earlier this year8th Judicial District Judge Stephen Jouard upheld the decision by the BOCC. Thornton is appealing the permit denial.

TAXATION AND FINANCE

Tenth Circuit grants en banc review of long-running TABOR case

- *Kerr v. Polis*, 977 F.3d 1010 (10th Cir. 2020)

Is this the end for the federal lawsuit originally filed in 2011 claiming that TABOR violates the Guarantee Clause of the U.S. Constitution because it deprives Colorado of a "republican form of government?" In 2019 a divided panel allowed the case to limp along on the theory that a handful of school districts, one county and one special district might have standing to continue the fight. But in October of 2020 the Tenth Circuit granted the state's petition for rehearing *en banc* and vacated the 2019 ruling. The entire court will now explore the larger question of when and how political subdivisions of a state can invoke the federal courts to sue their own state. To what extent must the plaintiffs point to a federal law that clearly defines local governments as a "beneficiary" of the law in order to establish standing? Hopefully the ultimately decision in this case will provide elucidation without inadvertently generating a decision that will (ironically) prove harmful to local governments by impairing our standing to bring other federal constitutional claims against the state..

Supreme Count allows school districts to restore tax levies without a vote under TABOR

- *In re: Interrogatory on House Bill 21-1164,* 487 P.3d 936 (Colo. 2021)

The Colorado Supreme Court rendered another very important TABOR ruling on in May of this year addressing a question of first impression about property taxes. The backstory: Beginning in the 1990s all but two school districts in Colorado received voter authority to exceed TABOR revenue and spending limits through broadly worded "de-Brucing" questions. Nevertheless, between 1995 and 2006 the Colorado Department of Education (CDE) "instructed" the districts to suppress their mill levies to stay withing TABOR property tax revenue limits, per the CDE's interpretation of the School Finance Act of 1994. In 2007 the General Assembly "corrected" this interpretation and adopted legislation "freezing" the district levies at their then-current rate. The 2007 mill levy freeze was upheld as being TABOR compliant by the supreme court in 2009.

This year, the General Assembly took the next step by adopting HB 21-1164, legislation that will now set in motion over the next nineteen years a gradual restoration of the school levies as they existed at the time the districts de-Bruced, up to a maximum of 27 mills. Even though this action will demonstrably lead to a "mill levy above that for the prior year" in many districts (i.e. something that would normally trigger the need for a TABOR vote), in responding to an interrogatory on the constitutionality of the legislation, the supreme court held "it makes sense to assume that in voting to waive TABOR's revenue limits, school voters understood that the votes were predicated on the continuation of the mill levy rates then in effect." In other words, there is no need to have another vote to restore the mill levy rate that existed before the

CDE directed that the levies must be reduced because the voters already implicitly approved the tax rates when they approved the retention of any and all revenues derived from those rates.

Instructive and potentially helpful for municipalities, there is language in the decision that may be applicable to other situations where the municipality mistakenly or even voluntarily reduced a tax rate and then elects to restore the rate later without the need for a TABOR vote.

TABOR challenge to "hospital provider fee" enterprise falls flat

- *TABOR Foundation v. Colorado Department of Health Care Policy and Financing*, 487 P.3d 1277 (Colo. App. 2020); *cert. denied* (2021)

Last November, the Colorado Court of Appeals issued a decision that could have significant impact on the question of standing in all future TABOR cases. The background:

In the waning days of their 2017 session, the Colorado General Assembly adopted a wide-ranging bill, SB 17-267, with the title "Concerning the Sustainability of Rural Colorado." The main purpose of the bill was to create a new TABOR enterprise funded by a fee on hospitals. In 2009 the state had originally adopted a "hospital provider fee" in order to leverage the receipt of extra federal Medicaid dollars, but administered this fee through the state's general fund. This massive revenue stream ultimately threatened to force the need for TABOR refunds. Thus, the main purpose of the 2017 legislation was to rename the fee and administer it through an "enterprise" in order to exempt the revenue from the state's calculation of "fiscal year spending" under TABOR.

The TABOR Foundation sued, claiming among the other thing that the fee was actually a tax, the enterprise was not TABOR-compliant, and that SB 17-267 violated the constitutional single subject rule. (For example, the bill changed state marijuana taxation rates and other state fiscal policies beyond reimagining the hospital provider fee.) However, the Court of Appeal ruled that the Foundation and its members completely lacked standing to bring the TABOR claims. The court applied the familiar standing rules requiring the plaintiffs to demonstrate a particularized "injury," the same standard that would apply to any "taxpayer standing" suit. But, significantly, the court paid no heed to the fact that TABOR itself expressly provides for individual enforcement suits, and the Colorado Supreme Court has previously implied that the bar may be lower for standing to bring claims of TABOR violations. Also, without explanation, the court of appeals did not address the plaintiffs single-subject claim at all.

Estes Park scores victory in TABOR case due to lack of taxpayer standing

- *Jirsa v. Town of Estes Park,* 2020CV3082, Larimer County District Court

In 2014 the Town of Estes Park entered into an agreement with the Federal Highway Administration to construct a road known as the Estes Park Loop. Local matching dollars to support the project to the tune of $4.2 million were included in the agreement, but the match came entirely from money disbursed to the Town by CDOT, with not a dime of Town money

being committed. The Town "scrupulously" accounted for the CDOT dollars and paid them out over time via annual appropriations to support the project.

A couple of local citizens who opposed the road project sued claiming the 2014 agreement violated TABOR on the theory that the agreement contained a "multiple fiscal year financial obligation" that should have required voter approval. On April 1 of this year, Larimer County District Court Judge Juan G. Villasenor granted the Town's motion to dismiss for lack of standing for the basic reason that the plaintiffs could not demonstrate any injury in fact. A plaintiff may assert "taxpayer standing" to attack the constitutionality of a government spending decision, but this requires "a clear nexus between his status as a taxpayer and the challenged government action." In this case, the Plaintiffs asserted standing as taxpayers of the Town, but the claim fell flat because no Town taxes were implicated in the 2014 agreement. Even if the Plaintiffs had survived the motion to dismiss, there is an excellent chance the Town would have prevailed on the underlying TABOR claim, since the $4.2 million was effectively a "present cash reserve" that obviates the need for voter approval of a multi-year obligation.

ZONING, LAND USE, AND EMINENT DOMAIN

SCOTUS: Spotlight on "physical invasion" taking of private property

- . *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021)

A 6-3 majority of the court held that a California statute allowing labor organizers to "invade" the property of private agricultural owners for a portion of the year violated the Fifth Amendment as a *per se* taking without just compensation. Significantly, even though the law in question was a labor regulation, the law was not analyzed as effecting a "regulatory taking." Instead, it was analyzed as a physical taking, implicating the property owner's "right to exclude." State and local governments scored an important win when the court clarified that nothing in this opinion diminishes the authority of the government itself to enter property to abate nuisances, effect criminal arrests, conduct inspections incident to licenses and permits, or anything else that would be recognized as a right of entry under the common law

SCOTUS: Takings claim is ripe without the need to exhaust state remedies

- *Pakdel v. City and County of San Francisco*, 141S.Ct. 2226 (2021)

A per curium opinion in the case of *Pakdel v. City and County of San Francisco* held that "where the government has reached a conclusive position," a Fifth Amendment challenge to the position is ripe in federal court, without the need to exhaust administrative remedies under state law. The ruling is essentially an extension of the watershed ruling by the court in 2019, *Knick v. Township of Scott*, giving plaintiffs a straight-line path into federal court without the need to pursue state remedies first. The case involved a challenge to a San Francisco ordinance regulating condo conversions and requiring certain renters to be offered a lifetime tenancy as a condition of the conversion.

Regulatory takings claim against City of Aspen not ripe for adjudication until city decision-making is final

- . North Mill Street, LLC v. City of Aspen, 6 F.4th 1216 (10th Cir. 2021)

In the landmark 2019 case of *Knick for Township of Scott*, the U.S. Supreme Court held that plaintiffs now have a straight path to assert a regulatory takings claim in federal court without the need to exhaust remedies under state law first. However, in order to meet the standard for "prudential ripeness" in federal court, a plaintiff must still demonstrate "finality" in the local land use decision-making process. So said a panel of the Tenth Circuit on July 27 in the case of *North Mill Street, L.L.C. v. City of Aspen*, The court meticulously analyzed the meaning of the term "finality." In this case, the property owner was aggrieved by a 2019 zoning change that prevented the owner from building market-rate housing on the owner's property, and then a subsequent refusal by the city to grant a conventional rezoning of the property that would have allowed "free market residential" structures to be developed. Nevertheless, the court concluded that the extent of the alleged taking could not be evaluated

unless and until the owner applied for a "planned development" approval as well under the city's PD regulations, i.e. a kind of zoning change that would allow the city to decide—up or down—whether to grant a "concrete development proposal" based upon a specific site plan. Only then would finality and prudential ripeness be achieved

The adoption of SB 19-181 did not revive Longmont's fracking ban

- *Our Health, Our Future, Our Longmont v. State of Colorado,* 20 CV 30033, Boulder County District Court

In November of last year, Boulder District Court Judge Judith LaBuda determined that Longmont's 2012 charter amendment banning fracking is still in "operational conflict" with state law, notwithstanding the adoption of SB 19-181. The landmark 2019 legislation granted local governments greater authority to regulate the "surface impacts" of oil and gas development, but did not change the basic principle that drilling is a matter of mixed state and local concern, as enunciated by the Colorado Supreme Court as recently as 2016. In granting summary judgment to the Colorado Oil and Gas Conservation Commission, Judge LaBuda simply refused to buy the argument that a fracking ban (along with a ban on the handling and storage of fracking wastes) is a regulation of the "surface" of the land like a typical zoning law. Although not mentioned by the court, at the time SB 181 was adopted the bill sponsors and Governor Polis declared that the intent of the legislation was <u>not</u> to authorize complete prohibitions on fracking at the local level.

Boulder County effort to terminate oil and gas leases on county-owned open space falters

- *Board of County Commissioners of Boulder County v. Crestone Peak Resources Operating LLC*, 493 P.3d 917 (Colo. App. 2021)

The decision in *Board of County Commissioner v. Crestone Peak Operating LLC* published by the Colorado Court of Appeals on May 13 focused on two longstanding oil and gas leases on property owned by Boulder County. The leases encumbered the property at the time the county acquired the land and mineral rights to include in its portfolio of open space properties. When Crestone applied to the Colorado Oil and Gas Conservation Commission in 2019 for permits to expand drilling and production on the properties, the county sued claiming the leases had actually lapsed in 2014 due to a "temporary shutdown" in operations for four months. However, both the trial court and the court of appeals sided with Crestone, interpreting the leases and prior case law to mean that the temporary cessation of "extraction" does not equate to the cessation of "operations" under an oil and gas lease.

Court of Appeals issues first-of-its-kind ruling on "lapsing" of special use permits in Boulder County case

- Save Our Saint Vrain Valley, Inc. v. Boulder County Board of Adjustment, 491 P.3d 562 (Colo. App. 2021)

Boulder County's land use regulations provide that a special use permit lapses if "there has been no activity under any portion of the special use permit for a continuous period of five years or more." A local environmental group sued to prevent the resumption of gravel mining at a quarry site near Lyons where there had been "no mining activities" since 2006. The quarry was originally authorized under a special use permit issued in 1998. The current owner argued that there had always been "activity" on the site pursuant to the SUP by virtue of the fact that the owner continued to take actions to comply with the 35 conditions attached to the permit, for example reclamation activities. But the court of appeals construed the county code to mean that the 5-year lapsing provision applies if the actual permitted "use" was suspended. This case offered a rare example of the court of appeals overriding the interpretation and judgment of the county zoning administrator, a legal consultant retained by the administrator, the board of adjustment, and the trial court, with the appellate court substituting its own interpretation of the local land use regulation.

More on special use permits: Glenwood Springs and Garfield County Score Victory in Quarry Case

- *Rocky Mountain Industrials, Inc. v. BOCC of Garfield County,* 2019CV30087, Garfield County District Court

Drama over the future of a limestone quarry located on BLM land immediately adjacent to Glenwood Springs continues to play out on multiple fronts. The parties are battling over two sets of issues: whether the quarry will be allowed to substantially expand its operations in the future; and whether the quarry is already in violation of its existing federal and local permits. The latter was the subject of two rulings favorable to Garfield County at the state district court level this year, the most recent occurring on June 26. The court held that the county was within its rights to issue a notice of violation regarding a county special use permit for the quarry operations originally issued in 1982. Most notably, the court held that a special use permit does not create a "protectable property interest" under the Due Process clause, and the issuing government always retains discretion to monitor and enforce compliance with the SUP. The court also brushed aside claims from the quarry owners that they faced a "stacked deck" with county commissioners were prejudiced against them. In the absence of any evidence of "actual bias," claims of this nature usually prove unsuccessful in Colorado courts.

A watershed ruling on time limit for quasi-judicial appeals, excusable neglect

- *Walker Commercial, Inc. v. Brown*, 492 P.3d 1045 (Colo. App. 2021)

Governments at all level in Colorado are accustomed to the principle that an appeal of a quasi-judicial decision must be brought within 28 days of the decision per Rule 106 (b), C.R.C.P. This has always been considered a hard and fast "jurisdictional" rule. Now, the court of appeals has ruled for the first time that a plaintiff can seek relief from the 28-day deadline on the basis of "excusable neglect." The case of *Walker Commercial v. Brown* arose from a decision by the Aurora Water Director to uphold the assessment of a $74,000 storm drainage development fee. The plaintiff filed its appeal to the district court 30 days after the final

decision, based on a provision of the Aurora municipal code that says the Director's decision is not effective until 30 days after the decision, even though the code explicitly provided that any appeal must be taken in compliance with Rule 106.

Among various other theories, Walker moved for relief from strict application of the 28-day deadline under Rule 6(b), C.R.C.P due to excusable neglect, which the trial court denied. The court of appeals reversed, saying that the plain language of Rule (6)(b) allows an enlargement of time at the discretion of the court, even for Rule 106 appeals. The court went on to expound at length on the criteria for evaluating "excusable neglect," including "equitable considerations," and remanded the case to the trial court for a fuller evaluation of Walker's motion for forbearance on its tardy complaint.

CML filed an amicus brief in this case in support of Aurora's position and the interest of municipalities statewide. Commenting on the brief (authored by CML Associate Counsel Laurel Witt) the court said: "We are sympathetic to the concerns raised in the Colorado Municipal League's amicus brief. We understand the importance of firm deadlines and the need for finality so that municipalities may operate effectively. We are not, however, empowered to rewrite the rules to achieve a particular policy outcome." A petition for certiorari in this case is pending.

When land use regulations "discriminate" against condominiums

- *Town of Vail v. Village Inn Plaza-Phase V Condominium Association,* 2021 WL 3556087 (Colo. App., August 12, 2021)

The current version of the Colorado Common Interest Ownership Act (CCIOA) became effective in 1992 and included for the first time an anti-discrimination clause prohibiting municipalities from "imposing any requirement upon a condominium . . . which it would not impose upon a physically identical development under a different form of ownership." Now, we have the first published opinion in Colorado arising under this section of CCIOA. In the case of *Town of Vail v. Village Inn Plaza*, the court struck down a town ordinance requiring condos in a particular development to be used for short-term lodging accommodations only (and not as residential dwelling units). Although this particular type of restriction may be uncommon elsewhere in Colorado, the larger import of the decision is unmistakable:

- The Vail regulation at issue in the case was adopted in 1987, four years before CCIOA. Nevertheless the court held that any attempt to enforce the regulation after the adoption of CCIOA is barred by the anti-discrimination provision in the statute.
- Vail tried to argue that the regulation related to a matter of "local concern" over which the town should enjoy home rule control. But the decision joins a long line of similar rulings concluding that the challenged regulation implicated a matter of "mixed" state and local concern. CCIOA trumps any municipal ordinance in conflict with its express provisions.
- By virtue of prevailing in both the trial court and the court of appeals, the condo association will receive an award of attorney fees under a provision of CCIOA that mandates such an award in any action to enforce CCIOA.

MISCELLANY

Colorado Supreme Court refuses to hear challenge to Denver camping ordinance

In 2019 many observers were surprised and disappointed when the U.S. Supreme Court refused to grant a petition for certiorari in the leading case testing municipal regulation of homeless encampments, *City of Boise v. Martin*. On May 10 of this year, the Colorado Supreme Court followed suit by refusing to hear the most important pending case of this type in our state, *Burton v. City and County of Denver*. In September of 2020, the Denver District court upheld the constitutionality of Denver's ordinance prohibiting unauthorized camping, particularly rejecting the claim that the ordinance violated the Eighth Amendment by inflicting cruel and unusual punishment on homeless persons. The case has returned to the county court level in Denver for a disposition.

Larimer County District Court overturns conviction arising under Ft. Collins camping ordinance

- *People v. Wiemold*, 19 CV 30889, Larimer County District Court

The Larimer County District Court overturned a municipal court conviction of Adam Wiemold for violating the City of Fort Collins' camping ban and ruled the prosecution itself a violation of the Eighth Amendment. The February 4, 2021 ruling, stemmed from a September 2018 citation issued to Mr. Wiemold for sleeping in his car at a designated rest stop, a violation of the city's camping-ban ordinance. At the time, Mr. Wiemold was experiencing homelessness and was unable to utilize a nearby shelter because not only were both local men's shelters at capacity that night, but also, because he worked as a supervisor at one of the shelters, he was prohibited from staying at either site due to an employee policy.

The ACLU, on behalf of Wiemold, argued that the city violated the Fourteenth Amendment by selectively enforcing the camping ban against homeless individuals without enforcing the ban for truck drivers who regularly sleep in the same rest stop's parking lot, but the court did not reach this issue. Instead, the ruling turned on the Eighth Amendment, similar to the landmark 2018 case of *Boise v. Martin* in the Ninth Circuit. Judge Julie Kunce Field ruled that the prosecution of Wiemold by Fort Collins violated the Eighth Amendment's prohibition of cruel and unusual punishment, since Wiemold's homelessness was "involuntary," noting this could arise from an individual's inability to access shelters for reasons other than shelters being full, including when indoor shelter is unavailable due to an individual's personal circumstances.

Remote hearing does not violate Due Process or Equal Protection

- *People in the Interest of R.J.B.,* 482 P.3d 519 (Colo. App. 2021); *cert. denied* (2021)

At the beginning of the COVID-19 pandemic as municipalities were first compelled to shift to the new world of "remote" meetings, some municipal attorneys expressed particular

concerns about conducting quasi-judicial hearings via Zoom and other platforms. Some went so far as to require a "waiver" of Due Process claims by an applicant for a license or permit before scheduling a remote quasi-judicial hearing. However, as remote judicial, quasi-judicial and legislative proceedings have become the norm, some of those concerns have subsided. In the summer of 2020, a Denver District Court judge summarily rejected an argument by John Hickenlooper that he was denied Due Process by being forced to appear before the Independent Ethics Commission remotely.

Now, in the first published decision of its type in Colorado, the court of appeals has held that a mother was not denied her rights to Due Process and Equal Protection when she lost custody of her child in a remote dependency and neglect hearing. In the case of *People in the interest of R.J.B.*, the Denver City Attorney's office successfully argued that the Webex hearing was conducted "with substantially similar procedures as would have been available at an in-person termination hearing." Two details stand out in the case. First, "Webex is a real time video conference in which *all participants may view own another*" and all materials related to the hearing were accessible to the attendees." Second, capabilities were in place to quickly address technical glitches, like audio problems, which are so common in the virtual world.

Colorado Supreme Court blesses remote testimony in criminal proceedings

- *People v. Hernandez,* 488 P.3d 1055 (Colo. 2021)

Since the COVID-19 pandemic switched the entire world of public meetings and legal proceedings to "virtual" for a time, the courts have had several occasions to address whether virtual judicial or quasi-judicial proceedings violated anybody's constitutional rights. The latest example was a June 7 decision by the Colorado Supreme Court in the case of *People v. Hernandez*. Early in the pandemic, the court had blessed the use of virtual proceedings throughout the state for any judicial proceeding that did not involve a jury. In the *Hernandez* case, the defendant himself did not consent to a virtual "make-my-day" pretrial hearing, and then objected when the witnesses against him appeared via videoconferencing technology. Hernandez complained that this format deprived him of his right to confront the witnesses against him. The court ruled unanimously against him, noting how, even before the pandemic, the U.S. Supreme Court had previously allowed witnesses to provide testimony via video if there was good reason to do so.

Post pandemic speedy trial rights

- People v. Sherwood, 489 P.3d 1233 (Colo. 2021)

Last year as the COVID-19 pandemic was ramping up, the Colorado Supreme Court adopted rule changes applicable to both state and municipal courts, allowing each court to declare a mistrial if a jury could not be safely seated due to a declared public health emergency. See: Rule 224 (b)(2), C.M.C.R.P. Now, in the case of *People v. Sherwood* the Colorado Supreme Court has elucidated how the declaration of a mistrial under these rules has a tolling effect on the normal speedy trial period. In particular, the court explained how the tolling period can reasonably relate back to the reason the original mistrial was declared (inability to safely assemble a jury pool) without needing to repeatedly declare additional

mistrials. The larger post-pandemic problem of "docket congestion" in the state criminal justice system was also addressed by the General Assembly with the adoption of HB 21-1309 which allows speedy trial deadlines to be extended until July 1, 2023 under some circumstances. However, this legislation applies only to state courts.

Supreme Court says sex offender registration is a form of "punishment" (and municipal residency restrictions on sex offenders are one reason why)

- *People in the Interest of T.B.*, 489 P.3d 752 (Colo. 2021)

On a question of first impression, a 6-1 majority of the Colorado Supreme Court in the case of *People in the Interest of T.B.* held that mandatory lifetime sex offender registration for juveniles who commit multiple offenses violates the Eighth Amendment prohibition against cruel and unusual punishment. To reach this conclusion, however, the court needed first to address the threshold question: Is sex offender registration a form of "punishment" at all? The court concluded among many other things that registration "resembles traditional shame-based punishments" and the "punitive effects outweigh the General Assembly's nonpunitive intent" when the legislature first adopted the registration system in 1991. In reaching this conclusion, the court cited municipal ordinances that limit where sex offenders may reside or that disqualify sex offenders from certain types of business licenses. (In footnote 17, the court lists twenty-one municipalities that have adopted such ordinances, mostly in the Denver metro area.) The court acknowledged how, just this session, the General Assembly repealed the mandatory lifetime registration requirement for juveniles via HB 21-1064, but decided to publish its decision anyway, potentially opening the door to future Eighth Amendment claims challenging other aspects of the registration statute.

What does it mean to "read" legislation before adopting it?

- *Markwell v. Cooke,* 482 P.3d 422 (Colo. 2021)

Both statutory and home rule municipalities are familiar with the traditional requirement that a proposed ordinance must be "read" in public before it is adopted. Fortunately, however, this requirement is not embedded in the Colorado Constitution for municipalities, and the "reading" requirement is obviated by a state statute that eliminates the requirement entirely as long as the ordinance is distributed to the governing body in writing before it is adopted. C.R.S. 31-16-107. In contrast, the constitution imposes more rigid requirements on the Colorado General Assembly. Each bill must be "read at length" in both chambers before adoption, absent unanimous consent to waive the reading. Colo. Const. Art. V, Sec. 22. During the 2019 session, some Republicans insisted that a 2000-page bill be read at length in order to leverage certain concessions from the Democrats on other legislation. The Democrats devised a way to read the bill using computers that would read different portions of the bill simultaneously at a rate of 650 words per minute, producing nothing but "unintelligible sounds." A 4-3 majority of the court parsed the dictionary definition of the word "read" as well as the historic roots of the reading requirement and held that the cacophony created by the computers did not satisfy the constitutional requirement. Notably, however, the court withheld

judgment on whether the constitutional violation would jeopardize the 2000-page bill that was adopted in 2019.

SCOTUS: Local government climate change lawsuits against "Big Oil" in state courts hit a bump in the road

- . *BP P.L.C. v. Mayor and City Council of Baltimore,* 141 S.Ct. 1532 (2021)

Like some other local governments around the country, the City of Boulder and two Colorado counties are suing major petroleum companies for damages occurring to their communities as a result of global warming. These lawsuits focus heavily on tort and nuisance theories arising under state law. The companies are fighting to remove these cases to federal court, however. Last year Boulder scored an important jurisdictional victory over Suncor Energy, et al, when the Tenth Circuit affirmed a remand of their case to the state court. The companies had asserted seven distinct theories for why the case should be removed to federal court (including federal preemption), but the circuit court ruled that it had jurisdiction to consider only one ground for removal from state court, so-called "federal officer" removal. On May 17, in a very similar case arising out of the City of Baltimore, the U.S. Supreme court held that circuit courts have jurisdiction to review any and all asserted grounds for removal when hearing an appeal from an order remanding a case to state court. A week later, the court granted Suncor's petition for certiorari in the Boulder case, vacated the Tenth Circuit decision, and directed the court of appeals to reconsider the case in light of the Baltimore decision

Round three in battle between Glendale and the IEC

The City of Glendale and Mayor Mike Dunafon have been fighting a jurisdictional battle with the Colorado Independent Ethics Commission since 2016, particularly since Glendale is a home rule city with its own ethics code. On December 10, the City of Glendale filed an entirely new lawsuit in Denver District Court, this time asking for declaratory and injunctive relief on the home rule issue on behalf of all their elected officials and employees. In essence, the city is asserting that the course of the prior litigation leaves all Glendale officials uncertain of whether state or local ethics laws govern their behavior. With the help of the Colorado Springs City Attorney's office, CML has been supporting Glendale as an *amicus curiae* on the home rule question, and will continue to do so in the new case.

District court strikes down Boulder assault weapon ban; General Assembly lifts the preemption statute that was the basis of the ruling

- *Chambers v. City of Boulder,* 2018CV30581, Boulder County District Court

In 2003 the Colorado General Assembly adopted a preemption statute forbidding municipalities from enacting any ordinance that "prohibits the sale, purchase, or possession of a firearm that a person may lawfully sell, purchase, or possess under state or federal law." C.R.S. 29-11.7-103. Denver immediately challenged the 2003 law on home rule grounds, and obtained a district court ruling upholding many of the city's existing firearms laws,

including a longstanding assault weapons ban. However, on March 12 of this year, Boulder County District Judge Andrew Hartman ruled exactly the opposite, and struck down a City of Boulder assault weapon ordinance adopted in 2018. Judge Hartman relied heavily on more recent appellate decisions examining the scope of home rule authority, particular the oil and gas cases decided in 2016, and concluded that firearms regulation is a matter of "mixed" state and local concern. However, the judge went on to also conclude that the General Assembly has demonstrated its intent to "wholly occupy the field of firearms regulation." Shortly after the ruling, SB 21-256 was introduced in the General Assembly, adopted, and signed into law to restore the authority of local governments to regulate firearms and firearm components more strictly than the state.