Understanding *Kisela v. Hughes* and Protecting the Shield of Qualified Immunity

**Introduction**

With the increased national focus on police conduct and, in particular, the use of deadly force, many local government attorneys may be wondering about the status of the doctrine of qualified immunity. As you are aware, the doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.\(^1\)

Qualified immunity protection essentially involves two questions (1) whether a constitutional right was violated on the facts alleged, and (2) whether the constitutional right was “clearly established” at the time of the incident.\(^2\) Have recent events impacted the United States Supreme Court’s opinion of qualified immunity? Based on the Court’s April 2018 opinion in *Kisela v. Hughes*, with respect to law enforcement’s use of force, qualified immunity is alive and well and apparently stronger than ever. However, the dissent echoes fears that the Court is promoting a “shoot first and think later mentality.”\(^3\)

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Localities and their law enforcement should be heartened by the Court majority’s broad support for the doctrine of qualified immunity. However, localities must also educate and train their officers about the unclear boundaries of the doctrine and the appropriate use of force.

This article examines case law that laid the foundation for the groundbreaking protection of qualified immunity in *Kisela*. It then analyzes *Kisela* regarding the majority’s protection and the dissent’s criticism of qualified immunity. Lastly, the article explores the methods localities and police departments can use to effectively educate their officers and examines whether police departments should enact policies addressing high-speed pursuits and the use of deadly force on moving vehicles, as well as other dangerous situations.

**Setting the Stage for *Kisela v. Hughes***

The Court’s progeny of *Scott v. Harris*, *Plumhoff v. Rickard*, and *Mullenix v. Luna* set the stage for *Kisela*. These cases illustrate both the Court’s promotion of the legitimate governmental interest in protecting public safety, and its reticence to remove that protection in murky factual circumstances that do not invoke an explicitly defined right. At the same time, these cases, in particular *Mullenix*, sow the seeds for the explosive dissent in *Kisela*.

**Scott v. Harris**

In 2007, the Court issued a landmark decision protecting qualified immunity and championing law enforcement methods to promote public safety. On appeal from the Eleventh Circuit, *Scott* involved a police officer’s termination of a high-speed pursuit by “appl[yng] his push bumper to the rear of [the suspect’s] vehicle” after receiving instructions from his superior to act. This case concerned an individual traveling at speeds exceeding 85 miles per hour, disregarding police instruction, and hitting the police officer’s car for a period of 6 minutes over a distance of nearly 10 miles. After receiving instruction from his superior,

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4 See *Scott v. Harris* 550 U.S. 372 (2007); see also Alan F. Smith and Sharon E. Pandak, *Scott v. Harris: Use of Force in Hot Pursuit*, THE PUBLIC LAWYER, ABA Vol. 16 No. 2 (Summer 2008) (“The Court is as clear as ever that although judicial review is alive and well, courts should not second-guess law enforcement—period.”)

5 Id. at 375. (footnote omitted).

6 Id. at 374-75.
Scott terminated the pursuit, causing the car to crash and render the driver a quadriplegic.\textsuperscript{7} The Court held:

\begin{quote}
[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.\textsuperscript{8}
\end{quote}

In its analysis, the Court honed in on the videotape of the incident, which showed the dangerous driving of the fleeing driver, and noted that his "version of events is so utterly discredited by the record [on the videotape] that no reasonable jury could have believed him."\textsuperscript{9} Based on the videotape, the Court stated that Scott did not violate the Fourth Amendment.\textsuperscript{10} The Court then turned to the question of whether Scott’s actions were objectively reasonable.\textsuperscript{11} In assessing Scott’s reasonableness claim based on the “governmental interest in ensuring public safety,” the Court acknowledged that the videotape showed “[the fleeing driver] posed an actual and imminent threat to the lives of any pedestrians...civilian motorists, and to the officers involved in the chase.”\textsuperscript{12} Further, the Court observed that the fleeing driver “intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight.”\textsuperscript{13} The Court concluded that the officer’s actions were reasonable and refused to enact a rule that allows fleeing suspects to escape when such suspects drive in a reckless manner that endangers others.\textsuperscript{14}

**Plumhoff v. Rickard**

In 2013, the Court was again faced with a qualified immunity case and ruled that officers involved in a high-speed pursuit, who had fired multiple shots at a fleeing individual, were entitled to qualified immunity.\textsuperscript{15} On appeal from the Sixth Circuit, *Plumhoff* concerned a driver that led officers on a high-speed pursuit that “exceeded 100 miles per hour and lasted over five minutes” and included passing “more than two dozen other vehicles, several of which were forced to alter course.”\textsuperscript{16} The officers involved fired a total of 15 shots at the car which eventually crashed into a building. Ultimately, injuries suffered from the gunshots and crash led to the deaths of the fleeing driver.\textsuperscript{17} The Court held that the Fourth Amendment did not prohibit the officers’ actions, and they were entitled to qualified immunity “because they violated no clearly established law.”\textsuperscript{18} In its reasoning, the Court ruled that the officers’ actions did not violate the Fourth Amendment because “[the fleeing driver’s] flight posed a grave public safety risk,” and the officers were entitled to use deadly force until the threat to public safety had ended.\textsuperscript{19} Further, the Court determined that, even if the Fourth Amendment had been violated, the officers would have been entitled to qualified immunity because

\begin{thebibliography}{99}
\bibitem{7} Id. at 375.
\bibitem{8} Id. at 386.
\bibitem{9} Id. at 380-81.
\bibitem{10} Id. at 381.
\bibitem{11} Id. (footnote omitted).
\bibitem{12} Id. at 384-85 (citation omitted).
\bibitem{13} Id. at 384.
\bibitem{14} Id. at 385-86.
\bibitem{16} Id. at 2021.
\bibitem{17} Id. at 2017-18 (internal citations omitted).
\bibitem{18} Id. at 2024.
\bibitem{19} Id. at 2022-23.
\end{thebibliography}
respondent has not pointed us to any case—let alone a controlling case or a robust consensus of cases—decided between 1999 and 2004 that could be said to have clearly established the unconstitutionality of using lethal force to end a high-speed car chase.20

This case further explores the high standard necessary to prove that a right was “clearly established.” As the Court reiterated,

a defendant cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.21

Plumhoff makes clear that the Court is not going to go out of its way to sift through the case law to unearth a right. Rather, the right must be readily apparent from the case law, so that an officer has clear notice.

Mullenix v. Luna
Just over a year later, the Court heard another qualified immunity case. Following in the footsteps of its previous decisions, the Court held that the officers were entitled to qualified immunity because there was no clearly established right “beyond debate.”22 On appeal from the Fifth Circuit, Mullenix involved an 18 minute high-speed pursuit of a potentially intoxicated driver traveling at speeds between 85-110 miles per hour who claimed to have a gun and threatened to shoot officers if they did not abandon their chase.23 Although spike strips24 were ordered to be placed in the path of the oncoming car, Trooper Mullenix, without his supervisor’s permission, fired six shots to disable the car before it hit the spike strip, killing the driver.25 The Court found that Mullenix was entitled to qualified immunity because there was not a clearly established right prohibiting his conduct.26 In its reasonableness discussion, the Court closely analyzed the facts as understood by the officer:

The fact is that when [Trooper] Mullenix fired, he reasonably understood [the fleeing driver] to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards [another officer’s] position.27

The Court reasoned that Mullenix’s actions were in furtherance of the governmental interest of “stop[ping] the car in a manner that avoided the risks to other officers and other drivers that relying on spike strips would entail.”28 Most importantly, the Court restated that “qualified immunity protects actions in the hazy border between excessive and acceptable force,” and it exists for an officer’s actions as long as there is no constitutional rule “beyond debate.”29

20 Id. at 2024.
21 Id. at 2023 (internal citation omitted; emphasis added).
22 Mullenix v. Luna, 136 S. Ct. 305, 312 (2015) (internal citation and quotations omitted).
23 Id. at 306.
24 Spike strips are designed to punch holes in a car’s tires as the car runs over the strips, thereby causing the car to eventually slow to a stop.
26 Id. at 307-8, 312.
27 Id.
28 Id. at 311.
29 Id. at 312 (internal citations and quotation marks omitted).
Justice Sotomayer dissented, arguing that it was clearly established "that an officer in Mullenix’s position should not have fired the shots."30 She heavily criticized the majority’s finding of a governmental interest because there was no evidence of “any possible marginal gain in shooting at the car over using the spike strips already in place.”31 Moreover, she argued that the governmental interest is not “whether the car should be stopped” but rather “how the car should be stopped.”32 Justice Sotomayer also attacked the majority’s characterization of the action as a split-second choice. She instead referred to the time that the officer had to make the decision and his apparent disregard of his supervisor’s instructions to “stand by.”33 In addition, the dissent explained that “an officer’s actual intentions are irrelevant to the Fourth Amendment’s objectively reasonable inquiry.”34 Justice Sotomayer stated that the court majority is “sanctioning a shoot first think later approach to policing.”35 As evidenced by the strong opinions in Scott, Plumhoff and Mullenix, interpretation of the facts in these cases depends on the prism through which one views policing. On the one hand, the holdings strengthen the doctrine of qualified immunity by immunizing an officer’s actions as long as they further the governmental interest of ensuring public safety, and there is no explicit precedent outlawing such actions. Alternatively, the dissent in Mullenix is deeply critical of the majority’s approach, and instead explains that the governmental interest analysis hinges on the reasonableness of the officer’s actions based on “the circumstances known to [the officer] at the time.”36 Justice Sotomayer paid close attention to the decision-making time, the supervisor’s order, and any less lethal/dangerous options available to the officer at the time.37 These cases and factual considerations laid the groundwork for the Court’s majority opinion in Kisela v. Hughes.

The Court’s Recent Decision Protecting Qualified Immunity
Kisela v. Hughes represents an important moment in qualified immunity jurisprudence that had been building since the Court’s decision in Scott. Notably, the Court’s decision appears to lower the standard by immunizing police officer actions, even when it is not clear that the officer or any member of the public is in imminent danger. Second, the dissent highlights the deepening divide of the Court, as Justice Sotomayer, joined by Justice Ginsberg, chastises the Court for its far-reaching decision immunizing lethal conduct that she believed had no legitimate governmental interest.

In Kisela, the Court found that qualified immunity existed when an officer shot an individual, who had a large knife at her side and who had failed to acknowledge the officer’s commands to drop the knife, because it was “far from an obvious case.”38 The facts started with a 911 call about a woman “hacking a tree with a kitchen knife.”39 Officers arrived on the scene and witnessed the woman carrying a large knife at her side, stopping no more than six feet from another individual.40 Through a chain-link fence, three officers drew their guns and de-

30 Id. at 313.
31 Id. at 314-15.
32 Id. at 315 (emphasis in original).
33 Id. at 316 (internal citations and quotation marks omitted).
34 Id. (internal citation and quotation marks omitted).
35 Id. (internal quotation marks omitted).
36 Id. at 314-15.
37 Id. at 315-16.
38 Kisela, 138 S. Ct. at 1151, 1152, 1153.
39 Id. at 1151.
40 Id.
manded that the woman drop the knife.  

The woman did not acknowledge the officers’ presence or instruction.  

All officers believed that the woman was a threat to the other individual.  

Officer Kisela dropped to the ground and shot the woman four times.  

Without deciding whether the officer’s action violated the Fourth Amendment, the Court unequivocally ruled that Kisela was entitled to qualified immunity.  

The Court reasoned:

Use of excessive force is an area of the law ‘in which the result depends very much on the facts of each case,’ and thus police officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.

Placing Kisela’s actions in context, the majority emphasized that the officers, who were separated from the other individuals by a chain link fence, were confronted with a woman acting erratically with a large knife, who had failed to acknowledge the officers commands to drop the weapon and was in close proximity to a member of the public.  

The majority recognized that it was “far from an obvious case” that the officer would have known that his actions would violate the Fourth Amendment.

The Court then examined Ninth Circuit case law upon which the Court of Appeals had determined clearly established Kisela’s “excessive force.”  

The Court quickly distinguished the case law from the specific factual circumstances at issue, underscoring the rule that specificity and similar facts are necessary to provide adequate notice to an officer “that a specific use of force is unlawful.”  

Additionally, the Court noted that “a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious.”  

The majority’s strong position in favor of the officer suggests that, in order to place an officer on notice of unreasonable conduct, the clearly established case law must have near identical facts to the case at issue, because the Court will not infer such notice.  

Although reasonable persons may have interpreted the facts differently, there was no jurisprudence that clearly established the unlawfulness of the officer’s act.

In a biting dissent, Justice Sotomayer, joined by Justice Ginsberg, took umbrage with the majority’s opinion that the officer’s action was reasonable. She concluded that the Fourth Amendment had been violated and emphasized the following factors: the woman shot by the officer had not committed any crime; a jury could reasonably conclude that the woman “presented no immediate or objective threat” to the others; the woman did not resist or evade arrest; and “[the officer] could have, but failed to, use less intrusive means before
deploying deadly force.”

Turning to the clearly established prong, Justice Sotomayer explained that

[b]ecause Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity.

From her perspective, the relevant case law in the Ninth Circuit and other circuits clearly established that the officer’s actions were unreasonable. In particular, she noted that “decisions from several other Circuits illustrate that the Fourth Amendment clearly forbids the use of deadly force against a person who is merely holding a knife but not threatening anyone with it.”

Holding no punches, Justice Sotomayer then transforms her dissent into an indictment of the Court’s qualified immunity approach. She writes:

[The majority’s decision] is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.

Echoing her dissent from Mullenix, Justice Sotomayer criticizes the majority’s qualified immunity approach that in her view protects unreasonable police actions.

Both the majority and the dissent fall on near opposite ends of the spectrum based on the same set of facts. Has Kisela changed the law in any way? It probably depends on who you ask. From a local government perspective, Kisela seems to have evolved from the Scott v. Harris line of cases, due to the expansive and broad view of a “legitimate governmental interest.” What came as a slight surprise was that the Court felt so strongly about this “far from [] obvious case,” that it granted the Petition and summarily reversed the Court of Appeals judgment without briefs or oral argument.

Do Justice Sotomayer’s dissenting statements represent a glimpse of what is to come, or will they be simply a footnote in the jurisprudence? Her dissent suggests that a legitimate governmental interest is a high standard and fact-intensive analysis that requires more than an officer’s belief of danger to the public. Rather, as she observed in her dissent in Mullenix, it is not a question of whether police conduct was necessary, but rather the reasonableness of the specific action in light of the facts and alternative methods available. This emphasis on the method means law enforcement must decide how to educate their officers and/or enact procedures to guide officers in those nebulous situations where officers must use force to protect themselves and others.

53 Kisela, 138 S. Ct. at 1156-58 (citation omitted).
54 Id. at 1158.
55 See generally id. at 1158-1161 (citations omitted).
56 Id. at 1162.
57 Id. at 1153.
58 Id. at 1154-55; See id. at 1162 (citations omitted) (“I cannot agree with the majority’s apparent view that the decision below was so manifestly incorrect as to warrant ‘the extraordinary remedy of a summary reversal’ . . . The relevant facts are hotly disputed, and the qualified-immunity question here is, at the very best, a close call. Rather than letting this case go to a jury, the Court decides to intervene prematurely, purporting to correct an error that is not at all clear.”).
59 See Mullenix, 136 S. Ct. at 315.
Preserving Qualified Immunity Through Education and Updated Policies

Localities have long been aware that they must take proactive measures to educate and prepare their officers for the sticky areas inherent in police work. Prudent law enforcement departments provide annual education and training to their officers regarding relevant state, federal, and Supreme Court case law concerning qualified immunity and reasonable officer conduct. A harder decision is whether a police department can enact policies that restrict officer action in dangerous circumstances where the risk to the individual or public at large is greater than the perceived benefit of the potentially lethal action. There are pros and cons in drafting a narrow or broad policy, but the broader the policy, the more it will permit officers to act as the situation requires.

Educating Your Officers

Educating your officers concerning the bounds of reasonable lawful conduct for qualified immunity is extremely important. It necessarily invokes two crucial questions: (1) how should they be educated; and (2) what should they be taught?

Some departments have counsel inform all officers on the bounds of reasonableness based on the specific facts in the case law and field questions from the officers. The ideal method is to have an in-person presentation where questions can be readily asked and answered. Another method is providing written readable summaries by counsel of relevant case law discussing the ruling and the facts upon which the court granted or denied qualified immunity. Obviously, the attorney should work with the law enforcement department to ensure that all officers are aware of any updates that occur in the interim between summaries.

Some local government attorneys may not have the time and resources necessary to sufficiently provide notice to the officers of all relevant case law. Local government attorneys could work with law enforcement on an annual presentation at a conference, for example, devoted to the discussion of qualified immunity case law and reasonable law enforcement practices. During such a seminar, an attorney can discuss the relevant case law, and law enforcement professionals can provide practical application of lessons learned from the case law. For example, this might involve tactical discussions regarding factual situations such as hot pursuit circumstances, situations where an individual is armed with a weapon and potentially threatening members of the public, and other incidents where an officer may need to use force to protect him/herself and/or the public.

These learning sessions should focus on the facts of each recent relevant case, including positive factual scenarios promoting qualified immunity as well as negative facts that officers need to be aware of. This teaching method would enable officers to have notice of clearly established precedent and provide them with an understanding of the ambiguous parameters of Court-determined lawful conduct. The small sampling of the Supreme Court cases discussed in this article provides a plethora of facts to instruct officers regarding lawful conduct.

In *Scott*, the Court found the video recording of the incident to be particularly insightful concerning the actual circumstances faced by the officer and noted that the “video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.” Not only is the *Scott* video instructive for officers, but the video illustrates the value of using dash cams and body

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60 For example, Fairfax County attorneys have taped an annual summary of the law, which has been shown at police department roll calls.

61 Some will recall joint presentations at LGA conferences of local government attorneys and law enforcement.

62 *Scott*, 550 U.S. at 380 (footnote omitted).
cams. Video recordings can be very helpful in informing the court of what actually occurred, if there are conflicting stories.

On that same hot pursuit theme, the Plumhoff Court stressed the importance of whether the car chase was in fact over at the time of the alleged unlawful officer conduct or whether the chase was still ongoing. The Court recognized, in ending a severe threat to public safety, if officers are justified to act, they are justified until such time as the threat is over. This is obviously a fact-specific inquiry, but officers must pay close attention to whether the fleeing assailant is attempting to abandon his/her flight.

Officers must take into account points raised in both the majority opinion and the dissent in Mullenix. From the majority opinion, a factor that clearly weighs in favor of qualified immunity is whether the fleeing assailant made overt threats to the police that the officers engaged in the pursuit were aware of. Conversely, the dissent concentrates on the officer’s failure to follow his supervisor’s instruction, and the availability of other options, such as choosing spike strips over shooting. Consequently, officers must understand the importance of complying with their supervisor’s instructions and not acting as a rogue vigilante. Supervisors and officers should consider whether there are less lethal options available. For example, prior to using a service weapon or employing a Precision Intervention Technique (PIT) maneuver, can spike strips be used or a less dangerous alternative?

Lastly from the Supreme Court’s latest discourse on the qualified immunity doctrine in Kisela, officers should attempt to provide clear warnings prior to using force. The majority opinion emphasized “she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough . . .” However, the dissent focuses on the fact that there was no warning of the imminent use of force. Therefore, officers should be encouraged, to the extent reasonable, to engage in clear commands where they explicitly state the consequences of what will happen if the individual does not comply with orders.

Virginia officers must also be educated on relevant state and Fourth Circuit case law regarding reasonable or prohibited law enforcement activity, which include those cases that appear to raise or lower the qualified immunity standard. In particular, the Fourth Circuit appears to find a clearly established right even if the court has not explicitly recognized the right “in a specific context.” The Fourth Circuit has also ruled that the clearly established analysis includes whether the official acted “beyond the boundaries of his discretionary authority.” Again Virginia law enforcement must understand the clearly established criteria assessed by the state and Fourth Circuit.

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63 Plumhoff, 134 S. Ct. at 2021-22.
64 Id. at 2022.
65 Mullenix, 136 S. Ct. at 311-12.
66 Id. at 314-16.
67 “A ‘PIT’ Maneuver...is ‘a law enforcement procedure whereby a police officer bumps the rear quarter panel of the suspect’s vehicle with the front quarter panel of the officer’s vehicle, sending the suspect vehicle into a spin.’” Hammock v. Nash, 2011 U.S. Dist. LEXIS 101296, n.2 (W.D.N.C. Sept. 8, 2011) (citation omitted).
68 Kisela, 138 S. Ct. at 1153.
69 Id. at 1156, 1159.
70 Meyers v. Balt. County, 713 F.3d 723, 734 (4th Cir. 2013) (citations omitted) (“it is not required that a right violated already have been recognized by a court in a specific context before such right may be held ‘clearly established’ for purposes of qualified immunity”).
71 Better Gov’t Bureau v. McGraw (In re Allen), 106 F.3d 582, 593 (4th Cir. 1997) (footnote omitted) (“an official may claim qualified immunity as long as his actions are not clearly established to be beyond the boundaries of his discretionary authority”).
Educating law enforcement officers is a crucial and essential part of shielding them from liability under the doctrine of qualified immunity. Specifically, local government attorneys should work with law enforcement to carefully dissect the relevant case law by extracting important facts that the Court will likely consider in any qualified immunity situation. Making officers aware of crucial facts can allow them to recreate certain facts such as warnings and considerations of alternative methods in training before using force in a real circumstance.72

**Implementing Certain Policies at Police Departments and Other Law Enforcement**

It is an extremely difficult task to adequately prepare officers to face situations where they must decide to use force in order to protect their lives or members of the public. As the above cases make clear, qualified immunity does not simply concern instances where the appropriate response is obvious. Rather, officers often face ambivalent facts and must quickly act to terminate the supposed threat. Prudent police departments are enacting policies to guide and restrict the use of force under certain circumstances. These policy changes include restrictions on the use of deadly force in or at moving vehicles, as well as restrictions on high-speed pursuits. Localities must decide whether implementing these types of policies will benefit the department or hinder police ability to effectively and constitutionally handle potentially dangerous and lethal situations.

**High-Speed Pursuit Policies**

Research suggests that there may be a benefit in restricting high-speed pursuits. In a 2016 essay, law school professor, John P. Gross, wrote:

> High-speed pursuits involve a great deal of risk to officers, the public, and suspects. One report estimated that an average of 323 people are killed each year because of police pursuits, 28% of them innocent bystanders and police officers.73

Another study found that less than 9% of high speed chases involve violent felonies.74 Further, the National Institute of Justice stated in a 1990 report: “For anyone other than a violent felon, the balance weighs against the high-speed chase.”75 Police departments must be cognizant of the risks involved to officers, the suspect, and the public with high-speed pursuits.

Police departments are taking note of these issues and restricting the circumstances upon which officers can engage in these types of pursuits. As Gross points out, “[a]ccording to one study, 40% of police departments have policies requiring termination of a chase once the suspect is identified.”76 A department may want to limit these pursuits once the alleged assailant is identified. Policies that enable pursuits to terminate once the individual has been identified through the use of “computer-controlled cameras or photo-radar systems,”77 can help resolve dangerous pursuit situations and ensure that the police have adequate means

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72 For recent citations to *Kisela* in the Fourth Circuit Court of Appeals, see *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 705 (4th Cir. 2018) and *Wilson v. Prince George’s Cnty.*, 893 F.3d 213, 221-222, n.11 (4th Cir. 2018).


75 *Id.* at n. 30 (citing HUGH NUGENT ET AL., NAT’L INST. OF JUSTICE, RESTRICTIVE POLICIES OF HIGH-SPEED POLICE PURSUITS 20 (1990), https://www.ncjrs.gov/pdffiles1/Division/122025NCJRS.pdf [https://perma.cc/KSVQ-GNTH] [hereinafter Nugent]).

76 *Id.* at 138 (footnote omitted).

77 *Nugent* at 20.
to track down the suspect at some later point. Of course, this presumes that the immediate safety issue will stop, once the pursuit ends; however, this is not always the case.

Obviously, police departments would not want to enact policies that impair their ability to protect the public. Depending on the location and resources of the department, policies restricting high-speed pursuit chases in certain instances may make sense in some localities but not in others. For instance, photo technology, license plate readers, and other sophisticated technology may be readily available in urban areas to identify suspects. However, in less densely-populated rural areas, such technology may not be available. Therefore, a policy that requires officers to identify the fleeing assailant while engaging in a high-speed pursuit is most likely not practical.

Realistically, there is also no guarantee that terminating the use of a high-speed pursuit will resolve the public safety issue. As the Supreme Court eloquently put in Scott:

... there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go ... [g]iven such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly ... 

This Court statement highlights that it may be impossible to assess the danger to public safety in continuing the high-speed pursuit versus terminating the pursuit. Specifically, it does not seem likely that public safety is served by terminating a pursuit, even if the identities are known, of individuals suspected of violent crime and/or terrorist activity.

Departments are not legally required to enact such policies. In fact, the Supreme Court has gone out of its way to explicitly reject such a requirement:

we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people’s lives in danger. It is obvious the perverse incentives such a rule would create ... The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness.

Clearly, the Court recognizes the dangers such a rule would impose on communities and law enforcement. Instead, any policies should be based on the needs, resources, and typical situations faced by the locality and police department.

**Policies concerning the Use of Deadly Force on Moving Vehicles**

As evident by the cases discussed in this article, qualified immunity oftentimes involves the use of force on moving vehicles. Any kind of force on a moving vehicle traveling at high speeds will undoubtedly cause injuries, but some methods, such as shooting at an automobile, may be more lethal than others, depending on the circumstances. Police departments should consult with their attorneys to determine if such policies should be enacted.

Numerous organizations and localities have begun to recognize the public safety issues with respect to allowing officers to shoot at moving vehicles. The dangers of this conduct are self-evident and can include killing/seriously injuring the driver; killing/seriously injuring innocent bystanders; and affecting the automobile’s path in such a way that it becomes an “unguided missile”80 hurtling towards pedestrians and officers. Unsurprisingly, by 2016, many law enforcement departments had established “policies prohibiting their officers from firing at moving vehicles.”81 Further, the October 2017 National Consensus Policy and Dis-

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78 550 U.S. at 385 (citation and footnote omitted).
79 *Scott*, 550 U.S. at 385-86.
80 *Gross* at 141.
81 *Id.* at 140 (footnotes omitted) (These police departments are in New York City, Los Angeles, Boston, Orlando, Miami, Detroit, Houston, Cincinnati, Cleveland, Las Vegas, Albuquerque, Cleveland, and Philadelphia).
cussion Paper on Use of Force,\textsuperscript{82} provides a policy that prohibits discharging firearms at moving vehicles subject to two narrow exceptions, which essentially allow such conduct if the person in the vehicle is threatening the officer with deadly force other than a vehicle and as a last resort.\textsuperscript{83} However, despite the acknowledgment of the dangers involved and various department-specific attempts at moving away from this conduct, there has been a trend to allow officers to fire at moving vehicles under certain circumstances.

In light of recent terrorist activity in the United States and across the world, policies are being revised to allow officers to fire at moving vehicles under certain circumstances. With the augmented use of vehicles being utilized as a weapon to injure and kill pedestrians, “[p]olice in Washington, New York City, Chicago and Las Vegas have begun allowing officers to fire at moving vehicles to stop such ramming attacks.”\textsuperscript{84} The policy changes range from narrowly defined circumstances to broader situations. The New York City policy allows “such action only ‘to terminate a mass casualty terrorist event,’” while the Las Vegas policy is broader as it allows officers “to shoot at moving vehicles if it is ‘absolutely necessary to preserve human life.’”\textsuperscript{85}

Obviously, the danger of enacting a policy is that it may create restrictions that the Supreme Court has not explicitly required. The Supreme Court has already held that “Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.”\textsuperscript{86} However, conceivably, if the action plainly violated the department’s policy, the Court may consider the policy violation with respect to the objective reasonableness of the officer’s conduct as well as the Fourth Circuit’s analysis regarding the “boundaries of [the official’s] discretionary authority.”\textsuperscript{87}

The Supreme Court has not yet required any specific policy regarding the use of deadly force on moving vehicles. However, policies and training can assist officers in preparing to face these split-second decisions to protect themselves and others. Your police department should review the host of model policies or those of other departments, similarly situated in size and location. Further, policies can be drafted to encompass specific circumstances or more broadly to allow officers to act as appropriate based on the situation.

**Conclusion**

The increased focus on police conduct and shootings in the news is a hot-button issue that may lead to confusion about whether a police officer’s actions still qualify for qualified immunity protection if litigation is brought against the officer. In \textit{Scott}, \textit{Plumhoff} and \textit{Mullenix}, the United State Supreme Court has clearly stated that qualified immunity applies, unless there is precedent with a near-identical factual situation clearly establishing the unlawful conduct. In the \textit{Kisela} opinion, the Court reiterated its protection of qualified immunity in murky circumstances where an officer acts fast to protect members of the public in close proximity to armed individuals. Notwithstanding the majority’s protection of qualified immunity, law enforcement departments and attorneys must be cognizant of the points raised.

\textsuperscript{82} The National Consensus Policy on Use of Force is a collaborative effort among 11 of the most significant law enforcement leadership and labor organizations in the United States.” \textit{Nat’l Consensus Policy and Discussion Paper on the Use of Force}, 2 (Oct. 2017).

\textsuperscript{83} Id. at 4.

\textsuperscript{84} Peter Herman, \textit{Police in D.C., New York revise shooting policies in response to vehicle ramming attacks}, WASH. Post (May 1, 2018).

\textsuperscript{85} Id.


\textsuperscript{87} See \textit{In re Allen}, 106 F.3d at 593 (footnote omitted).
in Justice Sotomayer’s dissent, which heavily criticized police conduct that resorts to lethal force without legitimate justification.

Local government attorneys and law enforcement departments should work together to provide officers notice of the relevant case law in the jurisdiction. Specifically, in the discrete areas of high-speed chases and the use of force on motor vehicles, consideration should be given to whether policies should be adopted. To the extent the department wants to enact such policies, they should be based on model policies or policies already utilized/tested by similarly situated police departments. Importantly, localities must make sure to educate their officers and police departments on the ever-evolving boundaries of qualified immunity protection.
Did You Know . . . that yes, Virginia, there is legislative history, and we need to be able to find it. And to fully understand the powers of local governments, we also need to know some demographics and geography. Hopefully, these notes will give you some clues in your search for answers.

At the outset, Virginia law pertaining to the powers of local government generally is controlled by Virginia's constitutional and statutory provisions and by Virginia's adoption of a judicial doctrine known familiarly as the "Dillon Rule," which was described by Judge John F. Dillon, a nineteenth century jurist, professor of law, and an author. The Dillon Rule generally provides that local governments may exercise only (1) those powers that are specifically conferred on them by the Constitution or the General Assembly; (2) those powers that are conferred on them by necessary implication from a specifically conferred power, and (3) those powers that are necessary and essential to their governance. Given those limitations, identifying the powers of counties, cities, and towns should be a simple matter of finding the applicable provisions of law and applying Judge Dillon's three-part test. However, things are not so simple because many grants of authority are restricted to local governments by geography, population, or form of government. Examples of geographic limits occur in many grants of authority. For example, certain powers may be granted to localities having a population of a certain size, to a geographic location, e.g., localities located in Tidewater Virginia, as defined in Virginia Code Section 28.2-100, or to localities that are adjacent to other localities. Further complicating these grants by population is that localities can "grow" into a power with a population increase, but once a power conferred by population that power is retained even if the population drops below the population threshold, Virginia Code Section 1-236.

Furthermore, the General Assembly has enacted many laws of "general application" with classifications that are so narrowly described that only one or a few localities qualify for the grant of authority. As Professor A.E. Dick Howard has observed, these narrowly-drafted laws are presented as general laws in order to avoid the constitutional requirement for a two-thirds vote of the members elected to each house of the General Assembly, Virginia Constitution Article VII, Section 1. A.E. Dick Howard, Commentaries on the Constitution of Virginia, (The University Press of Virginia), pp. 806-07. Also, in response to a judicial interpretation of an existing law, the General Assembly sometimes enacts legislation to amend a law when the General Assembly disagrees with the result of a significant court interpretation of a statute. Such potential changes provide an important reason to check for any subsequent amendments to a statute following a judicial interpretation. Finally, many laws of very narrow or specific application are not set out among the published provisions of the Virginia Code, including municipal charters and other specific laws. The publishers of the Virginia Code then highlight that omission with this mysterious simple note: [not set out].

In short, the Virginia laws empowering and limiting local governments form a large and complex web of grants and limitations. Some of those powers and limitations are not readily apparent. For that reason, those who represent local governments, those who work with local governments, and those who might want to challenge local governments must be as familiar with these laws and limitations and their dark corners much as a spider knows its own web.

But there is good news, and the good news here is that a lawyer working on a local government issue does not need to become a nerdy spider to figure out this legal web. The General Assembly's Division of Legislative Information Services annually publishes legislation as it is introduced and the final, approved legislation as the Acts of the Virginia General Assembly. The Division also publishes a range of major study reports and other documents that explain much of the legislative action. See http://dls.virginia.gov/publications.html. The Division also publishes the Virginia Administrative Code, municipal charters, compacts, uncodified acts, and a current version of the Virginia Code. Also, the Virginia Code Commission publishes reports of statutory recodifications that describe important clarifications and revisions. These sites are provided by the Commonwealth, and the information therein is available without charge online. In short, this is where to find legislative history and a lot more information.

Happy hunting!

Michael H. Long
As legal counsel to local governments and public entities, members of our Section are often called upon to advise our clients concerning compliance with the Americans with Disabilities Act. Compliance with the ADA can present unique challenges, especially in the context of public parks and recreation youth services. This is often a very sensitive and charged area of practice, fraught with the emotions of parents and caregivers, children, and public employees who are striving to do their best with the resources available. At times, there is difficult nexus of a desire to provide services with a concern for the well-being of the children, the burdens or expectations that can be placed upon public employees, a concern for the employees’ well-being, and exposure to potential liability. The following article, reprinted by permission of the author and previously published in Parks & Recreation, a magazine published by the National Recreation and Park Association, addresses a particularly sensitive area where all of these concerns are present and may be amplified because parents of children with disabilities often face extraordinary challenges in obtaining care for their children so they can go to work. Parks and recreation programs are often seen as a provider; however, there are very fine lines between compliance and potential liability from multiple directions. I hope this article will help you as you navigate these sensitive areas. It certainly helped me when I was asked to help a client navigate these challenges.

Eric A. Gregory
Board of Governors

Rectal Syringe Procedure
Unreasonable ADA Accommodation

James C. Kozlowski

The Americans with Disabilities Act (ADA) is a comprehensive civil rights law enacted “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1).

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

To bring a claim under Title II of the ADA, a plaintiff must establish that (1) he or she is a qualified individual who has a disability as defined by the statute, (2) he or she was excluded from a benefit provided by the public entity, and (3) exclusion was “by reason of” the disability.

An individual can show he or she was excluded from a benefit provided by a public entity by showing that the entity refused to provide a reasonable accommodation. Under Title II, a requested accommodation must be a reasonable one.

Title II regulations require reasonable modifications in policies when necessary to avoid discrimination on the basis of disability unless doing so would fundamentally alter the nature of
the service (see 28 C.F.R. § 35.130(b)(7)) or would create undue financial and administrative burdens. To prove an undue burden, a public entity would be required to show the costs are excessive in relation either to the benefits of the modification or to the entity’s financial survival or health.

**Camp Seizure Medication**

In the case of *United States of America v. Northern Illinois Special Recreation Association*, 2016 U.S. Dist. LEXIS 31565 (N.D. Ill. 3/2/2016), the issue before the federal district court was whether it would be a reasonable accommodation to require employees at a summer camp to administer seizure medication (Diastat) through a rectal syringe in the event of a seizure emergency.

The Northern Illinois Special Recreation Association (NISRA) is an agency that was created through an intergovernmental agreement between 13 local park districts and municipalities for the purpose of providing community-based park and recreation programs for people of any age with disabilities. NISRA programs include seasonal programs as well as summer camps that run six to eight weeks long, featuring arts and crafts, music and games, singing, theater, swimming and other camp activities.

NISRA staff members routinely maintain custodial supervision over all participants attending NISRA programs. Their tasks include, among other things, toileting assistance (including the use of a urinal bottle), changing diapers for both adults and children, showering participants and changing their clothes, lifting participants with physical disabilities, monitoring glucose-sugar levels with blood testing, feeding and medicating participants through gastro-feeding tubes, administering maintenance medications (such as Ritalin and Ativan), and recognizing and responding to a wide range of medical emergencies using first aid.

A majority of NISRA summer camp employees are part-time, typically high school and college-age students in their late teens or early twenties. Oftentimes, employment with NISRA is their first job. NISRA camp counselors are not required to have experience with disabled individuals to be hired by NISRA. Moreover, most camp counselors have not worked with disabled individuals prior to working at NISRA.

For more than a decade, Megan Monica had attended seasonal NISRA programs and summer camps. She was prescribed Diastat because of her epilepsy.

Diastat is the only FDA-approved medication for out-of-hospital treatment of emergency seizures. Diastat is administered rectally in a pre-filled plastic applicator. Diastat is generally prescribed for convulsive seizures that have lasted five minutes or more (i.e., a “prolonged seizure”) and for cluster seizures. Approximately 30 NISRA participants listed Diastat as a current medication.

Between 2001 and 2007, NISRA allowed its staff to administer Diastat in certain situations. After its 2008 summer-camp session, however, NISRA changed its policy to no longer allow its staff to administer Diastat under any circumstance. This policy applied to all NISRA participants.

Under NISRA’s seizure policy, NISRA participants with a history of seizures submitted a seizure plan in which their doctor described the type of seizures they experience, the medications they currently take and the protocol to follow in the case of a seizure.

If a convulsive seizure occurred, NISRA’s policy required the nearest staff member to follow basic first-aid protocol and move the other participants away from the area to preserve the person’s privacy. The staff member was trained to ease the person onto the ground, turn the person on his or her side and monitor the person’s breathing. Additionally, the staff members were directed to follow the person’s seizure plan to the best of their ability and call 911 as directed.
Nowhere in the NISRA medic/first aid training materials or basic first aid response did the training discuss giving Diastat or any other medication in response to a seizure.

**NISRA Accommodations**

NISRA evaluated requests for accommodation on a case-by-case basis. Most NISRA participants need reasonable accommodations of some sort, but if there was a request that went beyond the scope of the reasonable accommodation that was built into the program or camp or beyond the scope of simple accommodations, NISRA’s Superintendent of Recreation reviewed the request using NISRA’s Personal Medical Care Protocol.

Under NISRA’s Personal Medical Care Protocol, the Superintendent of Recreation looked at multiple factors to determine if NISRA can safely provide the requested accommodation:

1. *whether the requested accommodation requires medical judgment;*
2. *the manufacturer’s instructions and medical training required to perform the requested accommodation safely;* and
3. *the risk of harm of providing the requested accommodation if it were performed improperly.*

If a request was approved under this Personal Medical Care Protocol, NISRA typically required at least two of its staff to be trained regarding the accommodation. Although NISRA no longer does a case-by-case analysis of whether it will permit its staff to administer Diastat, it does do a case-by-case analysis of the other alternative accommodations NISRA would provide to an affected participant.

After deciding that it would not allow its employees to administer Diastat, NISRA began offering families other accommodations, including asking if the parent or family could provide a family member or personal aide at the program, who would not be charged program fees.

Since Monica’s siblings were NISRA employees, she received a 75 percent discount on program fees. In addition, NISRA offered to allow Monica’s siblings “to come off the clock and provide Diastat to Megan as a family member should the need arise.” During the course of litigation, NISRA indicated it would also allow the Epilepsy Foundation to provide volunteers to attend NISRA programs and administer Diastat when needed.

**Motion to Dismiss ADA Complaint**

In the original complaint against NISRA, the federal government, through the Department of Justice (DOJ), petitioned the federal district court to order NISRA to “administer Diastat to Megan Monica for convulsive seizures.” In response, NISRA filed a pretrial motion to dismiss, claiming DOJ had not alleged a sufficient set of facts that would support a claim under the ADA. The federal district court rejected NISRA’s motion to dismiss and allowed the federal government’s ADA claim to proceed to trial, *United States of America v. Northern Illinois Special Recreation Association*, No. 12 C 7613, 2013 U.S. Dist. LEXIS 52100 (N.D. Ill. 4/11/2013).

Two years later, in 2015, the federal district court conducted a trial on the ADA claim against NISRA, issuing the reported opinion described herein in 2016.

**Emergency Reality**

As noted by the federal district court, the ADA would require DOJ to show that NISRA camp staff administering Diastat was a reasonable accommodation under the circumstances. In the opinion of the federal district court, issuing an order that “forces lay people to administer an emergency rectal medication creates several problems.” In particular, the court found the “realities of administering the medicine in a real-life emergency situation” would have to
be taken into account in determining whether it would be reasonable to require NISRA staff to administer Diastat. In so doing, the court noted that NISRA does not employ medical personnel and “the majority of NISRA’s summer camp employees are part-time high school and college-age students.”

DOJ had argued that the administration of Diastat was a reasonable accommodation under the ADA because it was similar to other medical accommodations already provided by NISRA staff. Specifically, DOJ had cited NISRA policy to allow staff to feed a participant through a gastro-feeding tube or administer other rescue medicines, such as an Epi-pen or inhaler. While acknowledging some similarities, the federal district court disagreed that devices like gastro-feeding tubes and Epi-pens were necessarily “similar enough to prove that the administration of Diastat must also be considered a reasonable accommodation.”

While a gastro-feeding tube may be part of a daily routine, the court noted Diastat is reserved for emergency situations “that may only happen once in every five years, if at all.” Moreover, the court found “time is not of the essence” when a NISRA staff member is learning to feed a NISRA participant through a gastro-feeding tube. On the contrary, the court noted a staff member with questions would have enough time to ask for help in assisting a NISRA participant with a gastro-feeding tube.

Further, while Epi-pens and Diastat were both required in emergency situations, the court found “a stark difference between Epi-pens and Diastat lies in administration of the drugs.” Compared to Diastat, the court noted, “the operation of an Epi-pen is a much simpler task.”

Epi-pens are administered through a needle that can pierce clothing, even thick blue jeans...To administer Diastat, the caregiver must remove a person’s clothing between their waist and knees. Instead of a needle, Diastat is administered through a plastic applicator that must be lubricated and inserted into a person’s rectum...

If possible, the caregiver should put on gloves before administering Diastat because the caregiver may be exposed to feces or urine...In a larger person, it may be difficult to get the syringe into the rectum and, depending on the physical location of the individual, it may be difficult to position the individual to insert the syringe. Improper lubrication can cause damage to the seizing individual’s rectum. There is also a danger of the medication leaking out of the rectum. If Diastat does leak, it is difficult to tell how much of it leaked out of the bottle. Lastly, Diastat can be accidentally administered into the vaginas of female patients.

Drug Instructions Contradiction

Perhaps most significantly, the federal district court found “the government’s requested accommodation seems to directly contradict the manufacturer’s instructions for Diastat, which are mandated by the FDA [Food and Drug Administration] to accompany the drug.”

As characterized by the federal district court, “these instructions contemplate a system in which the caregiver and doctor interact directly and come to agreement regarding the caregiver’s role and competence and the ‘exact conditions’ when to treat with Diastat.” According to the court, these “exact conditions” would include “what is and is not an episode appropriate for treatment and the timing of administration in relation to the onset of an episode.” Moreover, the court found the following explicit warning and instructions would “also contemplate the caregiver having an intimate knowledge of an individual patient’s condition sufficient to distinguish ‘ordinary’ seizures from the seizures that would require Diastat.”

WARNINGS

General
Diazepam rectal gel should only be administered by caregivers who, in the opinion of the prescribing physician, (1) are able to distinguish the different clusters of seizures (and/or the events presumed to herald their onset) from the patient’s ordinary seizure activity, (2) have been instructed and judged to be competent to administer treatment rectally, (3) understand explicitly which seizure manifestations may or may not be treated with Diazepam rectal gel, and (4) are able to monitor the clinical response and recognize when that response is such that immediate medical evaluation is required.

The successful and safe use of Diazepam rectal gel depends in large measure on the competence and performance of the caregiver...

Because a non-health professional will be obliged to identify episodes suitable for treatment, make the decision to administer treatment upon the identification, administer the drug, monitor the patient, and assess the adequacy of the response to treatment, a major component of the prescribing process involves the necessary instruction of this individual...

In the opinion of the court, under the circumstances, it was not reasonable to grant the government’s request for the court to order NISRA camp staff to “administer Diastat to Megan Monica for convulsive seizures” because NISRA would be required to “disregard these cautionary instructions.” Moreover, under the circumstances, part-time high school and college-age employees at NISRA summer camps might not reasonably be expected to effectively implement these instructions and function as competent “caregivers” in administering Diastat in an emergency situation.

As a result, the federal district court concluded, “the government has failed to meet its initial burden of showing that its requests are considered reasonable accommodations under the ADA.” In so doing, the court also acknowledged NISRA’s efforts to provide alternative accommodations for Monica.

The evidence showed that NISRA participants have quick access to 911, and I find that NISRA has gone out of its way to give financial discounts to epileptic participants, such as Megan, and other concessions that make its refusal to administer Diastat easier to bear.

In reaching this determination, the court noted that the “decision might be different if the government had presented statistics on how a Diastat program under similar circumstances has worked and been successful.” While acknowledging the possibility that “this data does not exist,” the federal court noted “this issue may need to be reexamined at some point in the future if and when such data becomes available.”

**Fundamental Alteration Defense**

Assuming the government had been able to “meet its initial burden of showing that its requests are considered reasonable accommodations under the ADA,” in its defense, NISRA had argued that “the accommodation requested would fundamentally alter the nature of NISRA’s services and subject NISRA to an undue amount of liability and administrative costs.”

As described by the federal district court, the “fundamental alteration defense” would allow a public entity “to avoid making modifications to accommodate disabled individuals if it can show that adapting existing institution-based services to a community-based setting would impose unreasonable burdens or fundamentally alter the nature of its programs or services.” In the opinion of the federal district court, NISRA had failed to prove this defense because “NISRA already offers many similar health and emergency services.” Moreover, the court found NISRA had failed to present sufficient evidence to show that the requested accommodation would require hiring additional medical personnel.
NISRA had also argued “the accommodation sought by the government would subject NISRA to an undue amount of liability and administrative cost.” The federal district court rejected this argument.

*The fear of a lawsuit, however, alone is not enough to constitute an undue burden under the ADA, because if it were, the defense would swallow the rule. NISRA’s argument concerning administrative costs fails for similar reasons. To prove these defenses, NISRA was required to present specific evidence. NISRA chose not to do so.*

That being said, the court reiterated, “NISRA was not required to prove any of its affirmative defenses [fundamental alteration and/or undue financial burden] because the government failed to meet its initial burden” of proof under the ADA to show that the requested accommodation was reasonable under the circumstances.

**Conclusion**

Having found no evidence that NISRA violated Title II of the ADA under the circumstances of this case, the federal district court entered judgment in favor of NISRA.

*For more on this topic, read Kozlowski’s July 2013 Parks & Recreation magazine article, “Administration of Emergency Seizure Medication Discontinued.”*
Local Government Fellowship Recipients

First awarded in 2013, the Local Government Fellowship annually recognizes outstanding Virginia law students who will work full-time during the summer at a local government attorney’s office within the Commonwealth. The Board of Governors is delighted to announce that Sara Maynard and Aaron Pinsoneault have been selected as this year’s Local Government Fellows. Sara is a rising 3L at the University of Richmond Law School. She will intern with Henrico County. In her personal statement, Sara described her interest in the myriad aspects of a local government law practice and was looking forward to putting her Third-Year Practice Certificate to use on behalf of the county.

Aaron is a rising 2L student at the College of William & Mary Law School. He will spend the summer interning at the City of Suffolk’s Attorney’s Office.

In our busy practices and hectic lives, we sometimes forget the good work that local government does. Aaron’s application essay, which we share here, serves as a pointed reminder that our efforts can be inspirational and truly do make a difference.

I lived in Kent, Ohio, from the time I was two years old until I left for law school at age twenty-two. Located about an hour’s drive south of Cleveland, Kent is probably best known as the home of Kent State University. It is also the home of Acorn Alley, a vibrant shopping district that now dominates downtown. Acorn Alley was the brainchild of a committed local government, and it is a large part of why I want to work in local government.

For most of my childhood, Kent’s downtown was unremarkable. Although not an eyesore, I cannot imagine many people saw it as a selling-point for the city. The buildings were showing their age, and downtown was largely cut off from the university’s campus by one of Kent’s main streets. Though downtown was home to some of the staples of the community—like Ray’s Place, Taco Tontos, and Woodsy’s Music Store—I do not remember many new businesses coming through. Our unremarkable downtown contributed in some part to the city’s underwhelming economic performance throughout much of my childhood.

That started to change when I was in high school. The city government partnered with Kent State to undertake the hundred-million-dollar Acorn Alley renovation project. Over the next several years, the city rebuilt downtown and injected new life into it. It opened up a dingy alley and turned it into the eponymous Acorn Alley, a brick walkway lined with shops that ran through downtown and opened on the other side near the Kent State campus. Many of the other nearby streets underwent a similar transformation, and downtown began to bustle.

Throughout my high school years, I was able to watch my hometown undergo a massive, government-led change for the better. My friends and I began spending more and more time downtown. It seemed like there was always a new restaurant to try or some new shop one of us wanted to peek inside. We were not the only ones. As the project went on, downtown got livelier, and more and more people seemed to be there.
I do not see any way for Acorn Alley to have happened except through local government action. Kent is not a big enough city for the state or national government to pay much attention to it. Private developers probably would not have invested that kind of money either, given that Kent is probably too small to justify the risk. The city needed its government to step in, take the big risk, and improve things.

The law school at William and Mary strives to produce citizen-lawyers, lawyers who take an active part in their community. That ethos made me think about how much my local government had benefitted my community, and I realized that the city attorney played a crucial role in putting together many of the land deals and various contracts that were necessary to make Acorn Alley a reality. I want to work as a city attorney so that I can help my next community with its own version of Acorn Alley. I hope one day to use my legal skills to help my next home thrive.

We congratulate Sara and Arron and trust that they will have a wonderful summer. This year’s Fact Sheet and Application may be reviewed for informational purposes.

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**Election of Officers and Board of Governors**

At its annual meeting held on June 13, 2019, in Virginia Beach, the Local Government Section of the Virginia State Bar accepted the report of the nominations committee and elected the following as officers of the Section for one-year terms beginning on July 1, 2019:

- **Chair - Rebecca Kubin**, Deputy City Attorney, Virginia Beach
- **Vice Chair - Bernadette Peele**, Senior Assistant County Attorney, Prince William
- **Secretary, Cynthia Bailey**, Deputy County Attorney, Fairfax

Elected to the Board of Governors for their first three-year terms beginning July 1, 2019:

- **Kathleen Dooley**, City Attorney, Fredericksburg
- **Wahaj Memon**, Assistant County Attorney, Loudoun

Bernadette Peele was elected to a second three-year term. By virtue of serving as Chair, Rebecca Kubin’s second term is extended.

Board members **Minchau Corr** and **Brian Lubkeman** had been appointed by the Board to fill vacant seats and were elected to fill the remainder of the terms which expire June 30, 2020.

As immediate past-president, **Eric Gregory** of Hefty, Wiley & Gore will roll of the Board. Many thanks to Eric for his years of service.