RECENT FEDERAL CASES
OF INTEREST TO GOVERNMENTAL ENTITIES

TEXAS CITY ATTORNEYS ASSOCIATION
HOUSTON, TEXAS
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D. RANDALL MONTGOMERY
MICHAEL JUSTUS
D. Randall Montgomery & Associates, P.L.L.C.
12400 Coit Road, Suite 560
Dallas, Texas 75251
(214) 292-2600
Rmontgomery@drmlawyers.com
mjustus@drmlawyers.com

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I. FIRST AMENDMENT

***MC Allen Grace Brethren Church v. Salazar*, ---F.3d---, 2014 WL 4099141 (5th Cir., August 20, 2014)**

Robert Soto and numerous other plaintiffs sued the U.S. Department of the Interior over its role in enforcing a regulation, issued under laws protecting eagles, that allows only "members of federally recognized Indian tribes" to possess eagle feathers. "Soto is involved in a ministry that uses eagle feathers in its worship practice, and his sincerity in practicing his religion is not in question." He and the other plaintiffs claimed that the regulation violated the right, under the First Amendment and the Religious Freedom Restoration Act, of "American Indians who are not members of federally recognized tribes" to possess bald and golden eagle feathers. The district court granted summary judgment for the government, and the plaintiffs appealed only the ruling against their RFRA claim.

The Fifth Circuit reversed and remanded. The government did not deny that the regulation substantially burdened the plaintiffs' religious beliefs, so the RFRA burden of proof shifted to the government "to establish that the regulation (1) advances a compelling government interest, and (2) is the least restrictive means of furthering that interest." The Court "agree[d] with the Tenth and Ninth Circuits that protecting bald eagles qualifies as a compelling interest because of its status as our national symbol, regardless of whether the eagle still qualifies as an endangered species." And "because the bald eagle [was] often killed by persons mistaking it for the golden eagle," Congress extended protection to golden eagles. The government also argued that limiting access to eagle feathers to members of federally recognized tribes advanced its compelling interest in "'fulfilling its unique responsibilities to federally recognized tribes.'" The Court thought this was possibly a compelling interest, but not proven on summary judgment. Congress, in passing the laws on which the regulation was based, did not specify that only members of federally recognized tribes could possess eagle feathers, and the Department of the Interior's original regulation did not include that requirement. "The [d]epartment has failed to present evidence ... that an individual like Soto ... would somehow cause harm to the relationship between federal tribes and the government if he were allowed access to eagle feathers ...."But even if "either or both interests (protect[ing] ... eagles and further[ing] the relationship with federally recognized tribes) are compelling governmental interests," the government failed to prove as a matter of law that it advanced them by using the least restrictive means.

First, the government argued that permitting possession by American Indians who are not members of federally recognized tribes would lead to an increase in poaching. The Court's answer was that "[t]his case involves eagle feathers, rather than carcasses. It is not necessary for an eagle to die in order to obtain its feathers. Thus, speculation about poaching for carcasses is irrelevant ...." The government also argued that enforcement agents in the field would have no way of verifying if someone not in a federally recognized tribe was, indeed, an American Indian. The problem was that "the evidence in the record indicates that agents currently have to rely on anecdotal information and interviews" to determine whether someone is a lawful possessor of eagle feathers.

For these and other reasons, the Court found that the regulation was not proven to be the least restrictive means of protecting eagles. "On remand, the district court should consider the authorities cited in light of the Supreme Court's recent holding in [*Burwell v. Hobby Lobby Stores, Inc*.] and its exacting standard." The regulation was also not proven to be the least restrictive means of "further[ing] the relationship with federally recognized tribes" (if it is a compelling interest). Allowing more people access to feathers might lengthen the time it presently takes for members of federally recognized tribes to get feathers, but there was no evidence of how many more, so there was no way to evaluate that concern. Further, the government's system for permitting and fulfilling requests for eagle feathers is

"inefficient," and it "cannot infringe on Soto's rights by creating and maintaining an inefficient system and then blaming those inefficiencies for its inability to accommodate [him]."

***Hurst v. Lee County*, --F.3d.--, 2014 WL 4109647 (5th Cir., August 21, 2014)**

The sheriff of Lee County, Mississippi, terminated the employment of Rodricus Hurst for talking to a reporter about the arrest and detention the night before of a Mississippi State University football player. The sheriff determined that Hurst, in providing information to the reporter about the arrest, violated his policy that "only the [s]herifff or his 'designee' would be permitted to coordinate with the media with respect to crimes and investigations," and that non-designees (such as Hurst) could not. Before trial, the district court held that the administration finding (in the course of Hurst's application for unemployment compensation) that Hurst violated the sheriff's media relations policy was res judicata, but that it did not preclude Hurst's claim against the county alleging that his termination for violating the policy violated the First Amendment. After Hurst's case-in-chief, the county moved for judgment as a matter of law, which the district court granted on the grounds that the First Amendment did not protect Hurst because he spoke as an employee, not a citizen, and to any degree that he did speak as a citizen, the First Amendment did not protect Hurst because he spoke on a matter that was not a public concern.

The Court affirmed on the first ground only. Even though Hurst was designated to provide some of the information he gave to the reporter, he still spoke as an employee. "Sheriff Johnson's media relations policy states that employees like Hurst were authorized to take field calls from the media ... and to provide certain limited information when doing so.... Further, the Sheriff at his discretion could have authorized Hurst as his designee to make other statements to the media. Hurst did not obtain that authorization.... Accordingly, we hold that Hurst's statements to the news reporter... [were] 'ordinarily within the scope of [Hurst's] duties' and did not 'merely concern those duties' [quoting Lane v. Franks, 134 S. Ct. 2369, 2379 (2014)]."

McCullen v. Coakley, 573 U.S. ___, 134 S.Ct. 2518 (U.S. 2014)

Massachusetts' Reproductive Health Care Facilities Act, originally passed in 2000, was amended in 2007 to create a 35-foot buffer zone around reproductive health care facilities. The Act was challenged under the First and Fourteenth Amendments. Chief Justice John Roberts delivered the opinion of the Court, writing that, "The buffer zones burden substantially more speech than necessary to achieve [Massachusetts'] asserted interests." He stated that Massachusetts failed to show that it tried less intrusive alternatives first. Associate Justice Scalia filed an opinion concurring in the judgment. He disagreed with Roberts' analysis in considering whether the law is content-based and thus subject to strict scrutiny. Instead, he wrote that the buffer zones were unconstitutional because its primary purpose was just "to 'protect' prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks." Associate Justice Alito also filed an opinion concurring in the judgment, stating that the law blatantly discriminates based on viewpoint. He noted that while anti-abortion supporters criticizing the clinic may not enter the zone, clinic counselors or other employees may do so, giving them opportunities to talk to prospective clients.

***Town of Greece v. Galloway*, --S.Ct. --, 2014 WL 1757828, U.S., May 05, 2014.**

Since 1999, Greece, New York has opened monthly town board meetings with a roll call, recitation of the Pledge of Allegiance, and a prayer by a local clergy member. While the prayer program is open to all creeds, nearly all local congregations are Christian. Citizens alleged violation of the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers and sought to limit the town to "inclusive and ecumenical" prayers that referred

only to a "generic God." The district court entered summary judgment upholding the prayer practice. The Second Circuit reversed, holding that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that the town endorsed Christianity. A divided Supreme Court reversed, upholding the town's practice. Legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. Most states have also had a practice of legislative prayer and there is historical precedent for opening local legislative meetings with prayer. Any test of such a practice must acknowledge that it was accepted by the Framers and has withstood the scrutiny of time and political change. The inquiry is whether the town of Greece's practice fits within that tradition. To hold that invocations must be nonsectarian would force legislatures sponsoring prayers and courts deciding these cases to act as censors of religious speech, thus involving government in religious matters to a greater degree than under the town's current practice of neither editing nor approving prayers in advance nor criticizing their content after the fact. It is doubtful that consensus could be reached as to what qualifies as a generic or nonsectarian prayer. The First Amendment is not a "majority rule" and government may not seek to define permissible categories of religious speech. The relevant constraint derives from the prayer's place at the opening of legislative sessions, where it is meant to lend gravity and reflect values long part of the Nation's heritage. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based only on the content of a particular prayer will not likely establish a constitutional violation. If the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers to achieve religious balance.

***Morgan v. Swanson*, ---F.3d.---, 2014 WL 1316929 (Fifth Circuit, April 2, 2014)**

Doug Morgan sued Lynn Swanson—the principal of his son's public elementary school—for preventing him, in violation of the First Amendment, from "distribut[ing] ...religious material to other consenting adults" who were also present in his son's classroom for a party during a school day in December 2003. Separately, Morgan and his wife on behalf of their son, and some other parents on behalf of their children, sued Swanson, at least one other principal, and the Plano Independent School District for violating their children's First Amendment right to distribute such materials at these parties. In 2011, the Fifth Circuit en banc held that the principals did violate the children's right, but that they were entitled to qualified immunity. *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc). There were also two related appeals. In one, the Court held that the school district's modified (in 2005) policy for distribution of material was facially constitutional, but that the plaintiffs' challenges to the earlier policy were not moot. *Morgan v. Plano Independent School District*, 589 F.3d 740 (5th Cir. 2009) (King, Higginbotham and Clement). In the other, the Court held that the school district was entitled to summary judgment against the Morgan child's claim under the Texas Religious Freedom Restoration Act because his parents failed to satisfy the statute's pre-suit notice requirement. *Morgan v. Plano Independent School District*, 724 F.3d 579 (5th Cir. 2013) (King, Davis and Elrod). But, again, in this case Morgan had sued Swanson for his own alleged deprivation when Swanson, at the party, told him "not to distribute the religious material to other consenting adultsin the classroom." The district court held that Swanson was entitled to qualified immunity and dismissed the claim against her in her individual capacity. The Fifth Circuit affirmed. Like the district court, the Fifth Circuit did not consider whether Swanson's prohibition was constitutional, only whether "'no reasonable official' would have deemed the disputed conduct constitutional." Morgan could not satisfy that standard because there was no case sufficiently on point. He "argue[d] that his right to distribute religious material is clearly established because 'regardless of forum, viewpoint discrimination regarding private speech is unconstitutional.'" The Court did not disagree, but found that principle far too broad

to provide a public official "with any sense of what is permissible under a certain set of facts." Indeed, it noted that the en banc opinion in 2011, dealing with the children's First Amendment right, "already rejected the viewpoint discrimination principle as 'far too general' to establish the law in this context." Judge Benavides, in a special concurrence, observed that "[g]iven the wholesale absence of authority addressing the rights of adults in the classroom, the contours of those rights are even less distinct" than the children's rights that the en banc Court considered in 2011.

***Morgan v. Swanson*, --F.3d.--, 2014 WL 2484235 (5th Cir., June 3, 2014)**

In a separate lawsuit, Morgan and his wife on behalf of their son (and some other parents on behalf of their children) sued Swanson, at least one other principal, and the Plano Independent School District for violating their children's First Amendment right to distribute such materials at these parties. In 2011, the Fifth Circuit en banc held that the principals violated the children's right, but that they were entitled to qualified immunity because the right was not clearly established. *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc). There were also two appeals related to the lawsuit on behalf of the children. In one, the Court held that the school district's modified (in 2005) policy for distribution of material was facially constitutional, but that the plaintiffs' challenges to the earlier policy were not moot. *Morgan v. Plano Independent School District*, 589 F.3d 740 (5th Cir. 2009). In the other, the Court held that the school district was entitled to summary judgment against the Morgan child's claim under the Texas Religious Freedom Restoration Act because his parents failed to satisfy the statute's pre-suit notice requirement. *Morgan v. Plano Independent School District*, 724 F.3d 579 (5th Cir. 2013). But, again, in this case, Morgan had sued Swanson for his own alleged deprivation when Swanson, at the party, told him "not to distribute the religious material to other consenting adults in the classroom." The district court held that Swanson was entitled to qualified immunity and dismissed the claim against her in her individual capacity.

Like the district court, the Fifth Circuit did not consider whether Swanson's prohibition was constitutional, only whether "'no reasonable official' would have deemed the disputed conduct constitutional." Morgan could not satisfy that standard because there was no "factually analogous precedent [that] clearly established the disputed conduct as unconstitutional." He "argue[d] that his right to distribute religious material is clearly established because 'regardless of forum, viewpoint discrimination regarding private speech is unconstitutional.'" The Court did not disagree, but found that principle far too broad to provide a public official "with any sense of what is permissible under a certain set of facts." Indeed, it noted that the en banc opinion in 2011, dealing with the children's First Amendment right, "already rejected the viewpoint discrimination principle as 'far too general' to have clearly established, at the time of the incident, Swanson's constitutional obligations vis-à-vis the holiday party."

Judge Benavides, in a special concurrence, observed that "[g]iven the wholesale absence of authority addressing the rights of adults in the classroom, the contours of those rights are even less distinct" than the children's rights that the en banc Court considered in 2011. Judge Clement, in a concurrence, opined that Morgan en banc's holding about the children's right compelled the conclusions that Swanson also violated Morgan's right and that Morgan's right was not clearly established. But she also noted that since Morgan en banc, the law now is clearly established, so "[i]f the facts of Morgan were repeated in another case today, the outcome would be different, and rightly so. Ours was a nation founded by those who sought a place where they could proclaim their faith freely."

II. FOURTH AMENDMENT

***Thompson v. Mercer*, ---F.3d---, 2014 WL 3882460 (5th Cir. Aug. 7, 2014)**

On the morning of Sunday, December 18, 2011, Keith Thompson was killed when Palo Pinto County Sheriff Ira Mercer ended a two-

hour high-speed chase of a stolen vehicle containing a kidnapped victim by firing an assault rifle into Thompson's vehicle. Keith Thompson's parents ("the Thompsons") brought the civil action against Sheriff Mercer and the County pursuant to state law and 42 U.S.C. § 1983 alleging that Sheriff Mercer used excessive force in apprehending Thompson.

The facts are undisputed that Thompson stole a vehicle, kidnapped its sleeping occupant, and then fled for two hours at over 100 mph. The kidnapped victim called 911 during the high speed chase and informed dispatchers that there was a firearm in the vehicle. The dispatchers heard Thompson state that he would kill himself when he "got to where he was going." While in flight, "Thompson ignored traffic laws, did not yield to law enforcement, and was at one point pursued by six-vehicles representing four different law enforcement units." Officers made multiple attempts to disable Thompson's vehicle, but each attempt failed. Sheriff Mercer did not participate in the pursuit but was kept apprised of developments.

Sheriff Mercer laid in wait with a semi-automatic "AR-15" assault rifle on a rural road. When Thompson's vehicle came into view, Mercer fired into its hood and struck the radiator. Thompson's vehicle did not slow down. Mercer then aimed directly into the windshield and struck Thompson three times in the head and neck after firing twelve rounds. There were no bystanders in the area and no traffic in the vicinity.

Thompsons's parents brought a civil action against Sheriff Mercer and the County pursuant to 42 U.S.C. § 1983 alleging that Sheriff Mercer used excessive force in apprehending Keith Thompson. The district court awarded summary judgment in favor of the police officers/defendants.

The Thompsons appealed to the U.S. Court of Appeals for the Fifth Circuit. The court of appeals held that "[e]ven construing the facts in favor of the Thompsons, it seems clear that Sheriff Mercer acted within the bounds of the Constitution, and is entitled to qualified immunity even if we assume that he did not." First, the Fifth Circuit determined that the Thompsons had not alleged a constitutional violation. To prevail on an excessive force claim, "the Thompsons need only show that the use of deadly force was excessive, and that the 'excessiveness of the force was unreasonable.'" The court of appeals determined that Sheriff Mercer's use of deadly force was justified. The officers from three agencies had already tried to intercept and disable the vehicle four times. The officers also tried to deploy stop sticks on the interstate, and a deputy later fired a shotgun at Thomson's tires. "Sheriff Mercer was the last one who could intercept Keith [Thompson]'s vehicle before he headed into the town of Lone Camp, which the Thompsons describe as 'approximately a mile' away." Thus, given the circumstances and the egregious nature of Thompson's flight, there was no Fourth Amendment violation in that decision. Second, even assuming arguendo that Mercer's use of force was excessive under the Fourth Amendment, the court of appeals determined that Mercer's "decision was not so unreasonable so as to deprive him of qualified immunity from § 1983 liability." Accordingly, the court of appeals held that that there was no Fourth Amendment violation in the seizure of Keith Thompson and Sheriff Mercer was entitled to qualified immunity as a matter of law.

***Luna v. Mullenix*, ---F.3d---, 2014 WL 4251122 (5th Cir., August 28, 2014)**

A police officer's attempt to arrest Israel Leija led to a 26-mile car chase on Interstate 27 between Lubbock and Amarillo starting at around 10:20 p.m. As Leija proceeded north at speeds from 80 to 110 miles per hour, law enforcement officers ahead of the chase deployed tire spikes at three locations. The first location that Leija would encounter was underneath the Cemetery Road overpass, where a police officer from the nearby town of Canyon had taken his position. On the overpass was Texas Department of Public Safety Trooper Chadrin Mullenix, who "planned to use his .223 caliber M-4 rifle to disable [Israel's] vehicle by shooting at its engine block." He fired six shots as the car approached; it continued onto the tire

spikes, and then veered left into the median, where it began to roll over. Leija was pronounced dead soon after, and an autopsy determined that at least four of Mullenix's shots hit Leija, and one of them killed him. The representative of Leija's estate, and the representative of his minor child, sued Mullenix via 42 U.S.C. § 1983 for "unconstitutional use of excessive force in violation of the Fourth Amendment." Mullenix asserted qualified immunity and, after discovery, moved for summary judgment. The district court denied his motion.

The Fifth Circuit affirmed, holding that "[w]ith regard to high-speed chases, the Supreme Court has held that '[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.'" Here, on the other hand, "the risk posed by Leija's flight is disputed and debatable, and a reasonable jury could conclude that Leija was not posing a 'substantial and immediate risk' at the time of the shooting." Although Leija was clearly speeding excessively at some times during the pursuit, traffic in the rural area was light. There were no pedestrians, no businesses and no residences along the highway, and Leija ran no other cars off the road and engaged no police vehicles. Further, there is evidence showing that Leija had slowed to about 80 miles per hour prior to the shooting. Spike systems which could have ended the pursuit with non-lethal means had already been prepared in three locations ahead of the pursuit.

The Court distinguished *Thompson v. Mercer* (supra), where the Court "relies repeatedly on the fact that the officers had made four attempts to disable the vehicle with non-lethal means before resorting to deadly force.... In contrast ..., the non-lethal means that were already prepared [against Leija] were never given a chance to work." The Court acknowledged that Leija, during the case, had called a police dispatcher to warn that he had gun and would shoot at his pursuers if they did not break off, and that his threats had been conveyed to Mullenix and other officers involved in the pursuit (it turned out that he did not have a gun). "However, this fact is not sufficient, as a matter of law, to establish that Leija posed an immediate risk of harm at the time of the shooting." Since Mullenix could not establish the existence of the risk as a matter of law, and since "[a]t the time of this incident, the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a substantial and immediate threat, violated the Fourth Amendment," he was not entitled to qualified immunity on summary judgment.

Judge King dissented. Since there was no dispute about the facts, she argued that it was judges' responsibility, not jurors', to decide the one issue that the majority identified as a disputed fact: "'whether Leija was posing a substantial and immediate risk of danger ... sufficient to justify the use of deadly force.'" That was not disputed fact, but the legal question posed by the "objective reasonableness test." She would have answered that question in Mullenix's favor. His use of force was objectively reasonable. Among other reasons, Judge King noted that one of the "'non-lethal methods'" tried first in Thompson was firing a shotgun at the tires of the fleeing suspect's vehicle, and "[i]t is hard to see how [that] ... is any less lethal than shooting at its engine block." Further, "the fact that tire spikes twice failed to stop the suspect's truck in Thompson only adds to the evidence in this case that tire spikes are often ineffective."

***Riley v. California*, 573 U.S. ___, 134 S.Ct. 999 (U.S. 2014)**

This case consolidated two cases, *Riley* v. California itself, and *United States v. Wurie*, both with similar facts and the same conclusions, thus only the facts of the former are discussed herein. David Leon Riley was arrested on August 22, 2009, after a traffic stop resulted in the discovery of loaded firearms in his car. An officer searching Riley incident to the arrest seized a cell phone from Riley's pants pocket, accessed information on the phone, and noticed repeated use of a term associated with a

street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents. Based in part on photographs found, the state charged Riley in connection with a shooting and sought an enhanced sentence based on gang membership. Riley's lawyer moved to suppress all the evidence the officers had obtained during the search of his cell phone on the grounds that the search violated his Fourth Amendment rights. The trial court rejected this argument and held that the search was legitimate under the SITA doctrine. Riley was convicted. On appeal, the court affirmed the judgment based on the recent California Supreme Court decision *People v. Diaz*. In *Diaz*, the court held that the Fourth Amendment "search-incident-to-arrest" doctrine permits the police to conduct a full exploratory search of a cell phone (even if it is conducted later and at a different location) whenever the phone is found near the suspect at the time of arrest.

The California Supreme Court held that seizure of Riley's cell phone was lawful due to the fact that the seizure occurred during a "search incident to arrest." The court reasoned that historical precedent had been established from several cases brought to the U.S. Supreme Court; which that have allowed officers to seize objects under an arrestee's control and perform searches of those objects without warrant for the purpose of preserving evidence. In doing so, the court applied the case *People v. Diaz*, which held that the unwarranted search and seizure of a cell phone on Diaz's person was valid. The Court, with Diaz in mind, contended that only arrest is required for a valid search of an arrestee's person and belongings. The court then proceeded to apply *United States v. Edwards* to hold that the search was valid despite the fact that it had occurred 90 minutes after arrest. In the Edwards case, an arrestee's clothing was seized 10 hours after arrest in order to preserve evidence (paint chips) that might be present on the clothes. Given these cases, the court concluded that the search and seizure of Riley's cell phone was valid.

Chief Justice John Roberts delivered the opinion of the Supreme Court, concluding that a warrant is required to search a mobile phone. Roberts wrote that it fails the warrantless search test established in *Chimel v. California*: "Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon--say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one."

Although possible evidence stored on a phone may be destroyed with either remote wiping or data encryption, Roberts noted that is "the ordinary operation of a phone's security features, apart from any active attempt by a defendant or his associates to conceal or destroy evidence upon arrest." He then argues that a warrantless search is unlikely to make much of a difference: "Cell phone data would be vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed ... likewise, an officer who seizes a phone in an unlocked state might not be able to begin his search in the short time remaining before the phone locks and data becomes encrypted." Roberts then cites several common examples to either turnoff or prevent the phone's security features.

Furthermore, Roberts argued that cell phones differ in both a quantitative and a qualitative sense from other objects a person's pocket: "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life". The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought."

***Hogan v. Cunningham*, 722 F.3d 725 (5th Cir. 2013**)

A mother's concern that her ex-husband was in violation of a Texas court's child custody order led to the dispatch of two Corpus Christi police officers to meet the mother. The officers then proceeded to the apartment of the ex-husband, John Hogan. In the apartment, the officers tried to conduct a warrantless arrest that led to a "'controlled take-down'" that left Hogan with two broken ribs. Hogan then brought claims against the officers for unlawful arrest and use of excessive force to make the arrest and, under Texas law, for assault and battery. On summary judgment, the district court denied qualified immunity against the federal claims, and the officers' privilege defense under TEX. PENAL CODE § 9.51(a) against the state claims.

The Fifth Circuit affirmed in regards to the unlawful arrest claim. "For Hogan's [warrantless] arrest inside his home to be constitutional, there must have been probable cause and exigent circumstances." There was "probable cause [for the officers] to believe that Hogan was committing the felony offense of interference with child custody," but there were no exigent circumstances that existed as a matter of law. The officers argued that Hogan created exigent circumstances when, while they were standing in the open doorway of his apartment while they talked to him, he suddenly tried slamming the door, which hit the head of one of the officers. But

Hogan disputed that version, so the Court had to assume there were no exigent circumstances for going into Hogan's apartment to arrest him. Further, no reasonable police officer would have thought it was permissible for them to do so without a warrant or exigent circumstances.

Regarding Hogan's excessive force claim, the Fifth Circuit reversed and rendered for the officers. The officers testified that on entering the apartment, Officer Robert Cunningham instructed Hogan to turn around with his hands behind his back because he was under arrest, and that when Hogan refused, Cunningham started the take-down, which went so awry that Cunningham fell on top of Hogan and broke two of his Hogan's ribs. Hogan testified that both officers moved to tackle him to the floor as soon as they entered the apartment and that perhaps both officers were on top of him. Assuming the truth of Hogan's version, the officers used an amount of force that was not excessive as a matter of constitutional law or, even if it was, that not every reasonable police officer would know was unconstitutionally excessive.

III. SECTION 1983

***Kitchen v. Dallas County Texas, et al.*, --F.3d.--, 2014 WL 3537022 (5th Cir. July 2014).**

Plaintiff filed suit under 42 U.S.C. 1983, alleging claims that the individual defendants used excessive force against her deceased husband and that defendants acted with deliberate indifference to his medical needs. On appeal, Plaintiff challenged the district court's grant of summary judgment as to all of her claims. The court concluded that the record presented genuine issues of material fact from which a jury could conclude that excessive force was used against the husband. Therefore, the court reversed and remanded for the district court to consider in the first instance whether any or all of the individual defendants may proceed to trial on a theory of direct liability for use of force or, in the alternative, on a theory of bystander liability. The district court should also consider whether individual defendants are entitled to qualified immunity. The court affirmed the district court's grant of summary judgment in regards to the deliberate indifference claim and the municipal liability claim for failing to provide adequate training.

***Harris v. Serpas*, 745 F.3d 767 (5th Cir. 2014)**

Brian and Tyralyn Harris had divorced, but he still lived in the same house with her and their two children in New Orleans. On April 9, 2010, Tyralyn called 911 because Harris had

locked himself in a bedroom and, she feared, was trying to commit suicide by overdosing on sleeping pills because he was depressed over recently losing his job. Five New Orleans police officers arrived at the house, where Tyralyn gave them keys to the locked bedroom. She told them that Harris did not have a gun but he might have "a folding knife ... that he usually carried due to his former job as a welder." The officers proceeded to the locked door and called Harris's name. He didn't respond, so they unlocked the door, and found the entrance barricaded by furniture. They forced their way in, and saw "Harris lying on his back in his bed under a blanket, not moving." He also didn't respond to commands to show his hands, so one of the officers removed the blanket; they saw that he was holding the knife in his right hand. Harris refused commands to let go of the knife, so one of the officers attempted, unsuccessfully, to tase him. (The tasers—the officers had two—were equipped for audio and video recording, so much of the encounter was on tape.) "Harris stood up out of his bed after the first taser attempt, and he appears agitated at this point." Another officer used the second taser, but this "attempt apparently failed to work as well because ... Harris was not incapacitated." He was, though, provoked: he "began flailing his arms at the taser wires, and raised the knife above his right shoulder in a stabbing position." One officer yelled at Harris to drop the knife, he answered "'I'm not dropping nothing,'" and then one of the officers shot him three times. Harris died of the gunshot wounds.

His surviving children sued the officers via 42 U.S.C. § 1983 for using unconstitutionally excessive force and a warrantless entry; they also sued the city for inadequate policies and training that led to the constitutional violation. The district court found that the officers did not use excessive force and entered with Tyralyn's consent, so it granted their summary judgment motion for qualified immunity and dismissed the claim against the city.

The Fifth Circuit affirmed. Following *Rockwell v. Brown*, 664 F.3d 985 (5th Cir. 2011) (Jolly, DeMoss and Prado), the Court emphasized that an assessment of the reasonableness of force must focus on "'whether the [officer] was in danger at the moment of the threat that resulted in the [officer's] shooting.'" In Rockwell, a mother had called 911 because of concern about her son's being in a mental health crisis. As in this case, the officers entered his bedroom. The son was holding two eight-inch serrated knifes, rushed towards the officers, and then struggled with them, until they shot and killed him. Similarly, the taser video in this case "confirms that ... Harris was holding a knife above his head at the moment [an officer] fired his weapon." The plaintiffs argued that the officer who shot Harris was not in "actual, imminent danger" of Harris stabbing him, but that was irrelevant. It was enough that the taser video showed that "the officers reasonably feared for their safety at the moment of the fatal shooting." The plaintiffs also claimed that the warrantless entry into Harris's bedroom was unconstitutional, but this claim could not survive the fact that Harris's co–occupant of the house gave the officers the key to the bedroom. Since there was no constitutional violation—neither excessive force nor an unconstitutional entry—there was also no basis for the claim against the city for inadequate policies and training.

***Coleman v. Sweetin,* 745 F.3d 756, (5th Cir. 2014)**

Texas inmate Freddie Coleman slipped and fell in a shower room in June 2009 after he had allegedly complained several times in May-June 2009 about the room's slippery floor, all without result. He suffered two more falls (on June 20 and on June 23). After the June 20 fall, he was examined by a physician's assistant (Cheryl McManus) on June 23. Coleman told McManus "that he could neither move his right leg nor stand upon it." McManus ordered an x-ray and, after reviewing it, diagnosed Coleman with acute arthritis. She put him on crutches, though Coleman "protested (to no avail) that [the prison] was not handicap accessible." Later that day, June 23, Coleman suffered the third fall when, in the shower, "his crutches slipped out from underneath him." He was not able to visit the infirmary until July 18, in large part because of a lockdown. During the lockdown, on July 10,

a nurse practitioner (Brenda Hough) made a sick call to Coleman's cell but she would not examine him because she had no access to an examination table. "Coleman explained that he experienced extreme pain and believed that his right hip was broken," which turned out to be true. "Hough responded that she was not authorized to transport inmates to the infirmary unless they were 'bleeding or dying,'" and suggested that he continue submitting requests for permission to go to the infirmary. Coleman alleged that he had already submitted numerous such requests, each of which Hough disregarded.

Also during the lockdown, on July 12, two prison officials (Debbie Erwin, an assistant warden, and Craig Fisher) visited Coleman's cell. He told them "he had fallen multiple times, his right hip was broken, and he was unable to move his leg, lie in bed, or use the toilet," and that he had been trying to get into the infirmary since June 23. Coleman alleged that nothing came of their visit. When the lockdown was lifted on July 18, Hough examined Coleman in the infirmary, but he had to wait until July 21 to get an x-ray. This one disclosed the hip fracture, and Coleman was soon hospitalized for hip surgery (though Hough refused to give him any pain medication for the 178-mile trip).

He then sued (pro se and in forma pauperis) various prison officials: four who allegedly failed to respond to his complaints about the slippery shower floor, and seven who allegedly ignored his medical treatment needs. After a Spears hearing that touched on exhaustion—a grievance coordinator testified that Coleman had not exhausted internal remedies concerning the slippery floor; the court also had Coleman's form complaint, which requested information about the internal steps he had taken—the court dismissed all claims except a treatment claim against McManus (who, reading the first x-ray, diagnosed acute arthritis). Later, however, the district court also dismissed the claim against McManus. Sometime after the district court allowed Coleman to proceed against her, the Texas attorney general advised the court that he had been unable to contact McManus and was unable to file a responsive pleading for her; he provided to the court her last known address. The district court ordered service on her by the U.S. Marshal, but that was not successful and, after various extensions of a service deadline and in light of Coleman's inability to provide an address for McManus, the court dismissed her, effectively with prejudice because the statute of limitations had run.

The Fifth Circuit affirmed with respect to dismissal of the claim regarding the slippery floor, although the district court erred by considering whether Coleman exhausted that claim. It is error to dismiss a prisoner's complaint for want of exhaustion before a responsive pleading is filed unless the failure to exhaust is clear from the face of the complaint. District courts may not circumvent this rule by considering testimony from a Spears hearing or requiring prisoners to affirmatively plead exhaustion through local rules. Nonetheless, the claim was properly dismissed because the slippery floor was not an unconstitutionally unsafe condition. "The usual reasoning [in cases that have rejected such claims] is that the existence of slippery conditions in any populous environment represents at most ordinary negligence ...." Regarding Coleman's treatment needs, the Court reversed the dismissals of Erwin, Fisher, Hough, and McManus. The complaint sufficiently alleged facts indicating that Erwin and Fisher (who visited Coleman's cell on July 18) were deliberately indifferent to his serious medical needs. Likewise, "Coleman [allegedly] suffered substantial harm as a result of Hough's persistent refusal to answer his 'sick-call request slips' or provide pain medication even when he was in so much pain that he was unable to lie down in bed or use the toilet properly," and when he was transported for surgery. McManus also should not have been dismissed for failure of service. When the AG advised of his inability to locate McManus and her last known address, Coleman requested leave to conduct some discovery in order to find her. The district court thought it would be futile, but "it does not follow from the AG's inability to provide a current address ... that any attempt to discover the address [from the sources that Coleman proposed] ... would be futile."

***The Inclusive Communities Project, Inc. v. Texas Dep't of Housing & Community Affairs,* ---F.3d ----, 2014 WL 1257127, (Fifth Circuit, March 24, 2014)**

The Inclusive Communities Project sued the defendant Texas department (including its director and board members in their official capacities) for racial discrimination in housing. The claims involved the state's administration of a federal tax-credit program for low-income housing. "Developers apply to [the department] for tax credits for particular housing projects." Rental housing constructed with the assistance of the tax credits must be open to tenants who use Section 8 vouchers. In Dallas, the state allegedly awarded fewer tax credits for rental housing to be built in Caucasian-majority neighborhoods than in other neighborhoods; conversely, it allegedly denied more tax-credit applications for rental housing to be built in Caucasian-majority neighborhoods than in other neighborhoods. According to ICP's complaint, the state's "disproportionately approving tax credit [housing] units in minority-concentrated neighborhoods and disproportionately disapproving tax credit units in predominantly Caucasian neighborhoods ...creat[ed] a concentration of the units in minority areas, a lack of units in other areas, and maintain[ed] and perpetuat[ed] segregated housing patterns." ICP sued for disparate impact discrimination under the Fair Housing Act, and for intentional discrimination under the Fourteenth Amendment and 42 U.S.C. § 1982 (via 42 U.S.C. § 1983). It moved for summary judgment to establish its standing to sue (ICP "'seeks racial and socioeconomic integration in the Dallas metropolitan area,'" in part by "'assist[ing] low-income, predominately African-American families who are eligible for the Dallas Housing Authority's Section 8 Housing Choice Voucher program ... in finding affordable housing in predominately Caucasian, suburban neighborhoods'") and its proof of prima facie cases for both of its claims. The state cross-moved, arguing that even if ICP proved prima facie cases, it prevailed ultimately on the complete evidence. The district court held that ICP had standing and had made a prima facie showing for both claims, and denied the state's motion. After a bench trial, it "found that ICP did not meet its burden of establishing intentional discrimination," but that it won on disparate impact because the state did not counter ICP's prima facie case. To do so, it held that the state had to "(1) justify their actions with a compelling governmental interest and (2) prove that there were no less discriminatory alternatives." The district court assumed that the state did the first, but found it failed to do the second.

The Fifth Circuit reversed and remanded for reconsideration of the disparate impact claim. Although the Fifth Circuit has held that "disparate impact claims are cognizable under the FHA" (the Supreme Court has granted review in two cases in which a party has questioned that proposition, but neither case reached oral argument), it "has not previously addressed ... what legal standards apply to a disparate impact housing discrimination claim." Other circuits have developed four different standards. Plus, the Department of Housing and Urban Development issued, after the district court issued its judgment, a regulation (29 C.F.R. § 100.500(c)) setting out a proof standard for such a claim. Noting that HUD has "authority to administer the FHA, including authority to issues regulations interpreting the Act," that HUD's standard is similar to "the most recent decisions" from other appellate courts, and that HUD's standard is "similar to settled precedent concerning Title VII disparate impact claims in employment discrimination cases," the Court decided to "now adopt the burden-shifting approach found in 29 C.F.R. § 100.500 for claims of disparate impact under the FHA." That approach differed from the district court's. Again, the district court required ICP to establish a prima facie case (i.e., to "show 'adverse impact on a particular minority group' or 'harm to the community generally by the perpetuation of segregation,'" N.D. Texas slip op. at 18). Relying on statistics and two governmental reports (one state and one federal), the district court found that ICP established a prima facie case, then required the defendants to "(1) justify their actions with a compelling governmental interest and (2) prove that there

were no less discriminatory alternatives." The new HUD standard, on the other hand, requires defendants to prove their "'substantial, legitimate, nondiscriminatory interests,'" and then plaintiffs to prove that those interests "'could be served by another practice that has a less discriminatory effect.'" So instead of defendants having to prove that "there were no less discriminatory alternatives," plaintiffs have to prove that there are.

The Court remanded for the district court to apply this standard. "[W]e do not hold that the district court must retry the case; we leave it to the sound discretion of that court to decide whether any additional proceedings are necessary or appropriate."

***Pierce et al. v. Springfield Township, Ohio, --- Fed.Appx. ----,* 2014 WL 1408885 (6th Circuit, April 11, 2014)**

In the late evening of December 5, 2010, and early morning of December 6, Cordell Drummond fired several handgun rounds into the ground. Officers Marc Downs and Joseph Powers were parked in their patrol cars chatting with the windows down at the car wash at Seven Hills Plaza. At around 1:12 a.m., both officers responded to calls from the neighbors about the gunshots and drove-only 400 yards away-to the 10900 block of Birchridge Drive to investigate. At around 1:15 a.m., the officers arrived at the scene. Powers and Downs saw Drummond in front of 10929 Birchridge Drive. Downs got out of his car and approached Drummond to inquire about the reported gunshots. Downs made eye contact with Drummond, but Drummond ran from Downs before Downs could ask any questions. Downs immediately saw Drummond put his hands in his front waistband. After Drummond took about four steps, Downs heard a gunshot. He saw Drummond stop momentarily, jump several times, and then continue running. Downs saw that Drummond held a black 9-mm Glock in his right hand. Downs pursued Drummond and yelled to Powers, "Joe, he's got a gun. He's got a gun." Drummond collapsed in the snow in the front yard of 10904 Birchridge Drive, where his grandmother Gail Lewis lived in an apartment building. The officers approached Drummond with guns drawn and pointed, unsure of whether Drummond was still armed. Powers heard Drummond yell "I'm going to die!" The officers observed that Drummond was conscious but bleeding; they also observed that for the entire five minutes until the EMT squad arrived, Drummond was holding his right upper thigh with both hands. They radioed to Sergeant Burton Roberts that Drummond had a self-inflicted gunshot wound to his abdomen area. At 1:16 a.m., an EMT squad was dispatched. By 1:17 a.m., it was en route to the scene. At 1:22 a.m., an ambulance arrived. By 1:27 a.m., the EMT squad was transporting Drummond to the University of Cincinnati Medical Center. Tragically, Drummond died from his wound at the hospital. In the five minutes intervening, Powers and Downs did not touch Drummond, handcuff him, or restrain him in any way, nor did they allow anyone else to render aid, including his grandmother, girlfriend, and brother.

Drummond's relatives filed suit against the responding officers and the Township and alleged that the officers violated Drummond's Fourteenth Amendment Due Process rights by not giving Drummond first aid, by preventing Drummond from treating his own wounds, and by preventing others from carrying out a private rescue. The district court granted summary judgment on behalf of the defendants and Drummond's relatives appealed to the Sixth Circuit Court of Appeals. The issues on appeal were as follows:

- Whether there existed a special relationship between the officers and Drummond because they had placed him in custody;

- Whether the officers exposed Drummond to a state created danger by preventing him from applying pressure to his own wounds; and

- Whether the Township violated Drummond's liberty when the officers prevented others from effecting a private rescue of Drummond.

At the outset, the Sixth Circuit examined the lead United States Supreme Court case regarding the government's constitutional duty to protect, *Deshaney v. Winnebago County Dep't of Soc. Servs*. In *Deshaney*, child protection service workers, despite receiving credible complaints of abuse regarding a young boy's father, failed to protect the young boy from beatings which ultimately left the boy severely brain damaged. The boy, and relatives, sued the child protection workers and alleged that they violated the boy's Fourteenth Amendment rights by depriving him of his liberty without due process when they failed to protect him. The Supreme Court held:

That the substantive component of the Due Process Clause does not "require[] the State to protect the life, liberty, and property of its citizens against invasion by private actors." Id. at 195. The Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." Id.

Thus, the Sixth Circuit recognized that Deshaney stands for the legal principal that there is no general duty on the state to protect its citizens from private harm inflicted by third parties.

With the above in mind, the Sixth Circuit then examined the first issue before them, specifically whether a special relationship existed between the officers and Drummond because they had placed him in custody. When the state has placed a person in custody, often the courts will recognize a "duty to protect" that person on the part of the state. This is because the state has essentially removed that person's ability to care for themselves. However, the distinction that the Sixth Circuit found relevant on this issue was the difference between custody in the Fourth Amendment context and custody in the Fourteenth Amendment context.

Under the Fourth Amendment, a person is "in custody" when a police officer restrains a person's liberty such that a reasonable person would not feel free to leave. However, this standard does not apply in Drummond's case, because the suit is alleging a violation of Drummond's Fourteenth Amendment rights. As such, the more rigorous standard under the Fourteenth Amendment applies. The court stated:

For purposes, however, of the Fourteenth Amendment and of DeShaney's custody exception, custody requires that the state restrain an individual "through incarceration, institutionalization, or other similar restraint." DeShaney, 498 U.S. at 200. DeShaney's custody exception requires, "at a minimum-actual, physical restraint of the suspect by the police." *Cutlip v. City of Toledo*, 488 F. App'x 107, 114 (6th Cir. 2012).

The Sixth Circuit then held that in this case, since Drummond was merely being covered by officers with weapons drawn after he shot himself, but not "incarcerated, institutionalized or subject to a similar restraint," Drummond was not in custody for liability to attach under the Fourteenth Amendment and Deshaney.

Further, regarding the officers duty to provide medical aid to Drummond, the court also noted that the officers had no special training, beyond basic first aid, in treating gunshot wounds. The court then stated that, because of the officer's lack of training in this area, "any failure to treat would be, at most, negligent and thus not actionable under Section 1983." The Sixth Circuit did not speculate whether the officers would have had a different duty if they had more advanced medical treatment.

The court then examined the second issue before them, which was whether the officers exposed Drummond to a state created danger when they prevented him from treating his own wounds. The court noted that the rule regarding a "state created danger" liability is as follows:

A state is not subject to liability under DeShaney's state-created danger exception unless it takes an "affirmative action that exposed decedent to [a] danger to which [he] was not already exposed." *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 913 (6th Cir. 1995).

In Drummond's case, the court noted that the officers did not increase his risk of harm by their actions or make him more vulnerable. In fact, eye-witness testimony indicated that Drummond was applying pressure to his wound while the officers covered him with their weapons. As such, since the officer's actions did not expose Drummond to a danger to which he was not already exposed, there was no liability under the "state created danger" theory.

The court then examined the final issue, which was whether the Township violated Drummond's liberty when the officers prevented others from effecting a private rescue of Drummond. Specifically, two of Drummond's relatives attempted to approach him, allegedly to apply pressure to his wound, and the officers ordered them back. To this issue, the Sixth Circuit stated:

If police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt,… it would certainly be permissible to forbid such an attempt." Id. Even construing the facts in the light most favorable to Pierce, it is undisputed that neither Lewis nor Jason Drummond informed the officers of any ability on their part to render medical aid. And, far from the case in Beck I, the officers had no reason to believe Lewis and Drummond could provide aid. Powers and Downs, like the defendant police officers in Tanner v. County of Lenawee, were not "aware of the would-be rescuer's qualifications," if any. *Tanner v. Cnty. of Lenawee*, 452 F.3d 472, 481 (6th Cir. 2006).

The Sixth Circuit then held that, based on the above principals, the Township and officers are not liable under the Fourteenth Amendment for preventing Drummond's relatives from providing aid. As such, the Sixth Circuit affirmed the decision of the district court.

***Plumhoff, et al., v. Rickard,* --- S.Ct. ---, 2014 WL 2178335 (U.S., May 27, 2014)**

At midnight on July 18, 2004, West Memphis Police Officer Forthman pulled over Donald Rickard's vehicle because of an inoperable headlight. After Officer Forthman noticed damage on the vehicle and asked Rickard to step out of the car, Rickard sped away. Officer Forthman called for backup and pursued Rickard from West Memphis, Arkansas to Memphis, Tennessee. The police officers were ordered to continue the pursuit across the border and ultimately surrounded Rickard in a parking lot in Memphis, Tennessee. When Rickard again attempted to flee, the police fired shots into the vehicle. Both Rickard and Kelley Allen, a woman who had been a passenger in the vehicle, were killed by the barrage of gunfire. The entire exchange was captured on police video.

The families of Rickard and Allen sued the police officers, the chief of police, and the mayor of West Memphis under federal and state law claims. The families argued that the police used excessive force when pursuing and ultimately killing Rickard and Allen and that using that force violated the Fourth Amendment. The government argued that, because the police acted in their official capacity, they were entitled to either absolute or qualified immunity from any lawsuit. The district court refused to dismiss the case against the government, and the U.S. Court of Appeals for the Sixth Circuit affirmed the decision of the trial court. The Court of Appeals held that qualified immunity only applies when officers are acting reasonably, and after reviewing subsequent cases, held that the police did not act reasonably in this case. Additionally, because the video evidence showed that the police fired on unarmed, fleeing drivers, a jury could determine that the police were not acting reasonably.

The Supreme Court reversed the Sixth Circuit, holding that the officers acted reasonably in using deadly force. A "police officer's attempt to terminate a dangerous high-speed 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." Rickard's outrageously reckless driving—which lasted more than five minutes, exceeded 100 miles per hour, and included the passing of more than two dozen other motorists, posed a grave public safety risk, and the record conclusively disproved that the chase was over when Rickard's car came to a temporary standstill and officers began shooting. Under the circumstances when the shots were fired, all that a reasonable officer could have concluded from Rickard's conduct was that he was intent on resuming his flight, which would have again posed a threat to others on the road.

The Supreme Court also held that the officer's did not shoot more than necessary to end the public safety risk. It makes sense that, if officers are justified in firing at a suspect in order to end a severe threat to public safety, they need not stop shooting until the threat has ended. Here, during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee and eventually managed to drive away. A passenger's presence does not bear on whether officers violated Richard's Fourth Amendment rights, which "are personal rights [that] may not be vicariously asserted.

Lastly, even if the officer's conduct had violated the Fourth Amendment, the officers would still have been entitled to summary judgment based on qualified immunity. The respondent could point to no case that could be said to have clearly established the unconstitutionality of using lethal force to end a high-speed car chase.

IV. AMERICANS WITH DISABILITIES ACT

***Shirley v. Precision Castparts Corp.*, 726 F.3d 675 (5th Cir. 2013)**

Employee Bryan Shirley twice entered an in-patient rehabilitation program for abuse of prescription medication. Both times, he successfully detoxed but left the program prior to completing the treatment phase. His employer terminated him after he prematurely left the program the second time, and Shirley sued for violations of the ADA and the FMLA.

Shirley argued that the ADA's safe harbor provision shielded him because, at the time of the termination, he was not "currently engaging in the illegal use of drugs." He further argued that the FMLA guaranteed him reinstatement upon return from his approved leave for rehab. The district court disagreed, and granted summary judgment for the employer. Shirley appealed.

The Fifth Circuit affirmed the grant of summary judgment. The Circuit said that merely entering a rehab program does not automatically trigger the safe harbor. Current users in rehab are not absolutely protected from termination. The employee had used drugs illegally in the weeks preceding the termination and had failed to complete the rehab program a second time, so the employer had good reason to believe that illegal drug use would continue beyond the employee's second failed rehab stint. Thus, the ADA's safe harbor provision did not apply.

Second, the FMLA did not guarantee the employee's reinstatement because his drug abuse justified his termination. The employer's policy provided that an employee who does not complete a rehab program can be subject to termination. The FMLA shield does not trump an employer's legitimate reason for termination; in this case, drug abuse and failure to complete rehab. The employee would have been subject to termination even if he had not taken FMLA leave, and thus the fact that he took FMLA leave does not wipe the slate clean.

Accordingly, based on this case, employers should be cognizant of four things. First, the ADA does not protect an employee who illegally used drugs at any time within the weeks preceding the termination. Courts grant employers some leeway in determining whether an employee's recent drug abuse issues will continue to be a problem even if the employee's actual drug use has ceased at the time of the termination.

Second, simply entering a rehab program does not automatically trigger the ADA safe harbor provision's protections. An employee who has not been drug-free for a significant amount of time is still "currently engaging" in illegal drug use.

Third, reinstatement following FMLA leave is not guaranteed. In an important holding, the Fifth Circuit clarified earlier decisions suggesting that FMLA leave guaranteed reinstatement. The employee must still be eligible for the position. Here, the employee's position required that he successfully complete a rehab program, which is a valid job requirement under the FMLA.

Finally, "illegal" drug abuse is not confined to drugs that are per se illegal. In this case, the employee was addicted to prescription drugs. But his "legal" prescription drug use became "illegal" when he received additional prescriptions for the same drug from multiple physicians without their knowledge. In this light, the ADA does not protect prescription drug users when their legal use of the prescription has become illegal drug abuse.

V. FIFTH AMENDMENT

USA v. 0.73 Acres of Land, 705 F.3d 540 (5th Cir. 2013)

In this case of first impression, the Fifth Circuit Court of Appeals decided whether the loss of an association's right to collect assessments on condemned properties requires just compensation under the Takings Clause of the Fifth Amendment.

The assessments at the center of this dispute were connected with the Mariner's Cove Development, a 58-townhome residential community near Lake Pontchartrain and the 17th Street Canal. The Mariner's Cove Townhomes Association (MCTA)—a homeowner's association and non-profit corporation—periodically collects assessments from each of the townhome owners. The development's "declarations" or by-laws state that each lot owner pays a proportionate 1/58 share of the expense of maintenance, repair, replacement, administration, and operation of the properties.

After Hurricane Katrina, the United States Army Corps of Engineers began to repair and rehabilitate the levee adjacent to the development, and began to construct an improved pumping station at the 17th Street Canal. The Corps later determined that it needed to acquire 14 of the 58 units in Mariner's Cove to facilitate its access to the pumping station.

While the government was negotiating the acquisition of those properties with their owners, MCTA claimed that it was entitled to just compensation for the loss of its right to collect the association fees from the 14 properties in question. The government reached agreements with each of the landowners for the purchase of the properties, but it did not resolve MCTA's claim.

According to the Fifth Circuit Court of Appeals, compensating for these types of assessments "would allow parties to recover from the government for condemnations that eliminate interests that do not stem from the physical substance of the land" and "unjustifiably burden the government's eminent domain power." Under Louisiana law, the right to collect assessments is a building restriction, and by extension, an intangible (incorporeal) right. Louisiana case law recognizes the right to collect assessment fees as a covenant that runs with the land. Thus, the Fifth Circuit reasoned that MCTA's right is best understood as a building restriction, but more generally may be viewed as a real covenant.

Even though the appellate court agreed that an assessment would qualify as a property interest, it held that the assessment base was incidental to the condemnation, and thus barred by the consequential loss rule. The court explains that MCTA's right to collect assessments is a real covenant that functions like a contract and is not "directly connected with the physical substance" of the land. As a result, the loss of assessments is not a compensable taking.

***RBIII, L.P. v. City of San Antonio,* 2013 WL 1748056 (5th Cir, 2013)**

In January 2008, the City of San Antonio (the "City") demolished a dilapidated building. It was undisputed that the City did not provide notice to the owner, RBIII, before razing the building. The district court granted summary judgment for the City on all claims except a Fourteenth Amendment procedural due process claim and a Fourth Amendment unreasonable search and seizure claim. Those claims were tried to a jury, which returned a verdict in favor of the owner.

On appeal, it was apparent from the record that a City code enforcement officer visited the building on several occasions before it was demolished. Following internal procedure, the building was found to be an "imminent threat to life, safety, and/or property," requiring immediate demolition. The day after the building was demolished, the City sent notice to the owner, informing it that the City had demolished the building as an "Emergency Case."

The City argued that the verdict in favor of the owner was due to the district court's faulty jury instructions that did not accurately reflect the applicable law and that under the correct legal standards it was entitled to judgment as a matter of law. The appellate court agreed finding pre-deprivation notice is not always required. Where the State acts to abate an emergent threat to public safety, post-deprivation notice satisfies the Constitution's procedural due process requirement.

Determining whether a pre-notice deprivation of property comports with procedural due process requires an evaluation of (1) the State's determination that there existed an emergency situation necessitating quick action and (2) the adequacy of post-deprivation process. How the fact-finder approaches the first issue depends on whether the State acted pursuant to a valid summary-action ordinance. If it did, then the State's determination that it was faced with an emergency requiring a summary abatement is entitled to deference. In such cases, the relevant inquiry is not whether an emergency actually existed, but whether the State acted arbitrarily or otherwise abused its discretion in concluding that there was an emergency requiring summary action.

Here, the owner did not plead that the post-deprivation remedies available to it were procedurally inadequate, making the only issue before the court whether the City's determination that the building presented a public emergency requiring summary abatement. Finding that the City acted accordingly, the court vacated the district court's judgment on RBIII's claims.

***Salinas v. Texas*, 133 S.Ct. 2174 (U.S. 2013)**

Almost all Americans are aware of the Supreme Court case called *Miranda v. Arizona*, that held a criminal suspect who is in police custody must be advised of his right to remain silent; if the suspect chooses to remain silent, that silence cannot be used against him in a trial. The question before the Court in the *Salinas* case was whether this protection of silence applies before a suspect is actually arrested. The defendant in this case, Genevevo Salinas, voluntarily went to the police station, where officers interviewed him about a pair of 1992 murders. When asked whether a shotgun given to police by his father would match shell casings found at the crime scene, Salinas did not answer. At his trial for the murders, prosecutors used Salinas's silence as evidence of his guilt; Salinas was convicted and sentenced to twenty years in prison.

Over the years, the lower courts had been divided on whether prosecutors can point to the "precustodial" silence of suspects. Today the Court resolved that conflict, holding that because Salinas failed to invoke his right to remain silent in response to the officers' questions, his silence was fair game at his trial. The Court reasoned that the privilege against self-incrimination applies only when it is asserted, and that merely remaining silent in response to questions is not enough.

The Court's decision was fractured. Justice Alito wrote for a plurality of the Justices (himself, Chief Justice Roberts, and Justice Kennedy), setting forth the rule that the right to remain silent must be expressly invoked. Justices Thomas (joined by Justice Scalia) concurred only in the result, arguing that even if Salinas had invoked his right to remain silent, he still would have lost because the prosecutor's comments regarding his silence did not compel him to give self-incriminating testimony. These five votes, together, added up to a loss for Salinas, and the rule in Justice Alito's opinion is the controlling rule going forward. Justice Breyer, joined by the remaining three Justices, dissented, arguing that a defendant need not expressly invoke the privilege against self-incrimination.

Doe, et al. v. Robertson, et al., ---F.3d----, 2014 WL 1796653 (Fifth Circuit, May 06, 2014)

Plaintiffs filed suit against federal officials and others after they were sexually assaulted while being transported from an immigration detention center. Plaintiffs claimed violations of their Fifth Amendment due process right to freedom from deliberate indifference to a substantial risk of serious harm, alleging that the officials knew of violations of a contractual provision requiring that transported detainees be escorted by at least one officer of the same gender, and that the officials understood the provision aimed to prevent sexual assault. On appeal, Defendants Robertson and Rosado, federal officials who worked as ICE Contracting Officer's Technical Representatives (COTRs), challenged the denial of their motion to dismiss based on qualified immunity. The court concluded that plaintiffs properly alleged that Robertson and Rosado had actual knowledge both of the violations of the Service Agreement provision and of that provision's assault-preventing objective. However, because the complaint did not plausibly allege the violation of a clearly established constitutional right, Robertson and Rosado were entitled to qualified immunity and the district court erred in denying their motion to dismiss.

***Fisher v. University of Texas* --- S.Ct. ----, 2013 WL 3155220 (U.S. 2013)**

In 1997, the Texas legislature enacted a law requiring the University of Texas to admit all high school seniors who ranked in the top ten percent of their high school classes. After finding differences between the racial and ethnic makeup of the university's undergraduate population and the state's population, the University of Texas decided to modify its race-neutral admissions policy. The new policy continued to admit all in-state students who graduated in the top ten percent of their high school classes. For the remainder of the in-state freshman class the university would consider race as a factor in admission.

Abigail N. Fisher, a Caucasian female, applied for undergraduate admission to the University of Texas in 2008. Fisher was not in the top ten percent of her class, so she competed for admission with other non-top ten percent in-state applicants. The University of Texas denied Fisher's application.

Fisher filed suit against the university and other related defendants, claiming that the University of Texas' use of race as a consideration in admission decisions was in violation of the equal protection clause of the Fourteenth Amendment and a violation of42 U.S.C. Section 1983. The university argued that its use of race was a narrowly tailored means of pursuing greater diversity. The district court decided in favor of the University of Texas, and the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision. Fisher appealed the appellate court's decision.

The issue before the court is whether the Equal Protection Clause of the Fourteenth Amendment permits the consideration of race in undergraduate admissions decisions.

Justice Anthony M. Kennedy's opinion for seven Justices (Justice Ruth Bader Ginsburg dissented and Justice Elena Kagan did not participate) ordered the Fifth Circuit Court to take a new, and seemingly more demanding, look at an admissions formula adopted to be a

close match of one that the Supreme Court had actually upheld in 2003 in the *Grutter v. Bollinger* decision, involving the University of Michigan Law School. The university thought it was following the guidance of that ruling, and the Fifth Circuit agreed that it had.

The Fifth Circuit, Kennedy wrote, did not even apply the constitutional standard laid out in the *Grutter* ruling, and went seriously awry in giving too much emphasis to the University of Texas's "good faith" in adopting its own version of a *Grutter* plan.

Justice Kennedy spoke of *Grutter*'s continuation as a precedent in two places. First, he mentioned it along with other "affirmative action" precedents and commented: "We take those cases as given for purposes of deciding this case." Second, he mentioned what *Grutter*had concluded, and then said that "the parties do not challenge, and the Court therefore does not consider, the correctness of that determination."

***Fisher v. University of Texas at Austin,*-- F.3d--, 2014 WL 3442449 (5th Cir. 2014)**

On the 15th of July, 2014, the U.S. Court of Appeals for the Fifth Circuit announced its divided decision in the case of *Fisher vs. the University of Texas at Austin*, which had been remanded to the Fifth Circuit by the Supreme Court in the previous summer. In a 2-1 decision, the Fifth Circuit found in favor of UT Austin. In its decision, the majority wrote, "It is equally settled that universities may use race as part of a holistic admissions program where it cannot otherwise achieve diversity." The court continued, "This interest is compelled by the reality that university education is more the shaping of lives than the filling of heads with facts — the classic assertion of the humanities." As of July 22, 2014, Fisher and associated parties planned to file an appeal, either for an en banc hearing with the Fifth Circuit, or to return to the Supreme Court to argue their case.

***Shelby County v. Holder* --- S.Ct. ----, 2013 WL 3184629 (U.S. 2013)**

The Fourteenth Amendment protects every person's right to due process of law. The Fifteenth Amendment protects citizens from having their right to vote abridged or denied due to "race, color, or previous condition of servitude." The Tenth Amendment reserves all rights not expressly granted to the federal government to the individual states. Article Four of the Constitution guarantees the right of self-government for each state.

The Civil Rights Act of 1965 was enacted as a response to the nearly century-long history of voting discrimination. Section 5 prohibits eligible districts from enacting changes to their election laws and procedures without gaining official authorization. Section 4(b) defines the eligible districts as ones that had a voting test in place as of November 1, 1964 and less than 50% turnout for the 1964 presidential election. Such districts must prove to the Attorney General or a three-judge panel of a Washington, D.C. district court that the change "neither has the purpose nor will have the effect" of negatively impacting any individual's right to vote based on race or minority status. Section 5 was originally enacted for five years, but has been continually renewed since that time.

Shelby County, Alabama, filed suit in district court and sought both a declaratory judgment that Section 5 and Section 4(b) are unconstitutional and a permanent injunction against their enforcement. The district court upheld the constitutionality of the Sections and granted summary judgment for the Attorney General. The U.S. Court of Appeals for the District of Columbia Circuit held that Congress did not exceed its powers by reauthorizing Section 5 and that Section 4(b) is still relevant to the issue of voting discrimination.

The issue before the court is whether the renewal of Section 5 of the Voter Rights Act under the constraints of Section 4(b) exceed Congress' authority under the Fourteenth and Fifteenth Amendments, and therefore violate the

Tenth Amendment and Article Four of the Constitution.

In an opinion by Chief Justice John Roberts that was joined by Justices Scalia, Kennedy, Thomas, and Alito, the Court did not invalidate the principle that preclearance can be required. But much more importantly, it held that Section 4 of the Voting Rights Act, which sets out the formula that is used to determine which state and local governments must comply with Section 5's preapproval requirement, is unconstitutional and can no longer be used. Thus, although Section 5 survives, it will have no actual effect unless and until Congress can enact a new statute to determine who should be covered by it.

VI. TITLE VII

***Davoodi v. Austin Independent School District,* --F.3d--, 2014 WL 2714355 (5th Cir., 2014)**

Mostafa Davoodi sued Austin Independent School District for terminating his employment because of his national origin, retaliating, and intentionally inflicting emotional distress. His petition, filed in a Texas state court, cited neither Title VII nor Texas's analog, but it incorporated the charge he dual-filed with the EEOC and the Texas Workforce Commission, and the charge was attached to the petition as an exhibit. AISD removed on the basis of a federal claim, and then moved for dismissal of all claims except the claim for discriminatory termination to the extent it arose under state law. After Davoodi did not respond to the motion, the district court granted the motion, and sua sponte dismissed the claim for discriminatory termination under state law.

The Fifth Circuit held that the removal was proper because, in the incorporated EEOC charge, Davoodi asserted that he was discriminated against in violation of Title VII and Texas law. On the merits, Davoodi challenged only the sua sponte dismissal of his claim for discriminatory termination under state law. AISD did not move for dismissal of that claim, and the district court gave no prior notice of its intention to dismiss it. "'This treatment of the case did not provide adequate fairness ..., and thus was reversible error.'" The Court rejected AISD's argument that Davoodi waived his appellate challenge by not moving under FRCP 59(e) for the dismissal judgment to be altered or amended, or otherwise complaining to the district court about it. "To the extent that AISD attempts to broadly construe language in cases from our circuit to support its argument, we clarify that those cases do not require parties to file a Rule 59(e) motion in order to appeal the improper sua sponte dismissal of their claims." (But the Court noted that filing such a motion "is good practice" so that "a district court [has] an opportunity to correct its inadvertent dismissal of that party's claims.")

***Davis v. Fort Bend County,* ---F.3d---, 2014 WL 4209371 (5th Cir., August 26, 2014)**

Lois Davis alleged that her immediate supervisor, Kenneth Ford, retaliated against her for complaining that his supervisor "subjected her to constant sexual harassment and assaults soon after her employment began." (Fort Bend County's investigation substantiated Davis's complaints and led to the harasser's resignation.) Amidst Ford's alleged retaliatory tactics, Davis missed work on Sunday, July 3, when Davis and other supervisors in her department were expected to help with installing equipment in a new building. She had told Ford five days before that she could not attend during the morning because of "'a previous religious commitment,'" that she had arranged for another employee to take her place during those hours, and that she would be in after. Ford fired Davis for the absence, and she sued the county under Title VII for retaliation and religious discrimination. The district court granted summary judgment for the county.

The Fifth Circuit reversed with respect to the claim for religious discrimination. Of the prima facie elements, the parties disputed only "whether Davis sincerely felt that she was religiously compelled to attend and participate in a special service at church" on the Sunday in question. The service entailed "breaking ground for a new church and feeding the community,"

which the district court considered inadequate: "'[B]eing an avid and active member of church does not elevate every activity associated with that church into a legally protectable religious practice.'" This reasoning "improperly focus[es] upon the nature of the activity itself," rather than on whether "Davis sincerely believed [the event] to be religious in her own scheme of things."

Since Davis established a prima facie case, and Fort Bend did not contend that it reasonably accommodated her, it had to show as a matter of law that a reasonable accommodation would have presented an undue hardship. It failed to do so. "[R]equiring one employee to substitute for another presents an undue hardship," but there was no such requirement here, rather someone volunteered to cover Davis's absence. Davis's lack of "authority to schedule her own substitute does not take away from the fact that there was at least one volunteer." And the district court erroneously drew from Ford's denial of other employees' requests for leave on Sunday to go to church the conclusion that Ford had "'a neutral policy of denying all requests for time off.'" It only showed that he denied requests apparently rooted in religion; further, the district court disregarded Davis's testimony "that Ford permitted another employee time off to attend a Fourth of July parade the weekend of the move."

The Court affirmed with respect to the claim for retaliation. The alleged retaliatory acts—apart from the termination—were presented without enough context to show that they were materially adverse. For example, Davis alleged that she went from supervising 15 employees to four employees, but "she ma[de] no effort to evidence the circumstances that ma[d]e [it] 'materially adverse,'" and did not even testify that she viewed it as a constructive demotion: that characterization appeared in her briefing, not in her evidence. With respect to her termination as a retaliatory act, Fort Bend cited her absence as its legitimate, non-retaliatory reason, and Davis presented no evidence that it was a pretext.

Judge Smith dissented from the reversal, and argued that "[t]he district court correctly found that Davis's failure to appear for work was motivated by a personal commitment and not a religious belief protected under Title VII": Davis did not testify that she "needed" to attend her church's community service project because of "religious" motivation, even under the broad definition of "religious." She states only that her "Pastor requested all members participate in this highly anticipated community service event," that she "was in charge of the volunteer program that was responsible for feeding three hundred (300) people," and that her "church depended on her to be there." In other words, Davis "needed" to attend the community service project on Sunday, July 3 not because her personal conception of religion required her attendance but because she had made a personal, social commitment to her pastor and fellow church members who were depending on her being there. However, if Davis did establish a prima facie case, Judge Smith would have held that allowing her absence on July 3 would have presented an undue hardship because Davis offered no evidence that her volunteer was qualified for the duties required on July 3. Davis and all other supervisors were required to be present, and the volunteer "was not a supervisor but merely a subordinate member of the ... staff."

***Thompson v. City of Waco, Texas,* ---F.3d---, 2014 WL 4364153 (5th Cir., September 9, 2014)**

Allen Thompson, a Waco detective, filed this Title VII action. The case was decided on a motion to dismiss the complaint, and so the facts are sparely presented. Detective Thompson, identified as African-American, and two white detectives were suspended for the same violation, namely falsifying timesheets. When they returned to duty, Thompson—but not the white detectives—endured various restrictions: "The restrictions state that Thompson cannot (1) search for evidence without supervision; (2) log evidence; (3) work in an undercover capacity; (4) be an affiant in a criminal case; (5) be the evidence officer at a crime scene; and (6) be a lead investigator on an investigation." Thompson alleged that these duties represent "integral and material

responsibilities of a detective," and constitute a demotion. He further alleged that the diminished responsibilities rendered his position "less prestigious, will hinder his opportunities for advancement, and is less interesting." The district court granted the city's motion to dismiss, holding that because the reduction in duties did not culminate in an "ultimate employment decision," they were not actionable under Title VII or § 1981.

The Fifth Circuit reversed. The panel majority recognized that under the circuit's "ultimate employment decision" standard, the cases draw a dividing line between "a transfer or reassignment" that is the equivalent of a demotion - thus an 'ultimate' action - and a lesser loss of some job responsibilities," without any change in "title, pay, and benefits." The district court and the city stated that Thompson's complaint fell on the "loss of some job responsibility" side of the line. The panel majority, however, held that Thompson's complaint plausibly alleged an ultimate decision: "In this case, Thompson alleges more than a mere loss of some job responsibilities. He alleges facts that, taken as true, plausibly suggest that, following his reinstatement, the Department rewrote and restricted his job description to such an extent that he no longer occupies the position of a detective; he now functions as an assistant to other detectives. Although the city maintained that Thompson did not allege a forced transfer or reassignment, but just a loss of duties, the panel found that detail immaterial: "the City's proposed distinction is formalistic, easily manipulated, and has not been adopted by courts. In both scenarios [reassignment or loss of duties], the employee may effectively occupy a new and objectively worse position, with significantly diminished material responsibilities."

In dissent, Judge Smith argued that absent a formal change in Thompson's job, there was no claim of discrimination in "terms, conditions, or privileges of employment" under the Fifth Circuit's "ultimate" decision standard: "The majority errs in holding that Thompson's alleged loss of job responsibilities meets this exacting standard. By importing the lower 'materially adverse' employment-actions standard of our sister circuits, the majority sub silentio overrules our requirement of an ultimate employment action. Essentially, under the majority's notion, even the restriction of job duties may now be deemed a sufficient employment action where the plaintiff merely alleges that the restrictions are 'material.' Although that approach might be appropriate under the law as it has been interpreted by other courts of appeals, it is not the law here, at least not until today."

***Equal Employment Opportunity Commission v. Boh Brothers Construction Company,* 731 F.3d 444 (5th Cir. 2013)**

In this case, the Fifth Circuit directly holds that a plaintiff can rely on gender-stereotyping evidence to support a violation of Title VII in a same-sex discrimination case. While working on an all-male bridge-maintenance crew, one member of the crew was singled out for "almost-daily verbal and physical harassment because [he] did not conform to [the crew's superintendent's] view of how a man should act." Both the harasser and the target of the harassment were heterosexual. After complaining to a higher supervisor, the injured party was put on leave without pay, reassigned to another crew, and eventually fired. The EEOC brought suit on behalf of the victim.

At trial, a jury found that the harassment violated Title VII and awarded $201,000 in compensatory damages and $250,000 in punitive damages. The district court adjusted the compensatory damages down to $50,000 to comply with a statutory cap limiting total damages to $300,000. Following the judgment, the district court denied motions for judgment as a matter of law and for a new trial. On Boh Brothers' appeal, a panel overturned the jury verdict citing a lack of evidence to sustain the jury's finding that the harassment violated Title VII's protection against sex discrimination. The EEOC then requested en banc review.

On rehearing, the Fifth Circuit rejected Boh Brothers' claim that a Title VII same-sex

discrimination case cannot rely on gender-stereotyping evidence. The Court cited numerous gender-stereotyping decisions based on the Supreme Court's leading precedent, Price Waterhouse. It also expressly agreed with other circuits in interpreting the three evidentiary paths for claiming same-sex harassment discussed in the Supreme Court's Oncale decision as "illustrative, not exhaustive," thereby allowing for the present claim which did not fit within the three paths the Oncale Court established.

The Fifth Circuit then reviewed the jury verdict, stating that the context of this case required that two elements be met: (1) was the harassment "because of . . . sex" and (2) was it severe and pervasive. Finding that the harassment fulfilled the first element, the Court quoted testimony of the harasser in which he admitted to calling the victim names because he found the victim's usage of a personal-hygiene item as feminine. Responding to Judge Jones's claim in her dissenting opinion that the "judgment portends a government-compelled workplace speech code," the majority emphasized that there were other sexualized acts which accompanied the name-calling including the harasser exposing his genitals to the victim and simulating anal sex with the victim. The Court concluded that taken as a whole the record provided enough evidence that the jury's finding of sexual harassment should not be overturned. Regarding the second element, the Court ruled there was enough evidence of daily and repeated harassment to support the jury's finding that the harassment was severe and pervasive. Though the harassment took place on an all-male construction site, the majority found that jury was able to analyze the harassment within the proper social context and still deem the actions as rising to the level of severity required. After having found the evidence sufficient for a Title VII claim, the Court dismissed Boh Brothers' assertion of an affirmative defense to vicarious liability, finding that the company's nondiscrimination policies "offered no specific guidance regarding sexual harassment."

The Court also reviewed the punitive damages awarded by the jury and found that the punitive damages were not supported by the record because the defendants did not know that male-on-male harassment could violate Title VII. Therefore, the harassment was not done "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." After vacating the punitive damages, the Fifth Circuit then remanded the case back to the district court to re-assess the damages award. The district court had previously reduced the compensatory damages from $201,000 to $50,000 alongside the previous award of $250,000 in punitive damages to comply with the statutory cap.

VII. TITLE VIII

Vance v. Ball State University, --- S.Ct. ----, 2013 WL 3155228 (U.S. 2013)

Under Title VII of the Civil Rights Act of 1964, the standard for imposing liability on an employer for acts of workplace harassment depends on the status of the alleged harasser. When the harassment is committed by a co-worker, the employer ordinarily is not liable unless the plaintiff demonstrates that the employer was negligent in preventing or responding to the harassment. In a pair of 1998 cases, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), however, the Supreme Court established a different liability standard for harassment by supervisors. Under *Faragher* and *Ellerth*, an employer is vicariously liable for harassment by a supervisor—without proof of negligence—unless it establishes affirmatively that (1) it exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided.

In *Vance v. Ball State University*, No. 11-556, the Supreme Court resolved a long-standing circuit split concerning who qualifies as a "supervisor" for purposes of applying *Faragher* and *Ellerth's* vicarious liability rule. In a 5–4 opinion authored by Justice Alito, the Supreme Court held that a supervisor is an

employee authorized by an employer to take "tangible employment actions" against another worker. Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined the majority opinion. Justice Ginsburg filed a dissenting opinion, joined by Justices Breyer, Sotomayor, and Kagan, in which she advocated for a broader definition of "supervisor."

Petitioner Maetta Vance, who is African-American, worked in respondent Ball State University's catering department. A co-worker who had been given the authority to direct the work of several employees, including Vance, allegedly subjected Vance to severe and pervasive racial harassment. Vance sued the university under Title VII, asserting hostile-environment and retaliation claims. The district court granted Ball State's motion for summary judgment. It relied on Seventh Circuit precedent holding that, for purposes of imposing vicarious liability on an employer, "supervisor" status turned on "the power to hire, fire, demote, promote, transfer, or discipline an employee," which the alleged harasser lacked. The Seventh Circuit affirmed.

The Supreme Court largely adopted the Seventh Circuit's definition. After examining the origins of the supervisor-liability rule, the majority held that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has "empowered" the employee to take "tangible employment actions against the victim." The Court defined such actions to mean that the co-employee must be vested with the authority "to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The majority rejected as unworkable the broader definition that had been adopted by the Equal Employment Opportunity Commission and by several circuits. That definition afforded supervisor status to any employee bestowed with the authority to exercise significant control over the plaintiff's daily work. Although the majority today adopted a relatively narrow definition of who counts as a supervisor, it cautioned that an employer that "concentrates all decision-making authority in a few individuals" would be unlikely to "isolate itself from heightened liability" because "the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies."

In dissent, Justice Ginsburg criticized the majority's decision as "ignor[ing] the conditions under which members of the work force labor," and "disserv[ing] the objective of Title VII to prevent discrimination from infecting the Nation's workplaces." Noting that Congress had "in the recent past, intervened to correct the Court's wayward interpretations of Title VII," she urged Congress to "restore the robust protections against workplace harassment the Court weakens today."

Justice Thomas filed a short concurrence, in which he stated that *Faragher* and *Ellerth* were wrongly decided. He joined with the majority, however, because in his view the Court's decision "provides the narrowest and most workable rule for when an employer may be held vicariously liable for an employee's harassment."

This case is important to all employers. The Court's adoption of a clear and objective rule for determining when an employer is vicariously liable for harassment is likely to promote the resolution of claims at the summary-judgment stage. The decision is also likely to affect other statutes that borrow definitions from Title VII, such as the Federal Labor Standards Act.

VIII. FAIR LABOR STANDARDS ACT (FLSA)

Sandifer v. United States Steel Corporation, 134 S.Ct. 870 (2014)

This suit was brought by a number of U.S. Steel's workers who sought to recover, under the FLSA, for the time they spent donning and doffing protective clothing. A section of the FLSA (Section 203(o)) provides that, if an employer and a union agree to make "time spent

in changing clothes" noncompensable, that time will not count for purposes of the statute's minimum wage and overtime provisions. Collective bargaining agreements dating back to 1947 between U.S. Steel and the United Steelworkers of America provide that workers are not paid for the time they spend donning and doffing protective clothing and equipment at the beginning and end of the workday. The protective clothing and equipment that a U.S. Steel worker must wear depends on the worker's job task. But the company's workers often must wear such items as hardhats, safety glasses, earplugs, respirators, "snoods" (protective hoods that extend to the chest), flame-retardant hoods, flame-retardant jackets, flame-retardant pants, work gloves, "wristlets" (protective Kevlar sleeves that cover the lower arm and the opening of the work glove), steel-toed boots, and "leggings" (protective Kevlar sleeves that cover the lower leg and the opening of the boot). The Plaintiffs claimed activities during the donning and doffing time period did not constitute "changing clothes" for purposes of the statute, thus making this time compensable. Both the district court and the Seventh Circuit rejected this argument and granted summary judgment to the company. The Supreme Court granted certiorari to resolve the question of the meaning of "changing clothes" under Section 203(o), a question that had divided the circuits.

The Court affirmed the Seventh Circuit's judgment. Consulting dictionaries from the period during which Congress added Section 203(o) to the FLSA, the Court concluded that "clothes" refers to "items that are both designed and used to cover the body and are commonly regarded as articles of dress." The Court rejected the workers' argument that "clothes" could not refer to items designed to protect against workplace hazards. Justice Scalia noted that, for many workers (he listed "factory workers, butchers, longshoremen, and a host of other occupations"), "protective gear is the only clothing that," when donned or doffed, would trigger a requirement of compensation in the absence of Section 203(o). The workers' position, then, would "run[] the risk of reducing § 203(o) to near nothingness."

In emphasizing that the ordinary meaning of "clothes" applies in this context, the Court explicitly rejected "the view, adopted by some Courts of Appeals, that 'clothes' means essentially anything worn on the body—including accessories, tools, and so forth." As Justice Scalia's opinion noted, U.S. Steel had essentially urged the Court to adopt that broad view. The opinion explained that such a construction might be more readily administrable than the one the Court adopted. But, "[f]or better or for worse," Justice Scalia wrote, Congress "used the narrower word 'clothes.'"

In addition to pressing for a narrow definition of "clothes," the workers argued that "changing" clothes requires taking off the clothes a person is wearing and putting on new ones. Thus, they contended, simply putting on protective clothing over one's street clothes—as at least some of U.S. Steel's workers do when they arrive at work—did not constitute "changing clothes." The Court acknowledged that "the normal meaning of 'changing clothes' connotes substitution." But it observed that "the phrase is certainly able to have a different import"—namely, altering what one is wearing, whether or not one removes what one had been wearing before. The Court concluded that this latter, broader understanding of "changing clothes" is the one that best fit the statute. The Court reasoned that the decision whether to take off one's street clothes before putting on work clothes depends on the idiosyncrasies of personal preference, changing fashions, weather conditions, and so forth, and that an interpretation of Section 203(o) that depended on such variables would not provide a solid basis for employers and unions to negotiate collective-bargaining agreements.

Having resolved these definitional disputes, the Court readily concluded that the vast majority of the items donned and doffed by the plaintiff workers at the beginning and end of the work day—all but safety glasses and ear plugs—constituted "clothes," and that the donning and doffing constituted "changing" those clothes. As for the safety glasses and ear plugs, the Court held that, as a whole, the

workers' time donning and doffing their protective items at the beginning and end of the day constituted "time spent in changing clothes," and that the small amount of time it took to put on and take off ear plugs and safety glasses did not change that conclusion. Justice Scalia's opinion explained that we say that we spent the day skiing "even when less¬-than-negligible portions of the day are spent having lunch or drinking hot toddies." (Presumably, he meant to say "more than negligible.") "The question for courts," he said, "is whether the period at issue can, on the whole, be fairly characterized as 'time spent in changing clothes or washing.'"

IX. QUALIFIED IMMUNITY

Doe v. Robertson, 751 F.3d 383 (5th Cir. 2014)

Donald Dunn had pled guilty to state and federal criminal charges arising from sexually assaulting eight women. Thereafter, Dunn's victims sued employees of U.S. Immigration & Customs Enforcement. The women were immigrants whose asylum requests had prima facie merit and who had been "released ... on [their] own recognizance while [their] asylum claim[s] remained pending." Each had been released from the same ICE detention center. As a result of a contract and a subcontract, Corrections Corporation of America operated the detention center and Dunn, a CCA employee, was assigned to transport each of the released women to the airport or a bus station. CCA's contract required that at least one transporting employee be of the same sex as the transportee, but Dunn transported each woman alone, and assaulted each woman during the transport. The women sued George Robertson and Jose Rosado under Bivens. They alleged that the defendants were deliberately indifferent to enforcing compliance with ICE's contract, including the transport provisions, thereby depriving them of their Fifth Amendment right to substantive due process. In a motion to dismiss, the defendants argued that a Bivens action could not be brought against them and they were entitled to qualified immunity. The district court overruled the defendants' motion to dismiss.

Ruling only on the qualified immunity issue, the Fifth Circuit reversed and remanded with instruction to dismiss. "We ... conclude that Plaintiffs properly alleged that Robertson and Rosado had actual knowledge both of the violations of the [transport] provision [i.e., of the requirement that a transportee be transported by at least one employee of the same sex] and of that provision's assault-preventing objective." But that actual knowledge was not enough to establish the plausibility of the plaintiffs' claim that the defendants were deliberately indifferent: "no clearly established law provides that violations of contractual terms that aim to prevent sexual assault are 'facts from which the inference could be drawn that a substantial risk of serious harm exists.'" The Court acknowledged that compliance with the contractual terms "helps minimize the risk of sexual assault during ... transport," but declined "to ratify the inverse statement: If an official knows of a contractual violation, then the risk of sexual assault automatically becomes constitutionally 'substantial.'" To get past the defendants' motion, the plaintiffs had to have pleaded deliberated indifference "to a substantial risk of serious harm." The Court also, however, found no "clearly established law to support [the defendants'] contention that knowingly permitting violations of a contractual provision known to prevent harm do[es] not constitute deliberate indifference.") The plaintiffs argued for discovery, but "[their] Complaint gives Plaintiffs no right to discovery."

Zapata, et al. v. Melson, et al., --- F.3d.---, 2014 WL 1545911 (5th Circuit, April 18, 2014)

The plaintiffs alleged that "Operation Fast and Furious" (OFF) distributed the firearms that led to the shooting death of Jaime Zapata and the injury of Victor Avila. Zapata and Avila, both special agents of Immigration and Customs Enforcement, "were ambushed and shot by drug cartel members in Mexico using weapons they allegedly obtained unlawfully in the United States" as a consequence of OFF. The plaintiffs sued a number of federal officials for civil rights violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S.

388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1999). At least some of the defendants moved in the district court under FRCP 12(b)(6) for dismissal on the ground of qualified immunity. The district court declined to rule on the motion, but "issu[ed] an order allowing ... limited discovery on the issue of qualified immunity." The order "did not give the parties further guidance or limitations on the scope of discovery." The defendants timely appealed.

The Fifth Circuit vacated and remanded. First, the Court found that because the district court did not rule on the motion, it was "tantamount to an order denying" the motion, thus making it appealable. Regarding the merits, the Court found that the district court erred under precedents "'establish[ing] a careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense.'" It may defer ruling if, first, it "find[s] 'that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity'"; then, "'if [it] remains 'unable to rule on the immunity defense without further clarification of the facts,' it may issue a discovery order 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.'" Here, the district court did neither: it "failed to make an initial determination that the plaintiffs' allegations, if true, would defeat qualified immunity," and it "did not identify any questions of fact it needed to resolve before it would be able to determine whether the defendants were entitled to qualified immunity." The Court instructed the district court on remand "to follow the[se] procedures."

X. 42 U.S.C. § 1981

***Campbell v. Forest Pres. Dist. of Cook Cnty., Ill.*, No. 13-3147, 2014 WL 1924479 (7th Cir. May 15, 2014)**

As a matter of first impression, the Seventh Circuit has held that 42 U.S.C. §1981 does not create a private right of action against state actors. The plaintiff was fired after a security camera recorded him having sex with a coworker in the company's office. Two and a half years later, he sued his former employer. His suit included a claim under 42 U.S.C. §1981 that his termination violated that statute's prohibition on racial discrimination in the making and enforcement of contracts. His initially suit included claims under 42 U.S.C. § 1983, but he amended his complaint to leave them out, apparently conceding that they were time-barred.

The Seventh Circuit wrote that, under *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-35 (1989), § 1981 itself provides a remedy for violations committed by private actors, but an injured party must resort to §1983 to obtain relief for violations committed by state actors. Campbell argued that the Civil Rights Act of 1991 superseded Jett by adding the following language to §1981 as subsection (c): "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." As a result, he argued § 1981 provides a remedy against state actors independent of §1983. The Seventh Circuit recognized that the Ninth Circuit had taken this position in 1996 but that all six circuits considering the issue since then had not.

Finding against the plaintiff—and affirming the decision below—the Seventh Circuit observed that §1981(c) was intended not to overrule Jett but to codify an earlier Supreme Court holding that §1981 prohibits intentional racial discrimination in private as well as public contracting. Further, the Seventh Circuit reasoned that the fact that Congress has created a specific remedy against state actors under §1983 still counsels against inferring a remedy against them under §1981, even after the Civil Rights Act of 1991. Joining the "overwhelming weight of authority," the Seventh Circuit held that Jett remains good law, and consequently, §1983 remains the exclusive remedy for violations of §1981 committed by state actors.

XI. PATIENT PROTECTION AND AFFORDABLE CARE ACT ("ACA")

***Burwell v. Hobby Lobby*, 573 U.S. ___, 2014 WL 2921709 (U.S. 2014)**

Department of Health and Human Services (HHS) regulations implementing the 2010 Patient Protection and Affordable Care Act (ACA) require that employers' group health plans furnish preventive care and screenings for women without cost sharing requirements, 42 U.S.C. 300gg–13(a)(4). Nonexempt employers must provide coverage for 20 FDA-approved contraceptive methods, including four that may have the effect of preventing a fertilized egg from developing. Religious employers, such as churches, are exempt from the contraceptive mandate. Thus, the HHS has effectively exempted religious nonprofit organizations, whereby an insurer must exclude contraceptive coverage from such an employer's plan and provide participants with separate payments for contraceptive services.

Closely held for-profit corporations sought an injunction under the 1993 Religious Freedom Restoration Act (RFRA). They argued that the RFRA prohibits the government from substantially burdening a person's exercise of religion even by a rule of general applicability unless it demonstrates that imposing the burden is the least restrictive means of furthering a compelling governmental interest, 42 U.S.C. 2000bb–1(a), (b). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), the RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

The Circuits have been divided on the applicability of the HHS for for-profit corporations. For example, the Third Circuit held that a for-profit corporation could not "engage in religious exercise" under RFRA and that the mandate imposed no requirements on corporate owners in their personal capacity. The Tenth Circuit held that the businesses are "persons" under RFRA; that the contraceptive mandate substantially burdened their religious exercise; and that HHS had not demonstrated that the mandate was the "least restrictive means" of furthering a compelling governmental interest.

The Supreme Court ruled in favor of the businesses, holding that RFRA applies to regulations that govern the activities of closely held for-profit corporations. The Court declined to "leave merchants with a difficult choice" of giving up the right to seek judicial protection of their religious liberty or forgoing the benefits of operating as corporations. Nothing in RFRA suggests intent to depart from the Dictionary Act definition of "person," which includes corporations, 1 U.S.C.1; no definition of "person" includes natural persons and nonprofit corporations, but excludes for-profit corporations. "Any suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money flies in the face of modern corporate law." The Court rejected arguments based on the difficulty of ascertaining the "beliefs" of large, publicly traded corporations and that the mandate itself requires only insurance coverage. If the plaintiff companies refuse to provide contraceptive coverage, they face severe economic consequences; the government failed to show that the contraceptive mandate is the least restrictive means of furthering a compelling interest in guaranteeing cost-free access to the four challenged contraceptive methods. The government could assume the cost of providing the four contraceptives or could extend the accommodation already established for religious nonprofit organizations. The Court noted that its decision concerns only the contraceptive mandate, not all insurance-coverage mandates, e.g., for vaccinations or blood transfusions.

XII. UPCOMING US SUPREME COURT DECISIONS TO WATCH

Heien v. North Carolina

The issue is: "Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop."

Holt v. Hobbs

The issue is: "(1) Whether the Arkansas Department of Corrections' no-beard-growing policy violates the Religious Land Use and Institutionalized Persons Act (RLUIPA) or the First Amendment; and (2) whether a half-inch

beard would satisfy the security goals sought by the policy."

Young v. United Parcel Service

The issue is: "Whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are "similar in their ability or inability to work."

***Munn v. City of Ocean Springs, MS, ---F.3d---*, 2014 WL 4066202 (5th Cir. Aug. 18, 2014)**

Stephen Munn, individually and on behalf of his nightclub, sued the City of Ocean Springs to enjoin enforcement of a noise ordinance on the ground that it was unconstitutionally vague. "Munn challenges virtually the entire ordinance. Nonetheless, the genuine legal dispute can quickly be focused on the alleged vagueness of one word: 'annoys.'" The ordinance prohibited "'unreasonable noise,'" which it defined in part as "noise that 'annoys ... a reasonable person of ordinary sensibilities.'" The district court held on summary judgment that it was not unconstitutionally vague.

The Fifth Circuit affirmed, holding that the ordinance's reference to the sensibilities of a reasonable person "imposes an admittedly objective standard of conduct in its enforcement. For this reason, we are fully satisfied that the ordinance meets the standard of due process of law and consequently is not unconstitutionally vague." The Court acknowledged that in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), the Supreme Court held that an ordinance "prohibit[ing] three or more people from assembling on a sidewalk 'and there conduct[ing] themselves in a manner annoying to persons passing by'" was unconstitutionally vague. The difference was that the capacity for annoyance of anyone who happened to pass by those standing on the sidewalk in Cincinnati was "an unquantifiable standard," while Ocean Springs avoided "[t]his vagueness ... by the inclusion of the reasonable person standard." Not that such a standard will make everything crystal clear: "We are cognizant that the enforcement ... will not be uniform, and that a police officer will be required to apply his or her judgment in determining a violation. Nevertheless, the Supreme Court precedents consider this level of uncertainty tolerable in the noise ordinance context."