# RECENT FEDERAL CASES OF INTEREST TO GOVERNMENTAL ENTITIES

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**ANNUAL CONFERENCE**
**SAN ANTONIO, TEXAS**
**SEPTEMBER 24, 2015**

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# I. FIRST AMENDMENT

### *Town of Greece v. Galloway,* 134 S.Ct. 1811 (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.

### *Bell v. Itawamba County School Board,* 774 F.3d 280 (5th Cir. 2014)

Taylor Bell, when a senior at Itawamba (Miss.) Agricultural High School, wrote, recorded, and posted on the Internet (on his Facebook page and YouTube) a rap song about two of the school's coaches. He had heard from some female students that these male coaches "had inappropriately touched them and made sexually-charged comments to them and other female students at school." Bell testified that "he believed that ... somebody might listen to his music and that it might help remedy the problem of teacher-on-student sexual harassment." The song, with "vulgar and violent lyrics" identified the coaches by name. One of the coaches heard the song and reported it to Bell's principal, who reported it to the district superintendent. The latter two, and the district's attorney, questioned Bell the next day about the song and its accusations. Bell was then sent home before the school day was over. Bell returned the next school day (after a weekend, then days when the school was closed due to snow; during that interval he uploaded "a more polished version of the song"),when he was informed that he was suspended pending a disciplinary hearing.

The principal issue presented by this case is whether a public high school violated the First Amendment by punishing a student for his off-campus speech, which did not involve speech that took place on school property or during a school approved event off campus. Nevertheless, the district court, interpreting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) as applying directly to students' off-campus speech, as well

as their on-campus speech, held that the School Board had authority to regulate and punish Bell's speech because the evidence established that his rap song had "in fact" substantially disrupted the school's work and discipline and that it was "reasonably foreseeable that the song would cause such a disruption...."

The Fifth Circuit, however, disagreed. It noted that its previous decisions had "left open the question of whether the Tinker 'substantial-disruption' test can apply to off-campus speech," and found that this case did not require it to "resolve that consequential question" because "the summary-judgment evidence "establishes that no substantial disruption ever occurred, nor does it 'demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.'" "Viewing the evidence in the light most favorable to the School Board, there was no commotion, boisterous conduct, interruption of classes, or any lack of order, discipline and decorum at the school, as a result of Bell's posting of his song on the Internet.... Indeed, the School Board's inability to point to any evidence in the record of a disruption directly undermines its argument and the district court's conclusion that the summary-judgment evidence supports a finding that a substantial disruption occurred or reasonably could have been forecasted...."

The Court also rejected, as a model for this case, *Ponce v. Socorro Independent School District*, 508 F.3d 765 (5th Cir. 2007), which denied First Amendment protection to "a student's notebook which contained his plans to commit a coordinated 'Columbine-style' shooting attack on his high school and other district schools." Bell's "song amounts only to a rhetorical threat ... and does not come close to the catastrophic facts threatened in Ponce." The song also did not "fall[] within the 'true threat' exception to the First Amendment." (The exception encompasses "'those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'")

The school board and the official-capacity defendants have petitioned for rehearing en banc.

***Cutler v. Stephen F. Austin University,* 767 F.3d 462 (5th Cir. 2014)**

Christian Cutler sued his former employer, Stephen F. Austin University, for firing him in retaliation for First Amendment free speech, specifically telling someone who worked for U.S. Rep. Louie Gohmert that it was "his impression that Rep. Gohmert was a fear monger with whom Cutler did not want to be associated." Cutler alleged that he said so in response to an invitation from Gohmert's staff to "curate and judge ... a high school art exhibition and contest in Tyler Texas, hosted by [Gohmert]." Cutler was the director of art galleries at Stephen F. Austin University, a public entity. His job included "'maintain[ing] good public relations, including working with community support groups, as well as coordinating special events with other arts and cultural groups in the area [SFAU is in Nacogdoches, Texas],'" but accepting the Gohmert invitation "was not within his job requirements."

Soon after, Gohmert sent a letter to Cutler with a copy to the university's president. Gohmert's letter "expressed disappointment that Cutler would 'not host the ... [c]ompetition this fall because you did not 'want to be involved in any way' with me'"; the letter also "informed Cutler that '[w]e will not bother you in the future' with an invitation to host the event." Hence, the university contended that it fired Cutler because the true fact, or at least the fact that it reasonably believed after an investigation, was that Cutler expressed his dislike of Gohmert in connection with a request made to him as part of his official duties—to host the competition at the university. Citing evidence developed in discovery that Cutler himself knew that he had been asked to host the competition at the university, not to judge the competition in Tyler, the university and its co-defendants (the university's president and other administrators involved in the decision to fire Cutler) moved for summary judgment on the merits; the

individual defendants also moved for summary judgment on qualified immunity. The district court denied both motions, and the individual defendants filed this interlocutory appeal.

The Fifth Circuit dismissed in part, and affirmed in part. Two of the individual defendants argued that they could not be sued because they were not final decision makers in the termination. The Court dismissed this aspect of the appeal because not being a final decision maker is a defense from liability on the merits; it is not a basis for qualified immunity from suit, the denial of which is a collateral order that can be appealed on an interlocutory basis. Further, these two defendants could not invoke pendant appellate jurisdiction because their final-decision maker issue was not "inextricably intertwined" with the appealable immunity issue.

Regarding the immunity issue, there was no dispute on appeal that under Cutler's version of the facts—he spoke in connection with declining to participate in something that was not part of his official duties—the university violated his First Amendment right. The fight on appeal was over the second prong of qualified immunity, whether the right that was violated was "'clearly established' at the time of the challenged conduct.'" The Court held that its free speech cases after *Garcetti v. Ceballos*, 547 U.S. 410 (2006), should have provided Defendants with a clear warning that terminating Cutler on the basis of his speech to Rep. Gohmert's office—based on the undisputed facts and taking all reasonable inferences in Cutler's favor—would violate Cutler's First Amendment right. "Assuming that Cutler's account of his conversations with Rep. Gohmert's office is credible, as we must do, Cutler's speech was made externally to a staff member of an elected representative[] of the people allegedly about participating in an event that was not within his job requirements.... Cutler spoke about concerns entirely unrelated to his job and from a perspective that did not depend on his job as a university employee, but rather emanated from his views as a citizen."

### ***Graziosi v. City of Greenville, MS,* 775 F.3d 731 (5th Cir. 2015)**

Susan Graziosi complained that the City of Greenville illegally terminated her employment as a police offer in retaliation for exercising her First Amendment right of free speech. The district court held on the city's and the police chief's motion for summary judgment that Graziosi's speech was unprotected because she spoke in her capacity as a city employee, not as a member of the public; that she did not speak on a matter of public concern; and that even if she did speak as a citizen on a matter of public concern, then "Greenville's interests in maintaining discipline and good working relationships within the department outweighed Graziosi's interest in speaking as a citizen on a matter of public concern."

The Fifth Circuit affirmed, on slightly different reasoning. "[I]mmediately after returning to work from an unrelated suspension," Graziosi made the speech at issue: several postings on Facebook. The postings pertained to the police chief's decision not to allow Greenville officers to use patrol cars to attend the funeral in Pearl, Miss. (about 125 miles away) of an officer who had been killed in the line of duty; the chief "decided that the officers [who wanted to attend] would have to use their personal vehicles." On her own Facebook page, Graziosi complained—in the context of the decision about use of the patrol cars—about the quality of the department's leadership, then she made similar comments on the Facebook page of Greenville's mayor.

Contrary to the district court, which held that Graziosi spoke in her official capacity because her posts identified her as a police officer, the Fifth Circuit held that the identification was irrelevant, and what mattered was that the "statements [at issue] [were] not within the ordinary scope of Graziosi's duties as a police officer." On whether Graziosi's posts were a matter of public concern, the Court acknowledged that Graziosi "perhaps [had a] genuine desire to inform the community about the [police department's] failure to send a representative to the funeral." But it held that the

content and context of Graziosi's speech weighed in favor of finding that it was, as a matter of law, speech on a non-public concern. The mayor's Facebook page was public, and so that factor—the form of the speech—weighed in Graziosi's favor. But the content "quickly devolved into a rant attacking [of the police chief's] ... leadership and culminating with the demand that he 'get the hell out of the way.' ... Therefore, the speech at issue here is akin to an internal grievance, the content of which is not entitled to First Amendment protection." The context—Graziosi's recently-ended suspension, and her "anger and dissatisfaction with [the chief's] ... decision" about attending the funeral—also weighed in favor of concluding that Graziosi's postings involved "not ... a matter of public concern, but instead, ... a dispute over an intra-departmental decision."

The Court also agreed with the district court's alternative holding: even if Graziosi's postings involve a public concern, "she nevertheless fails to demonstrate that her interests outweigh those of Greenville." With respect to Greenville's evidence of its interest, the Court remarked:

> Here, Greenville contends that it justifiably dismissed Graziosi to prevent insubordination within the department. We agree. Through her statements, Graziosi publicly criticized the decision of her superior officer and requested new leadership. Furthermore, she told leadership to "get the hell out of the way," underscoring that demand by stating, "seriously, if you don't want to lead, just go." Finally, Graziosi vowed to "no longer use restraint when voicing [her] opinions." These statements coupled with her vow of future and continued unrestrained conduct "smack of insubordination," and Greenville was well within its wide degree of latitude to determine that dismissal was appropriate.... Accordingly, Greenville has articulated a substantial interest in maintaining discipline and close working relationships and preventing insubordination.

Graziosi countered that Greenville failed to prove that her posting actually disrupted the police department, to which the Court replied that no such proof was necessary. Greenville presented evidence that "Graziosi's statements [created] ... a 'buzz around the department,'" and that the chief "noticed a change in the demeanor towards him by two of his officers." Furthermore, "Graziosi's promise of future unrestrained conduct" also supported the reasonableness of its fear that Graziosi would disrupt the department.

***Elonis v. United States,* 135 S. Ct. 2001 (2015)**

Anthony D. Elonis was indicted with five counts of making threats in violation of 18 U.S.C. § 875(c) ("§ 875(c)"). Section 875(c) provides that it shall be illegal to transmit "in interstate or foreign commerce any communication containing . . . any threat to injure the person of another." Elonis was indicted for communications all made on the social networking website Facebook.

Count One alleged that Elonis made threats against the employees and patrons of the amusement park where Elonis worked. Soon after being fired for posting a photograph of himself with a toy knife against his coworker's throat with the caption "I wish," Elonis published a series of posts which formed the basis of Count One. Elonis claimed he had keys to his former workplace and implied that he would enter the park to cause fear.

Count Two alleged that Elonis made threats against his estranged wife. Elonis published several Facebook posts that described taking the life of his wife. Because of these posts, Elonis' wife obtained a protection-from-abuse order against Elonis. Soon after, Elonis posted a parody of a comedy sketch, describing

a desire to kill his wife and diagramming his wife's home to explain how he would carry out such a plan. Elonis then posted on his Facebook: "Fold up your PFA [protection-from-abuse order] and put it in your pocket / Is it thick enough to stop a bullet?" Elonis also commented that he had enough explosives to "take care of the State Police and the Sheriff's Department." This statement formed the basis of Count Three for threats against local law enforcement.

Count Four alleged that Elonis made threats against a kindergarten class. Elonis posted on his Facebook that he planned to make a name for himself by shooting a kindergarten class. This post caught the attention of the Federal Bureau of Investigation ("FBI"). After FBI Special Agent Denise Stevens interviewed Elonis regarding the post, Elonis published a Facebook post where he described wanting to kill the agent and claimed he had been wearing a bomb during the interview. This post formed Count Five for threats against an FBI agent.

At trial, Elonis claimed his statements were made in jest or were rap lyrics he had written to cope with his feelings about his wife leaving him. A jury convicted Elonis of Counts 2 through 5. The U.S. District Court for the Eastern District of Pennsylvania denied Elonis' post-trial motions, and sentenced him to forty-four months in prison and three years of supervised release. The U.S. Court of Appeals for the Third Circuit affirmed the district court's ruling, rejecting Elonis' argument that the court below had erred in instructing the jury that no subjective intent to threaten was necessary to violate § 875(c).

The issue before the Supreme Court was whether 18 U.S.C. § 875(c) requires a finding of subjective intent to threaten, and if not, whether only requiring a showing that a reasonable person would regard the statement as threatening violates the First Amendment. Elonis argued that a negligence standard regulating free speech is contrary to the First Amendment. Conversely, the United States argued that threats are not protected speech and the government has a compelling interest in protecting the public from threats.

The Supreme Court reversed Elonis' conviction in a 7-2 decision. Chief Justice John G. Roberts wrote for a seven-justice majority, while Samuel Alito authored an opinion concurring in part and dissenting in part and Clarence Thomas authored a dissenting opinion. In his majority opinion, Justice Roberts held that the Third Circuit's instruction, requiring only negligence with respect to the communication of a threat, was not sufficient to support a conviction under Section 875(c). Section 875(c) does not indicate whether the defendant must intend that the communication contain a threat. The "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." (Citation omitted) Thus, criminal statutes are generally interpreted "to include broadly applicable scienter requirements, even where the statute . . . does not contain them." (Citation omitted) This does not mean that a defendant must know that his conduct is illegal, but a defendant must have knowledge of "the facts that make his conduct fit the definition of the offense." (Citation omitted) Elonis' conviction was premised solely on how his posts would be viewed by a reasonable person, a civil standard of liability in tort law inconsistent with the conventional criminal conduct requirement of awareness of wrongdoing. Thus, the Court held that Section 875(c)'s mental state requirement is satisfied if the defendant transmits a communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat. The Court, however, declined to address whether a mental state of recklessness would also suffice. Based on its ruling, the Court considered the First Amendment issues moot.

### ***Benes v. Puckett,* 602 Fed.Appx. 589 (5th Cir. March 4, 2015)**

Frank Benes, a long-time City of Dallas employee, was terminated from the Dallas Water Utilities in early 2012. Throughout his career, Benes filed numerous complaints to his superiors and to high-ranking city officials about pay inequity based on his age and national origin. Benes also made numerous allegations that certain Dallas Water Utilities projects were plagued by fraud and waste. Although an outside

firm found that these allegations were unsubstantiated, Benes continued to send complaints. In early January 2012, Benes emailed the members of the Dallas City Council, again alleging misuse of public funds, fraud, and other unethical activities related to the White Rock Spillway project. The following day, Jo Puckett, the Director of the Dallas Water Utilities, sent Benes a disciplinary notice for violating various personnel rules, which explained that Benes could be terminated. After a hearing, Benes was terminated.

Benes filed suit under 42 U.S.C. §1983 against Puckett and the City of Dallas, claiming they violated his First Amendment rights by terminating him in retaliation for communicating with the City Council. Benes later conceded that the City of Dallas was not liable on the section 1983 claim and therefore sought only to recover from Puckett in her individual capacity. Puckett sought summary judgment. Concluding that Puckett acted in an objectively reasonable manner when she determined that Benes's communications were not protected speech, the district court found Puckett was entitled to qualified immunity. Benes timely appealed.

The Fifth Circuit focused its analysis on whether it was objectively reasonable for Puckett to conclude that Benes's emails to the Dallas City Council relating to the White Rock Spillway project were made in his capacity as a public employee. As the district court noted, "[t]here is no bright line rule for determining whether an employee acts in his official capacity or in his capacity as a citizen" [citations omitted]. Relevant factors in this analysis include: whether the employee expressed views inside the office or publicly; the subject matter of the relevant communication; and, most importantly, whether or not the statements were made pursuant to an official duty [citation omitted].

Several facts weigh in favor of finding that Benes wrote the email in his professional capacity. First, his email discussed the White Rock Spillway, a project in which he was professionally involved as an engineer. Second, the memo attached to Benes' email also stated that "[p]roviding project reports was (and is) my job responsibility, and if I would not have reported these inappropriate practices and project violations, I would not be performing (and in fact would be in violation of) my job duties and my professional and engineering ethics." Third, although not dispositive, Benes signed the email—which was written on City of Dallas stationery—using his professional title "Senior Engineer" and "City of Dallas, DWU." Thus, the discussion of the above factors shows that the case law did not clearly establish whether Benes was speaking pursuant to his job duties or as a citizen. This is precisely the situation in which qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions" [citation omitted].

***Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)**

Clyde Reed, pastor of Good News Community Church (Good News), rented space at an elementary school in Gilbert, Arizona, and placed about 17 signs in the area announcing the time and location of Good News' services. Gilbert has an ordinance (Sign Code) that restricts the size, number, duration, and location of certain types of signs, including temporary directional ones, to prevent improper signage. After Good News received an advisory notice from Gilbert that it violated the Sign Code, Good News sued Gilbert and claimed that the Sign Code violated the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

The district court found that the Sign Code was constitutional since it was content-neutral and was reasonable in light of the government interests. The U.S. Court of Appeals for the Ninth Circuit affirmed and held that, even though an official would have to read a sign to determine what provisions of the Sign Code applied, the restrictions were not based on the content of the signs, and the Sign Code left open other channels of communication. The Supreme Court, however, held the Sign Code's provisions are content-based regulations of speech that do not survive strict scrutiny.

Here, the Sign Code was content based on its face. It defined the categories of temporary, political, and ideological signs on the basis of their messages and then subjects each category to different restrictions. The restrictions applied thus depend entirely on the sign's communicative content. Because the Code, on its face, is a content-based regulation of speech, there is no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny. Moreover, none of the Ninth Circuit's theories for its contrary holding is persuasive. Its conclusion that the Town's regulation was not based on a disagreement with the message conveyed skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. Thus, an innocuous justification cannot transform a facially content-based law into one that is content neutral. A court must evaluate each question—whether a law is content based on its face and whether the purpose and justification for the law are content based—before concluding that a law is content neutral. Ward does not require otherwise, for its framework applies only to a content-neutral statute.

The Ninth Circuit's conclusion that the Sign Code does not single out any idea or viewpoint for discrimination conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints is a "more blatant" and "egregious form of content discrimination," but "[t]he First Amendment's hostility to content-based regulation [also] extends ... to prohibition of public discussion of an entire topic," The Sign Code, a paradigmatic example of content-based discrimination, singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter.

The Ninth Circuit also erred in concluding that the Sign Code was not content based because it made only speaker-based and event-based distinctions. The Code's categories are not speaker-based—the restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. And even if the sign categories were speaker based, that would not automatically render the law content neutral. Rather, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."

The Sign Code's content-based restrictions do not survive strict scrutiny because the Town has not demonstrated that the Code's differentiation between temporary directional signs and other types of signs furthers a compelling governmental interest and is narrowly tailored to that end. Assuming that the Town has a compelling interest in preserving its aesthetic appeal and traffic safety, the Code's distinctions are highly under-inclusive. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town when other types of signs create the same problem. Nor has it shown that temporary directional signs pose a greater threat to public safety than ideological or political signs.

This decision will not prevent governments from enacting effective sign laws. The Town has ample content-neutral options available to resolve problems with safety and aesthetics, including regulating size, building materials, lighting, moving parts, and portability. And the Town may be able to forbid postings on public property, so long as it does so in an evenhanded, content-neutral manner. An ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—e.g., warning signs marking hazards on private property or signs directing traffic—might also survive strict scrutiny.

***Walker v. Texas Division, Sons of Confederate Veterans, Inc*., 135 S. Ct. 2239 (2015)**

Texas offers automobile owners a choice between general-issue and specialty

license plates. Those who want the State to issue a particular specialty plate may propose a plate design, comprising a slogan, a graphic, or both. If the Texas Department of Motor Vehicles Board approves the design, the State will make it available for display on vehicles registered in Texas. Here, the Texas Division of the Sons of Confederate Veterans and its officers (collectively SCV) filed suit against the Chairman and members of the Board (collectively Board), arguing that the Board's rejection of SCV's proposal for a specialty plate design featuring a Confederate battle flag violated the Free Speech Clause. The District Court entered judgment for the Board, but the Fifth Circuit reversed, holding that Texas's specialty license plate designs are private speech and that the Board engaged in constitutionally forbidden viewpoint discrimination when it refused to approve SCV's design.

In reversing the Fifth Circuit, the Supreme Court held that Texas's specialty license plate designs constitute government speech, and thus Texas was entitled to refuse to issue plates featuring SCV's proposed design. When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. A government is generally entitled to promote a program, espouse a policy, or take a position. Were the Free Speech Clause interpreted otherwise, "it is not easy to imagine how government would function." That is not to say that a government's ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech, and the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech.

Clear precedent supports this decision. The same analysis the Court used in *Summum*—to conclude that a city "accepting a privately donated monument and placing it on city property" was engaging in government speech, 555 U.S., at 464, 129 S.Ct. 1125—leads to the conclusion that government speech is at issue here. First, history shows that States, including Texas, have long used license plates to convey government speech, e.g., slogans urging action, promoting tourism, and touting local industries. Second, Texas license plate designs "are often closely identified in the public mind with the [State]." Each plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: the State places the name "TEXAS" in large letters across the top of every plate. Texas also requires Texas vehicle owners to display license plates, issues every Texas plate, and owns all of the designs on its plates. The plates are, essentially, government IDs, and ID issuers "typically do not permit" their IDs to contain "message[s] with which they do not wish to be associated." Third, Texas maintains direct control over the messages conveyed on its specialty plates, by giving the Board final approval over each design. Like the city government in *Summum*, Texas "has effectively controlled the messages [conveyed] by exercising final approval authority over their selection." These considerations, taken together, show that Texas's specialty plates are similar enough to the monuments in *Summum* to call for the same result.

Forum analysis, which applies to government restrictions on purely private speech occurring on government property is not appropriate when the State is speaking on its own behalf. The parties agree that Texas's specialty license plates are not a traditional public forum. Further, Texas's policies and the nature of its license plates indicate that the State did not intend its specialty plates to serve as either a designated public forum—where "government property ... not traditionally ... a public forum is intentionally opened up for that purpose," *Summum*, supra, at 469, 129 S.Ct. 1125—or a limited public forum—where a government "reserv[es a forum] for certain groups or for the discussion of certain topics." The State exercises final authority over the messages that may be conveyed by its specialty plates, it takes ownership of each specialty plate design, and it has traditionally used its plates for government speech. These features of Texas specialty plates militate against a determination

that Texas has created a public forum. Finally, the plates are not a nonpublic forum, where the "government is ... a proprietor, managing its internal operations." The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum provider. *See Summum*, supra, at 470–471, 129 S.Ct. 1125. Nor does Texas's requirement that vehicle owners pay annual fees for specialty plates mean that the plates are a forum for private speech. And this case does not resemble other nonpublic forum cases.

The determination that Texas's specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. The Court in fact acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. The Court also recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. Just as Texas cannot require SCV to convey "the State's ideological message," SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.

***East Texas Baptist University v. Burwell,* __ F.3d ___, 2015 WL 3852811 (5th Cir. June 22, 2015)**

Church-affiliated universities and other religious entities brought three separate actions contending that the Patient Protection and Affordable Care Act's (ACA) contraception-coverage mandate, and its accommodation violated the Religious Freedom Restoration Act (RFRA) and the Establishment Clause, by requiring plaintiffs to facilitate their employees' free access to emergency contraception or face penalties. In one case, the United States District Court for the Eastern District of Texas entered judgment in favor of plaintiffs and issued a permanent injunction barring enforcement of the challenged ACA provisions. In another case, the United States District Court for the Southern District of Texas, granted partial summary judgment in favor of the plaintiffs, and issued a permanent injunction barring enforcement of the challenged ACA provisions. In the third case, the United States District Court for the Northern District of Texas issued permanent injunctions against the government. Several government agencies charged with enforcing the ACA, including Sylvia Mathews Burwell, secretary of the U.S. Department of Health and Human Services, appealed the trial court decisions to the Fifth Circuit in a consolidated appeal.

The Fifth Circuit reversed, holding that the challenged ACA provisions did not violate the plaintiffs' rights under the RFRA. In his decision, Judge Jerry Smith wrote that the Fifth Circuit was joining several other circuit courts in finding that the ACA's contraception coverage mandate does not present a substantial burden to the plaintiffs' religious freedom. "Although the plaintiffs have identified several acts that offend their religious beliefs, the acts they are required to perform do not include providing access to contraceptives. Instead, the acts that violate their faith are those of third parties." "Because RFRA confers no right to challenge the independent conduct of third parties, we join our sister circuits in concluding that the plaintiffs have not shown a substantial burden on their religious exercise." While the plaintiffs complain that sending in a notion of opposition will authorize or trigger payments for contraceptives, that is "not so," wrote Judge Smith, who explained that "the ACA already requires contraceptive coverage." Judge Smith also noted that the Hobby Lobby decision mentions that certain religious organizations have already been "effectively exempted" through the ACA's accommodation. "Thus, *Hobby Lobby* is of no help to the plaintiffs' position, and the requirement to offer a group health plan does not burden their religious exercise."

## II. SECTION 1983

***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,* 747 F. 3d 275 (5th Cir. 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,* 562 Fed.Appx. 431, 2014 WL 1408885 (6th Cir. 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,_ 134 S. Ct. 2012 (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.

***Estate of Pollard v. Hood County, Texas,* 579 Fed. Appx. 260, 2014 WL 4180809 (5th Cir. 2014)**

The Estate of Michael Mark Pollard appeals from the summary judgment dismissal of its 42 U.S.C. § 1983 complaint against Sheriff Roger Deeds, Captain Ann Brown, and officers Norma Hanson and Travis Barina, and from the dismissal following judgment on the pleadings of their § 1983 complaint against Hood County, Texas. Plaintiffs argue on appeal that (1) the individual defendants violated decedent Michael Mark Pollard's Fourteenth Amendment right as a pretrial detainee by acting with deliberate indifference to his known risk of suicide; and (2) Hood County, Texas is liable as a municipality for promulgating unconstitutional customs, practices, policies, or procedures.

In March 2010, charges were brought against decedent Michael Mark Pollard for aggravated sexual assault of a child. After learning of the impending charges, but before his arrest, Pollard twice attempted suicide. First, in March of 2010, he slit his wrist and was hospitalized for four days. On April 10, 2010, he attempted suicide again, this time cutting his arm "vertically to the bone and slit[ting] his neck with a box cutter." Pollard was taken to the hospital, where he received emergency surgery. Thereafter, he was admitted to the inpatient psychiatric ward of the hospital for treatment. Immediately after his discharge from the hospital, Pollard was arrested on the aggravated sexual assault charges and taken to Hood County Jail.

At booking, Pollard was assessed and deemed to be a high risk for suicide. Pollard was strip searched and dressed in paper clothing. He was placed in a single occupancy cell containing only a mattress and, for his protection, was not provided with any other items in his cell. Pollard was placed on 15–minute watch, meaning that jailers would visually check on him every fifteen minutes. Up until Pollard's death, the 15–minute watch remained in effect but was not meticulously implemented: some checks were a few minutes late and some a few minutes early. Despite these precautions, on April 26, 2010, Pollard committed suicide by hanging himself from a laundry bag tied to an air vent in his cell. The individual defendants each testified that they were unaware of the presence of the laundry bag in Pollard's cell until it was used to effectuate his suicide, which they believed was left in the cell by a previous inmate and overlooked when the cell was cleaned. Upon discovering Pollard hanging in his cell, Hanson immediately called for help, and several other jailers arrived within about twenty seconds. A jailer lifted Pollard to release the tension, and

another checked for a pulse, but found none. According to the jailers who responded to Hanson's call for help, because Pollard lacked a pulse, he was not cut down, but was left in the position in which he was discovered, until the investigator could arrive.

On March 20, 2012, Plaintiffs filed their original complaint alleging liability in three ways: individual liability with respect to individual defendants Barina and Hanson, supervisory liability with respect to individual defendants Brown and Deeds, and municipal liability with respect to Hood County. On June 29, 2012, the individual defendants filed a motion for summary judgment. After limited discovery, plaintiffs filed their response in opposition to defendants' motion for summary judgment on January 18, 2013.

The district court granted summary judgment on plaintiffs' claims against the individual defendants on the basis of qualified immunity on March 14, 2013, but found that such ruling should not have preclusive effect on plaintiffs' claims against Hood County. On September 3, 2013, the district court entered an order granting Hood County's motion for judgment on the pleadings. Plaintiffs timely filed their notice of appeal.

To defeat a defendant's summary judgment motion premised upon qualified immunity, a plaintiff must produce evidence that presents a genuine issue of material fact that (1) the defendants' conduct amounts to a violation of the plaintiff's constitutional right; and (2) the defendants' actions were "objectively unreasonable in light of clearly established law at the time of the conduct in question." Here, however, the Court found that Plaintiff did not establish a genuine issue of material fact that the defendants' violated Pollard's constitutional rights; thus, it did not address the defendants' objective reasonableness in light of clearly established law.

The constitutional violation alleged here stems from the Due Process clause of the Fourteenth Amendment, under which a "pretrial detainee ... ha[s] a clearly established ... right not to be denied, by deliberate indifference, attention to his serious medical needs." This right includes protection from known suicidal tendencies. "Deliberate indifference is an extremely high standard to meet," and requires a plaintiff to establish more than mere negligence, unreasonable response, or medical malpractice. Under the facts of this case, the Plaintiffs failed to establish that any of the individual defendants acted with deliberate indifference, despite their irregular 15-minute watch cycles they were ordered to undertake.

Regarding Hood County, the Court also affirmed the district court. Because none of the individual defendants acted with deliberate indifference, the Plaintiffs did not state a claim of a constitutional violation for which Hood County may be held municipally liable. To impose liability on a municipality under § 1983, plaintiffs must first show that a municipal employee committed a constitutional violation—here, deliberate indifference to Pollard's known suicide risk. Once this underlying constitutional violation is established, liability can be extended to the county if plaintiffs can show that the violation "resulted from a Hood County policy or custom adopted or maintained with objective deliberate indifference to the detainee's constitutional rights." "If a plaintiff is unable to show that a county employee acted with subjective deliberate indifference, the county cannot be held liable for an episodic act or omission."

### ***Dawson v. Anderson County, Tex.,* 769 F.3d 326 (5th Cir. 2014)**

Appellant Claudia Dawson was arrested by Palestine, Texas police for public intoxication and interference with public duties. She was taken to the Anderson County jail and, based on probable suspicion, police officers asked the jail's officers to perform a strip search. During that search, Dawson was shot with a pepper ball gun, once in the leg and once in the abdomen. She sued, alleging civil rights violations under 42 U.S.C. §1983 for use of excessive force by Anderson County jailers and an unreasonable search. She also raised pendent state law claims for assault and battery. The district court

granted the defendants' motion for summary judgment and dismissed Dawson's claims.

The Fifth Circuit affirmed. Appellant first claims that the use of the pepper ball gun constituted excessive force in violation of the Fourth Amendment. Contrary to her jailers, Dawson stated she initially complied with their directive to squat and cough during the strip search. This initial compliance removed any need for the pepper ball gun (which left small marks and broke the skin) and, she contended, its use therefore was excessive. The defendants responded with a claim of qualified immunity. To overcome this defense, Dawson must show an injury caused by actions that were objectively unreasonable in light of clearly established law. "We cannot conclude that all reasonable officers would believe that the use of force in this case violated the Fourth Amendment, because it is undisputed that Dawson did not comply with successive search commands given at her arrestee intake encounter. Even crediting her that she obeyed at first, Dawson admitted refusing a renewed command to "squat and cough." Law enforcement officers are within their rights to use objectively reasonable force to obtain compliance from prisoners.

Regarding Dawson's claim that the search was conducted in an unreasonable manner, specifically that the defendants laughed at her and made abusive comments, the Court has previously held that verbal abuse by a jailer alone does not give rise to a §1983 claim. Given the Court had already held that the use of the pepper ball gun in this case was objectively reasonable, her assertions about laughter and taunts do not overcome defendants' qualified immunity.

Finally the Court addressed Dawson's state law claims of assault and battery. The question is whether the officers acted in good faith and their conduct "is evaluated under substantially the same standard used for qualified immunity determinations in §1983 actions." *Meadours v. Ermel*, 483 F.3d 417, 424 (5th Cir. 2007). Because the officers were entitled to qualified immunity on the federal claims, they are also protected by official immunity under state law.

***City and County of San Francisco v. Sheehan,*** **135 S.Ct. 1705 (2015)**

Respondent Sheehan lived in a group home for individuals with mental illness. After Sheehan began acting erratically and threatened to kill her social worker, the City and County of San Francisco (San Francisco) dispatched police officers Reynolds and Holder to help escort Sheehan to a facility for temporary evaluation and treatment. When the officers first entered Sheehan's room, she grabbed a knife and threatened to kill them. They retreated and closed the door. Concerned about what Sheehan might do behind the closed door, and without considering if they could accommodate her disability, the officers reentered her room. Sheehan, knife in hand, again confronted them. After pepper spray proved ineffective, the officers shot Sheehan multiple times. Sheehan later sued petitioner San Francisco for, among other things, violating Title II of the Americans with Disabilities Act of 1990(ADA) by arresting her without accommodating her disability. She also sued petitioners Reynolds and Holder in their personal capacities under 42 U.S.C. § 1983, claiming that they violated her Fourth Amendment rights. The District Court granted summary judgment because it concluded that officers making an arrest are not required to determine whether their actions would comply with the ADA before protecting themselves and others, and also that Reynolds and Holder did not violate the Constitution. Vacating in part, the Ninth Circuit held that the ADA applied and that a jury must decide whether San Francisco should have accommodated Sheehan. The court also held that Reynolds and Holder are not entitled to qualified immunity because it is clearly established that, absent an objective need for immediate entry, officers cannot forcibly enter the home of an armed, mentally ill person who has been acting irrationally and has threatened anyone who enters.

The Supreme Court granted certiorari to consider two questions. After reviewing the parties' submissions, the Court dismissed the

first question regarding whether the ADA "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody," as improvidently granted. On the second issue of qualified immunity, the Court held that the officers are entitled to qualified immunity because they did not violate any clearly established Fourth Amendment rights.

Certiorari was granted on the first issue with the understanding that San Francisco would argue that Title II of the ADA does not apply when an officer faces an armed and dangerous individual. Instead, San Francisco merely argued that Sheehan was not "qualified" for an accommodation because she "pose[d] a direct threat to the health or safety of others," which threat could not "be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services." This argument was not passed on by the court below. The decision to dismiss this question as improvidently granted, moreover, was reinforced by the parties' failure to address the related question whether a public entity can be vicariously liable for damages under Title II for an arrest made by its police officers.

As to the second issue, Reynolds and Holder were entitled to qualified immunity from liability for the injuries suffered by Sheehan. Public officials are immune from suit under 42 U.S.C. § 1983 unless they have "violated a statutory or constitutional right that was clearly established at the time of the challenged conduct," an exacting standard that "gives government officials breathing room to make reasonable but mistaken judgments," The officers did not violate the Fourth Amendment when they opened Sheehan's door the first time, and there is no doubt that they could have opened her door the second time without violating her rights had Sheehan not been disabled. Their use of force was also reasonable. The only question, therefore, was whether they violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempt to accommodate her disability. Because any such Fourth Amendment right, even assuming it exists, was not clearly established, Reynolds and Holder are entitled to qualified immunity. Likewise, an alleged failure on the part of the officers to follow their training does not itself negate qualified immunity where it would otherwise be warranted.

### ***Singleton v. Darby,* --F.3d--, 2015 WL 2403430 (5th Cir. May 21, 2015)**

Plaintiff–Appellant Barbara Jeannette Singleton ("Singleton") filed this action under 42 U.S.C. § 1983 against Defendant–Appellee Michael Darby ("Darby"). Singleton claims that Darby retaliated against her for exercising her First Amendment rights. She also claims that Darby subjected her to excessive force in violation of the Fourth Amendment.

The suit arises from facts that occurred on November 19, 2012. On that day, citizens opposed to the Keystone XL Pipeline conducted a protest at Farm to Market Road 1911 in Cherokee County, Texas. Approximately eighty people attended the protest, including Singleton, a retired schoolteacher who opposes the pipeline. Although a few of the protestors, including Singleton, were older persons, and a few of the protestors were confined to wheelchairs, a video taken at the protest demonstrates that a large number of the protestors were young and able-bodied.

The Cherokee County Sheriff's Department dispatched a truck carrying a cherry picker to the site of the protest to remove protestors from nearby trees. The Sheriff's Department also dispatched Darby, a deputy sheriff sergeant, to ensure that the protest remained under control.

The truck arrived at the scene first, with Darby following behind in his police car. Some of the protestors, including Singleton, became concerned that the truck was about to run over a young demonstrator. Accordingly, they entered the road and began screaming at the driver to stop. One protestor banged on the hood of the truck, jumped on the vehicle, and opened the door to make the driver stop. Upon witnessing the protestor climb on the truck, Darby exited

his vehicle and began walking toward the protestor. Before the protestor reached the driver of the truck, he jumped off the truck and fled.

At some point, the young demonstrator in the path of the oncoming truck stood up and moved out of the way. Several protestors nevertheless remained in or entered the road to prevent the cherry picker from reaching the protestors in the trees. The video shows several protestors leaning against the grill of the truck and inviting about a dozen other protestors into the road to block the truck's path. Singleton remained in the road during this time.

Darby walked toward the protestors blocking the truck, including Singleton, and ordered them to "[g]et out of the road." The protestors did not obey his command. Approximately five seconds later, Darby leveled a stream of pepper spray toward Singleton and several other protestors in the road. Darby did not spray any of the protestors on the sides of the road who were not obstructing traffic. Singleton described the burning in her eyes as extremely painful. After Singleton left the protest, she visited her doctor, who treated and released her that same day.

Singleton alleged that Darby violated her constitutional rights under the First and Fourth Amendments by using pepper spray on her. The district court concluded that Darby was entitled to qualified immunity from Singleton's suit, and accordingly granted summary judgment in Darby's favor. Singleton timely appealed.

To survive summary judgment on her First Amendment retaliation claim, Singleton must, among other things, produce sufficient evidence that (1) she was "engaged in constitutionally protected activity;" (2) Darby's actions caused her "to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity;" and (3) Darby's adverse actions "were substantially motivated against [her] exercise of constitutionally protected conduct." The Fifth Circuit, however, concluded that Singleton failed to demonstrate a genuine dispute of material fact as to the first of these elements. The First Amendment does not entitle a citizen to obstruct traffic or create hazards for others. A State may therefore enforce its traffic obstruction laws without violating the First Amendment, even when the suspect is blocking traffic as an act of political protest. The video demonstrates that Singleton and her compatriots were obstructing traffic in violation of Texas law. Thus, Singleton was not engaging in constitutionally protected activity at the time Darby pepper sprayed her.

Turning to Singleton's excessive force claim, Singleton must, *inter alia,* demonstrate that Darby's use of force was objectively unreasonable under the circumstances and under current law. Looking at the facts of his case, however, the Fifth Circuit held Darby's use of force was not objectively unreasonable. First, although Singleton's crime was not particularly severe, she was blocking traffic in violation of Texas law, and the State of Texas has an interest in keeping its roads free of obstructions.

Secondly, a reasonable officer would have concluded that the protestors posed a threat to Darby, the driver of the truck, the truck itself, or to others. The protestors vastly outnumbered Darby. Darby saw one of the demonstrators climb onto the truck, bang on its hood, and open the truck's door. The video shows several young protestors leaning against the grill of the truck and inviting other protestors to block the vehicle. Because numerous other protestors remained crowded around the truck, a reasonable officer could have believed that other protestors might climb on the truck or attack the driver. A reasonable officer in Darby's position could have reasonably concluded that the protestors were out of control and that the situation required definitive action to move the truck past the demonstrators and out of danger.

Third, Singleton and her compatriots resisted Darby's attempt to clear the road. Singleton admits that she heard Darby's warning before he pepper sprayed her group. The video demonstrates that Darby gave Singleton sufficient time to at least begin walking out of the road before he deployed the pepper spray. Singleton nevertheless did not move. Although

Singleton testified in her deposition that Darby did not give her enough time to react, we must credit the video evidence over Singleton's contrary testimony.

Thus, Darby, as a reasonable officer, was justified in using some degree of force to clear the road. The force Darby employed was not disproportionate to the need. Deploying pepper spray was not an unreasonable way to defuse the situation. Indeed, it was probably the least intrusive means available to Darby. To reiterate, the protestors vastly outnumbered Darby. As one of only two police officers on the scene, Darby could not have individually handcuffed and arrested each of the numerous protestors blocking the road. In addition to the obvious difficulty of one officer attempting to handcuff so many violators, Darby faced the likelihood that such an action could motivate a larger number of protestors lining the road to join in the road-blocking enterprise or otherwise retaliate against Darby. Darby's decision to utilize pepper spray was therefore not an unreasonable way to gain control of a potentially explosive situation.

### ***Weatherbe v. Smith,* --F.3d--, 2014 WL 7564675 (5th Cir. November 24, 2014)**

James Wetherbe, a professor at Texas Tech University ("Texas Tech"), sued Bob Smith, the former provost, under 42 U.S.C. § 1983 for allegedly retaliating against Wetherbe for his views on tenure. Wetherbe has been a professor at Texas Tech since 2000 and before then was a professor at other institutions for twenty-seven years. When he was a professor at the University of Minnesota twenty or so years ago, he resigned tenure and has continued to decline offers of tenure, thinking that tenure is damaging to the educational system and that foregoing tenure gives him credibility in the business world. He has been outspoken on his views about the alleged evils of tenure for at least two decades.

In August 2011, the dean of Texas Tech's Rawls College of Business announced his plan to retire. The outgoing dean had not had tenure, and the announcement did not specify that tenure was required for the deanship. Smith, then the provost, put Wetherbe on the search committee for the new dean, but Wetherbe resigned from the committee so that he could pursue the position himself.

At that time, Wetherbe was nominated for the Horn Professorship, a prestigious position that comes with certain financial advantages. The Horn Committee approved the nomination and scheduled it for the March 2012 meeting of the Board of Regents, but at the request of the President's Office the item was pulled from the agenda in February. At Smith's behest, the Committee conducted a new vote on Wetherbe in a meeting at which Smith changed his vote; the nomination still was approved.

Wetherbe was in an interview group for the deanship in March 2012. A new question had been added to the set of inquiries for the candidates asking whether each applicant had tenure. Smith admitted that the question was added because he had found out only during the dean-application process that Wetherbe was not tenured. Wetherbe shared his views on tenure with the search committee at the off-site interview, at which Smith was present.

The committee listed Wetherbe as one of its four top recommendations for an on-campus interview, but Smith decided to interview only the other three top candidates. When one of them withdrew, Smith selected another candidate who had been recommended lower by the search committee; that person was ultimately selected to be the dean. Smith would later testify that he had not designated Wetherbe for an interview because he thought the off-site interview had gone poorly, he did not like the fact that Wetherbe had no tenure, and he did not agree with "some of [Wetherbe's] philosophies on being a leader."

In a meeting with Dean McInnes at the end of March 2012, Wetherbe learned that Smith considered him ineligible for the Horn Professorship because he did not have tenure. Smith met with Wetherbe and said that he was not actually eligible to be a professor at all because he was not tenured. Wetherbe asked

about his application for the Horn Professorship in May, in response to which Smith reiterated that he was not eligible for it.

At a grievance hearing in July 2012, Smith confirmed that he considered a person who was neither tenured nor tenure-track not to be a professor. In August, Smith gave a deposition in another case in which Wetherbe was a party, stating that he did not think an untenured faculty member should be a professor, let alone a Horn Professor. When asked how he came to know of Wetherbe's opinion on tenure, Smith first said that it came out "in his application" and "in his off-campus interview." Wetherbe does not dispute that Smith became aware of his views on tenure during the application process for the Horn Professorship. In his deposition, Smith confirmed that he thought Wetherbe's "views on tenure" made him unfit to be a Horn Professor and dean.

In May 2013, the new dean of the business school circulated a revised organizational chart; one change was to eliminate the position of Associate Dean for Outreach, which was held by Wetherbe. That did not mean that Wetherbe lost his teaching job, but he contends that his teaching position was still in danger as a result of the earlier statements by Smith that Wetherbe's appointment to a professorship without tenure was a mistake.

Wetherbe sued, alleging that Smith retaliated against him in violation of the First Amendment for his speech about tenure, specifically in impeding his candidacy for the Horn Professorship and the deanship and for removing the associate dean position that Wetherbe had held. Smith moved to dismiss for failure to state a claim and for qualified immunity. The district court denied the motion, holding that Wetherbe had adequately pleaded a case of First Amendment retaliation and that Smith was not entitled to qualified immunity because the allegations showed that he had violated Wetherbe's clearly established right not to "suffer an adverse employment decision for engaging in protected speech."

Because Wetherbe failed to state a claim and did not satisfy the first prong of qualified immunity, the Fifth Circuit reversed and rendered a judgment of dismissal on the First Amendment-retaliation claim and remanded for proceedings as needed. Parts of Wetherbe's complaint and brief focus on his lack of tenure as a motivation for Smith's alleged adverse actions. To the extent that Wetherbe alleges retaliation for his lack of tenure, he fails to state a claim. Under *Garcetti v. Ceballos,* 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), a threshold inquiry for a First Amendment-retaliation claim is whether the employee was speaking as a citizen on a matter of public concern. If not, he cannot state a claim for First Amendment retaliation. *See id.* at 418. He is speaking as a citizen where the speech is "the kind of activity engaged in by citizens who do not work for the government," but "activities undertaken in the course of performing one's job" are not protected. *Williams v. Dallas Indep. Sch. Dist.,* 480 F.3d 689, 693 (5th Cir. 2007).

Wetherbe alleges that Smith retaliated against him for his views and speech on tenure. It is not enough for Wetherbe to aver that Smith acted against him because of Wetherbe's views on tenure. A First Amendment-retaliation claim requires that the defendant retaliated in response to some protected speech. There is no freestanding First Amendment prohibition on taking action against a public employee for his beliefs; such a claim must be made to fit within a particular prohibition, such as retaliation under *Garcetti* or political discrimination under *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), and *Rutan v. Republican Party of Illinois,*497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). Wetherbe has elected to claim retaliation, and so he must make a short and plain statement of facts that, accepted as true, plausibly alleges First Amendment retaliation.

Wetherbe identifies instances of speech that can be grouped into two categories. The first includes his public speeches and consulting work covering the issue of tenure over the past twenty years. The second is his speech while applying to be dean and a Horn Professor. The

first category does not provide a basis for relief because Wetherbe has not alleged that Smith was aware of this speech or that it motivated his actions. Because these are requirements of Wetherbe's claim for First Amendment retaliation, this deficiency means that Wetherbe's claim fails to defeat qualified immunity. There is nothing in the complaint that alleges Smith was aware of any of Wetherbe's outside speech when Smith allegedly wronged Wetherbe, not even a bare allegation of knowledge; in regard to Smith's knowledge of Wetherbe's views, the complaint even says that "clearly it came out during the course of looking at him as a potential candidate to be a Horn Professor."

***Grady v. North Carolina*, 135 S.Ct. 1368 (2015)**

Between 1997 and 2006, Torrey Grady was convicted of two sexual offenses. After being released for the second time, a trial court civilly committed Grady to take part in North Carolina's satellite-based monitoring program for the duration of his life. The program required participants to wear a GPS monitoring bracelet so that authorities can make sure that participants are complying with prescriptive schedule and location requirements. Grady challenged the constitutionality of the program and argued that the constant tracking amounted to an unreasonable search that was prohibited under the Fourth Amendment. Both the trial court and the North Carolina Court of Appeals held that wearing a GPS monitor did not amount to a search.

In a per curiam opinion, the Supreme Court held that the trial court and appellate court both failed to apply the correct law based on the Court's decision in *United States v. Jones*, which held that placing a GPS tracker on the bottom of a vehicle constituted a search under the Fourth Amendment. The Court held that participation in the North Carolina program amounted to a search because requiring someone to wear a bracelet that tracks the person's whereabouts constitutes what the *Jones* decision termed a "physical occup[ation of] private property for the purpose of obtaining information." The Court remanded the case back to the trial court for a determination of whether or not this "search" was unreasonable under the Fourth Amendment.

## III. FOURTH AMENDMENT

***Heinen, v. North Carolina*, 135 S.Ct. 530 (2014)**

On April 29, 2009, Maynor Javier Vasquez and Nicholas Heien were traveling along Interstate 77 in North Carolina. Vasquez was driving Heien's car, and Heien was sleeping in the back seat. While watching for "criminal indicators of drivers [and] passengers", Sergeant Matt Darisse observed Vasquez drive by and thought he appeared "nervous. Sergeant Darisse then began following Vasquez. Vasquez eventually slowed his car when approaching a slower-moving vehicle and Sergeant Darisse observed the car's right rear brake light hadn't turned on. Sergeant Darisse believed that it was a violation of North Carolina traffic law to drive a vehicle with a broken brake light, so he activated his blue lights and stopped Vasquez (observing that as he did so, the right brake light "flickered on"). Sergeant Darisse informed Vasquez and Heien that he had stopped them for a broken brake light.

During the stop, Sergeant Darisse began to suspect the vehicle might contain contraband. His suspicion increased when Vasquez and Heien claimed, in separate questioning, that they were traveling to different ultimate destinations. Sergeant Darisse then asked Vasquez if he could search the vehicle. Vasquez said he should ask Heien, who said he "didn't really care". The ensuing search found cocaine. On appeal, the North Carolina appellate courts surprisingly ruled that the outdated state vehicle code required only *one* working brake light; therefore, there had been no violation of law that would permit the stop. The officer made no error about the facts; but he had been mistaken about the meaning of the law. However, the North Carolina Supreme Court ruled, the officer's mistake about this law was "reasonable," and for that reason the Fourth Amendment right to be

secure from "unreasonable … seizures" was not violated. The Supreme Court affirmed.

The vague word "unreasonable" in the Fourth Amendment has long risen questions about what sort of circumstances constitutionally permit law enforcement seizures. Thus, the current "probable cause" standards in *Illinois v. Gates* and *Terry v. Ohio* hold that even brief stops on the street require at least specific and articulable "reasonable suspicion," not just hunches. The Court has subsequently made clear that even when police are mistaken about facts, their stops do not violate the Constitution if their mistakes are "reasonable."

In the present case of first impression, the majority of the Supreme Court held that "there is no reason … why this same result" should not apply "when reached by way of a similarly reasonable mistake of law." So in this case, because the officer's mistake about the meaning of North Carolina's vehicle code was reasonable, "there was no violation of the Fourth Amendment in the first place." However, footnote of Justice Elena Kagan's concurring opinion should not be overlooked. She noted that that an individual officer's mistaken view, "no matter how reasonable," that he has complied with the Fourth Amendment, does not undermine a reviewing court's "ultimate conclusion" that governmental actions have violated the Fourth Amendment – even though it might affect the remedy.

***Rodriguez v. United States*, 575 U.S. ___ (April 21, 2015)**

On March 27, 2012, a Nebraska K-9 police officer pulled over a vehicle driven by Dennys Rodriguez after his vehicle veered onto the shoulder of the highway. The officer issued a written warning and then asked if he could walk the K-9 dog around Rodriguez's vehicle. Rodriguez refused, but the officer instructed him to exit the vehicle and then walked the dog around the vehicle. The dog alerted to the presence of drugs, and a large bag of methamphetamine was found.

Rodriguez moved to suppress the evidence found in the search, claiming the dog search violated his Fourth Amendment right to be free from unreasonable seizures. The district court denied the motion. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed, holding the search was constitutional because the brief delay before employing the dog did not unreasonably prolong the otherwise lawful stop.

The Supreme Court held that the use of a K-9 unit after the completion of an otherwise lawful traffic stop exceeded the time reasonably required to handle the matter and therefore violated the Fourth Amendment's prohibition against unreasonable searches and seizures. Because the mission of the stop determines its allowable duration, the authority for the stop ends when the mission has been accomplished. The Court held that a seizure unrelated to the reason for the stop is lawful only so long as it does not measurably extend the stop's duration. Although the use of a K-9 unit may cause only a small extension of the stop, it is not fairly characterized as connected to the mission of an ordinary traffic stop and is therefore unlawful.

***Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015)**

In May 2010, Michael Kingsley, who was being held as a pretrial detainee in Monroe County Jail, was ordered to take down a piece of paper covering the light above his cell bed but refused to do so. After Sergeant Stan Hendrickson ordered Kingsley to take down the paper several times and each time was met with refusal, Lieutenant Robert Conroy, the jail administrator, ordered the jail staff to take down the paper and transfer Kingsley to another cell. During the transfer, Kingsley refused to act as ordered, so the officers pulled him to his feet in such a manner that his feet hit the bedframe, which caused pain and made him unable to walk or stand. In the new cell, when Kingsley resisted the officers' attempts to remove the handcuffs, Hendrickson put his knee in Kingsley's back and Kingsley yelled at him. Kingsley also claimed that Hendrickson smashed his head into the concrete bunk. After further verbal exchange,

another officer applied a taser to Kingsley's back.

Kingsley sued Hendrickson and other jail staff members and claimed that their actions violated his due process rights under the Fourteenth Amendment. The jury found the defendants not guilty. Kingsley appealed and argued that the jury was wrongly instructed on the standards for judging excessive force and intent. The U.S. Court of Appeals for the Seventh Circuit reversed.

Justice Stephen G. Breyer delivered the opinion of the 5-4 majority. The Court held that, in a claim regarding whether an officer used excessive force against a pretrial detainee, the plaintiff is not required to prove that the defendant thought the force was excessive but that the force was excessive based on an objective standard. Therefore, the court must determine whether, from the perspective of a reasonable officer on the scene at the time, the use of force in question was excessive. The Court held that the objective standard is in line with existing precedent that holds that the Due Process Clause protects pretrial detainees from excessive force that amounts to punishment, which can be shown through evidence that proves that the force in question was not reasonably related to the legitimate purpose of holding detainees for trial. The objective standard also protects an officer who acts in good faith by taking into account the situation as the officer was aware of it at the time. The Court also noted that the use of force in question must be deliberate in order to give rise to an excessive force claim.

Justice Antonin Scalia wrote a dissenting opinion in which he argued that, while the Due Process Clause protects pretrial detainees from conditions that amount to punishment, objectively unreasonable force does not rise to the level of intentional punishment that the Due Process Clause prohibits. Because punitive intent cannot be inferred simply from the fact that an officer used more force than was objectively necessary, simply showing that the force in question was objectively unreasonable does not violate a pretrial detainees rights under the Due Process Clause. Chief Justice John G. Roberts, Jr. and Justice Clarence Thomas joined in the dissent. In his separate dissent, Justice Samuel A. Alito, Jr. wrote that the Court should have dismissed this case as improvidently granted because such a case should be examined under Fourth Amendment search and seizure analysis before the Court addresses the due process claims brought here.

***Bailey v. Lawson,* 2015 WL 3875940 (5th Cir. June 23, 2015)**

In this civil rights action, the district court granted a motion for summary judgment filed by defendants Gretna, Louisiana Police Chief Arthur Lawson, Jr., and Officers Scott Vinson, James Price, and Russell Lloyd, (collectively, "Appellees"), on the basis of qualified immunity. Plaintiffs, individually and on behalf of their now-deceased mother, Willie Nell Bullock (collectively, "Appellants"), appeal the judgment of the district court.

At approximately 4:00 p.m., on November 16, 2011, several officers constituting the Special Response Team ("SRT") of the Gretna Police Department ("GPD"), entered Ms. Willie Nell Bullock's residence and executed a search and seizure warrant for narcotics. Ms. Bullock, who was sixty-six years old at the time, was sleeping. She had recently undergone an ileostomy/stoma procedure, and suffered from advanced cancer, high blood pressure, and diabetes. Although the parties dispute exactly what occurred during the execution of the warrant, surveillance video footage confirms that about two minutes after the SRT entered Ms. Bullock's residence, an officer escorted her outside and unfolded a chair on which she could sit.

Approximately a year after the SRT executed the warrant at Ms. Bullock's residence, Appellants filed a § 1983 action in federal court. They claimed that the conduct of Officers Vinson, Lloyd, and Price during the execution of the warrant violated Ms. Bullock's Fourth Amendment right to be free from excessive force; and that Chief Lawson and Officer Vinson were liable in their supervisory capacities.

In September 2014, Appellees filed two motions for summary judgment. In one motion, Appellees contested the veracity of Appellants' complaint. In the other motion, Appellees asserted that they were shielded by qualified immunity. The district court granted Appellees' motion for summary judgment on the basis of qualified immunity and denied as moot all other pending motions. Appellants timely appealed.

Appellants argued that Ms. Bullock suffered injuries as a result of Officer Vinson's decision to dispatch the SRT and/or that the decision itself violated her right to be free from excessive force. Officer Vinson testified that he decided to use the SRT to execute the warrant for Ms. Bullock's residence based on his assessment of several factors, including (1) the criminal history of Appellant Ralph Jackson, an individual named in the warrant; (2) the difficulty of predicting the number of individuals who would be present in Ms. Bullock's residence; (3) discrete facts provided by a confidential informant; and, (4) the Bullock family's prior threats against the GPD. Appellants understandably argued against each of these factors.

The Fifth Circuit held that under the totality of the circumstances that Officer Vinson's decision to deploy the SRT to execute the search warrant for Ms. Bullock's residence did not constitute force excessive to the need, nor was it objectively unreasonable. Because Appellants failed to adduce any credible evidence that Ms. Bullock was subjected to excessive force, the district court correctly held that Officer Vinson did not violate Ms. Bullock's constitutional right, entitling him to qualified immunity.

***City of Los Angeles v. Patel,* 135 S. Ct. 2443 (2015)**

A Los Angeles's municipal code requires hotel operators to maintain guest registration information on the premises, and directs that such records "shall be made available to any [LAPD] officer for inspection." Failure to make the records available is punishable as a misdemeanor with up to six months in jail as well as a fine. A group of motel owners challenged the statute as authorizing an unreasonable search under the Fourth Amendment. The district court and a panel of the Ninth Circuit ruled for the City, but a seven-to-four en banc panel of the Circuit reversed.

Coming to the conclusion that the statute violates the Fourth Amendment, the Fifth Court first assumed without discussion that a compelled governmental inspection of commercial records is a "search" encompassed by the Fourth Amendment. This is important because both the district court and the initial court of appeals panel had ruled that there was no "search" at all, asserting that motel owners had no "reasonable expectation of privacy" in their records. The en banc court ruled to the contrary, noting that the records are still "the hotel's private property" and that an owner has a "right to exclude others from prying into their contents."

Until 1967, the Court had ruled that governmental inspections were not governed by the Fourth Amendment because they are not "criminal" in their focus. But the text of the Fourth Amendment is not limited to "criminal" searches and seizures. So in the same 1966 Term that the Court extended the Fourth Amendment to "stop and frisks" by police on the street, the Court ruled in two cases (*Camara v. Municipal Court* and *See v. City of Seattle*) that the Fourth Amendment does indeed reach non-criminal, governmental "administrative" searches. This brought large numbers of governmental inspection programs under the Fourth Amendment's protective mantle, and led to the development of "administrative subpoenas," meaning orders issued by an official (who is not necessarily a judge) that authorize government agents to inspect, based not upon probable cause to believe that individual crimes are being committed, but rather that as a general matter there is likely to be non-compliance within an industry or geographic area (such as restaurants or public housing) that threatens the public's interests in health and safety.

Under this context, the Court generally held that "absent consent, exigency, or the like,

in order for an administrative search to be constitutional, the subject of the search must be afforded the opportunity to obtain pre-compliance review before a neutral decision maker." This means that business owners who are confronted with an administrative subpoena to inspect their premises must have some opportunity to "question the reasonableness of the subpoena before suffering any penalties for refusing to comply." With these broad statements, the Court seems to establish a clear general rule for all administrative search contexts.

Because the Los Angeles statute allows "a hotel owner who refuses to give an officer access to" the guest registry to "be arrested on the spot," without an opportunity to contest the reasonableness of the search, it "is, therefore, facially invalid." The majority does not appear to disagree with Justice Scalia's dissenting point that motels, "offering privacy on the cheap, have been employed as prisons for migrants … and rendezvous sites" for "child sex workers." Narcotics distributions can also take place in some motels. But these "nefarious" uses do not make all hotels "intrinsically dangerous," and only intrinsically dangerous industries are (it now seems) released from today's constitutional "pre-compliance review" rule.

By contrast, the Court notes the possibility that in some cases a government inspection may be "motivated by illicit purposes." In such as case, a "move to quash the subpoena before any search takes place" might be required – although the Court carefully notes that it has "never attempted to prescribe the exact form an opportunity for pre-compliance review must take."

Indeed, the majority stresses "the narrow nature of [their] holding." First, it has no bearing on cases where exigent circumstances would permit a warrantless search, or where record owners consent to police review. Second, no "onerous burdens" are required – a simplified administrative subpoena system, with review when necessary by an "administrative law judge," will in most cases suffice. And finally, the majority notes that in the "rare[] event that an officer reasonably suspects that a hotel owner may tamper with the registry while [a] motion to quash is pending," the officer may "guard the registry until the required hearing can occur, which ought not take long." With these narrowing thoughts, the majority expresses confidence that there can be "at least an opportunity to contest … without compromising the government's ability to achieve its regulatory aims."

## IV. FIFTH AMENDMENT

### *Doe, et al. v. Robertson, et al.*, 751 F.3d 383 (5th Cir. 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.

## V. FOURTEENTH AMENDMENT

### *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015)

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between

one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

The Supreme Court reversed. Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined, holding that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. Roberts, C. J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined. Alito, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined.

Before turning to the governing principles and precedents, the Court noted that the history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution of marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for them because of their respect—and need—for its privileges and responsibilities, as illustrated by the petitioners' own experiences. In addition, the history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers* v. *Hardwick*, 478 U. S. 186 , which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U. S. 558 . In 2012, the federal Defense of Marriage Act was also struck down. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue.

The Fourteenth Amendment requires a State to license a marriage between two people of the same sex. (1) The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, *e.g., Eisenstadt* v. *Baird*, 405 U. S. 438 ; *Griswold* v. *Connecticut*, 381 U. S. 479 –486. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving* v. *Virginia*, 388 U. S. 1, invalidated bans on interracial unions, and *Turner* v. *Safley*, 482 U. S. 78, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a

relationship involving opposite-sex partners, as did *Baker* v. *Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g., Eisenstadt*, *supra*, at 453–454. This analysis compels the conclusion that same-sex couples may exercise the right to marry.

Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U. S., at 485, and was acknowledged in *Turner*, *supra,* at 95. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence, supra*, at 567.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, *e.g., Pierce* v. *Society of Sisters*, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard* v. *Hill*, 125 U. S. 190. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage. The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifested.

The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving,* where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki* v. *Redhail*, 434 U. S.

374 , where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, *e.g., Kirchberg* v. *Feenstra*, 450 U. S. 455 –461, and confirmed the relation between liberty and equality, see, *e.g., M. L. B.* v. *S. L. J.*, 519 U. S. 102 –121.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence*, 539 U. S., at 575. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians.

The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker* v. *Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers,* in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners' stories show the urgency of the issue they present to the Court, who has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.

Therefore, the Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

## VI. 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.'"

***Integrity Staffing Solutions v. Busk*, 135 S.Ct. 513 (2014)**

Jesse Busk and Laurie Castro were former employees of Integrity Staffing Solutions, Inc. (Integrity), a company that provides warehouse space and staffing to clients such as Amazon.com. Busk and Laurie both worked in warehouses in Nevada filling orders placed by Amazon.com customers. At the end of each day, all the workers were required to pass through a security clearance checkpoint where they had to remove their keys, wallets, and belts, pass through a metal detector, and submit to being searched. The whole process could take up to 25 minutes. Similarly, up to ten minutes of the workers' 30-minute lunch period was consumed by security clearance and transition time. In 2010, Busk and Castro sued Integrity and argued that these practices violated the Fair Labor Standards Act (FLSA) as well as Nevada state labor laws.

The district court granted Integrity's motion to dismiss and held that time spent clearing security was non-compensable under the FLSA and that the shortened meal periods were not relevant to the FLSA because the plaintiffs did not argue that they performed work-related duties during their lunch periods. The U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. While the Court of Appeals agreed that the shortened lunch periods were not relevant to the FLSA, the Court of Appeals held that the district court should have assessed the plaintiffs' claims that the security clearances were "integral and indispensable" to their work in order to determine if that time was compensable.

Justice Clarence Thomas delivered the unanimous opinion of the Court. The Court held that the time spent by warehouse workers undergoing security screenings is not compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act. The Portal-to Portal Act exempted employers from liability for claims dealing with activities that are preliminary or postliminary to the principle activities that an employee is employed to perform. The screenings in this case are not a principle activity and were not integral to the employees' duties; therefore the screenings are not compensable.

## VII. FAIR HOUSING ACT

***Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015)**

This case involved low Income Housing Tax Credits, which are federal tax credits distributed to low-income housing developers through an application process. The distribution of such credits is administered by state housing authorities. In 2009, the Inclusive Communities Project (ICP), a non-profit organization dedicated to racial and economic integration of communities in the Dallas area, sued the Texas Department of Housing and Community Affairs (TDHCA), which administers the Low Income Housing Tax Credits within Texas. ICP claimed that TDHCA disproportionately granted tax credits to developments within minority neighborhoods and denied the credits to developments within Caucasian neighborhoods. ICP claimed this practice led to a concentration of low-income housing in minority neighborhoods, which perpetuated segregation in violation of the Fair Housing Act.

At trial, ICP attempted to show discrimination by disparate impact, and the district court found that the statistical allocation of tax credits constituted a prima facie case for disparate impact. Using a standard for disparate impact claims that the U.S. Court of Appeals for the Second Circuit articulated in *Town of Huntington v. Huntington Branch*, the court then shifted the burden to TDHCA to show the allocation of tax credits was based on a

compelling governmental interest and no less discriminatory alternatives existed. TDHCA was unable to show no less discriminatory alternatives existed, so the district court found in favor of ICP. TDHCA appealed to the U.S. Court of Appeals for the Fifth Circuit and claimed that the district court used the wrong standard to evaluate disparate impact claims. The appellate court affirmed and held that the district court's standard mirrored the standard promulgated by the Department of Housing and Urban Development, the agency tasked with implementing the Fair Housing Act.

The question before the Supreme Court was whether the district court used the correct standard for evaluating a Fair Housing Act claim of discrimination based on disparate impact? Justice Anthony M. Kennedy held that it did in the Court's 5-4 majority opinion. The Court held that the statutory language of the Fair Housing Act (FHA) focuses on the consequences of the actions in question rather than the actor's intent. This language is similar to that used in Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, both of which were enacted around the same time as the FHA and encompass disparate-impact liability. Additionally, the 1988 amendments retained language that several appellate courts had already interpreted as imposing disparate-impact liability, which strongly indicates Congressional acquiescence to that reading of the statute. Disparate-impact liability is also consistent with the FHA's purpose of preventing discriminatory housing practices because it allows plaintiffs to counteract unconscious prejudices and disguised discrimination that may be harder to uncover than disparate treatment. However, a prima facie case for disparate-impact liability must meet a robust causality requirement, as evidence of racial disparity on its own is not sufficient.

Justice Clarence Thomas wrote a dissent in which he argued that the Court's decision in *Griggs v. Duke Power Co.*, on which the majority opinion based its Title VII analysis, wrongly interpreted Title VII as enabling disparate-impact liability, and therefore that opinion should not serve as the basis for the majority opinion's interpretation of the FHA in this case. In holding that Title VII allows for disparate-impact liability and applying that analysis to the FHA, the majority relied on the Equal Employment Opportunity Commission's interpretation of the statute rather than the statutory language that Congress enacted. Justice Thomas also argued that racial imbalance alone is not sufficient to prove unlawful conduct and should not be punished as such. In his separate dissent, Justice Samuel A. Alito, Jr. wrote that the FHA did not encompass disparate-impact liability when it was enacted, and no further amendments or precedents have created such liability. The plain language of the statute clearly focuses on intentional discrimination rather than the racial disparity itself, and the 1988 amendments have not been interpreted as altering that understanding of the statute. Justice Alito also argued that precedent interpreting similar text has held that the use of "because of" language linking a cause to a particular reason criminalizes the intention behind discrimination rather than solely the result. Chief Justice John G. Roberts, Jr., Justice Antonin Scalia, and Justice Thomas joined in the dissent.

## VIII. QUALIFIED IMMUNITY

***Zapata, et al. v. Melson, et al.,* 750 F.3d 481 (5th Cir. 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."

***Rice v. ReliaStar Life Insurance Co.*, 770 F.3d 1122, (5th Cir. 2014)**

This appeal combines civil rights claims against law enforcement officers and an ERISA claim against an insurer, resulting from the death of Gerald Rice. On the day Mr. Rice died, he was suicidal and had been drinking heavily. He took eleven prescription pills while drinking, and he told the bartender at the bar where he had been drinking that he left his pills behind because "it's over." Rice was also heard revving the engine in his truck while the garage was closed, suggesting he may have been trying to kill himself through carbon monoxide poisoning.

A nephew, in a call to 911, stated that Rice, sitting in his truck, had "a loaded gun to his head." When Deputies Joel Arnold and David Johnson arrived at the house, the nephew told them that "Rice was armed, had been drinking, had taken a lot of medication, and ... had a problem with law enforcement." The deputies entered the house without a warrant in order to get into the garage, and "Arnold saw Rice sitting in his truck ... with a gun to his head." The deputies retreated to the kitchen (connected to the garage via a short hall). Rice refused their requests to put down the gun, asked them at least once to leave, and fired one shot into a wall. After the deputies learned that the shot had not injured Rice, they "again asked Rice to relinquish his gun ..., but Rice refused." Eventually, however, "Rice exited his truck and began walking toward the kitchen. Arnold repeatedly told Rice to put the gun down. While continuing to walk toward the kitchen, Rice stated, 'I want to commit suicide.' Arnold then fired four shots at Rice, hitting Rice in the chest three times," and Rice later died.

Rice's children sued Arnold and Arnold's sheriff (both in their individual and official capacities) for constitutional violations (warrantless entry and excessive force), and for torts under Louisiana law (assault and battery, false imprisonment, and intentional infliction of emotional distress). They also sued ReliaStar Life Insurance after it refused to pay accidental death benefits under an ERISA-governed policy. The district court granted summary judgment for all defendants.

The Fifth Circuit affirmed. In previous civil rights cases of this general type (where "a police officer, in an attempt to aid a potentially suicidal individual, entered without a warrant and killed the person the officer was trying to help"), the Court has affirmed summary judgment on qualified immunity for the defendants without addressing the lawfulness of the warrantless entry, and ruling only, under the second prong of the qualified immunity analysis, that the law on warrantless entry in this context was not clearly established. Here, in contrast, "we reach that [first] issue and hold that the threat an individual poses to himself may create an exigency that makes the needs of law enforcement so compelling that a warrantless entry is objectively reasonable under the Fourth Amendment." The Court then considered

whether, and held that, Arnold "had an objectively reasonable belief that Rice would imminently seriously injure himself," so his warrantless entry was not unlawful. Nor was it unlawful for him to remain ("the exigent circumstances that justified ... entry ... had not disappeared just because Rice asked them to leave"), and "the fact that Arnold's entry into Rice's home may have violated departmental policies does not deprive him of qualified immunity."

Regarding the excessive force claim, the plaintiffs argued that there was a genuine dispute about "whether Rice actually had a gun in his hand at the time Arnold shot him." The district court disagreed, and the Fifth Circuit did too. To determine that the dispute was "not genuine" and "resolved" in the defendants' favor, the Court relied on evidence of an audio recording in which "Arnold can be heard shouting at Rice [in the seconds before shooting] to 'put the gun down' ... and warning him not to 'come in here' [i.e., the kitchen]." The Court noted that the plaintiffs never contended that "Arnold was lying about Rice having a gun when he was heard [on the tape] telling Rice to put the gun down." Since it could not be disputed that Rice was holding a gun as he walked toward the deputies, Arnold's shots were not excessive force, even if he shot while Arnold was still in the garage.

The reasonableness of Arnold's shooting precluded the state law claim for assault and battery. Further, the state law claim for false imprisonment failed because Arnold did not detain Rice "in the garage by use of force" and, even if he did, he could have reasonably done so in response to Arnold's firing the gun while he was in the garage. The intentional infliction claim failed because, "[w]hile the facts in this case are tragic," Arnold's actions did not "'go beyond all possible bounds of decency.'" And so the respondeat superior claims against Arnold's sheriff also failed.

The Court also affirmed summary judgment for ReliaStar on the ERISA claim. ReliaStar denied coverage on the ground that Rice's death was not accidental because it found that "either Rice did not have a subjective expectation of survival or that, if he had that expectation, it was not objectively reasonable." Those findings were not abuses of discretion in light of his suicidal statements (what he told the bartender, what he said as he walked toward the officers, and what he wrote in a note that sheriff's investigators found after the shooting), and his behavior. ReliaStar's conflict of interest as both the evaluator and payer of claims did not invalidate its decision.

***Burnside v. Kaelin,* 773 F.3d 606 (5th Cir. 2014)**

Thomas Burnside was a police officer. His direct supervisor, Sheriff Jim Kaelin, (1) told Burnside that a political action committee, of which Burnside was the chair, should support Kaelin for reelection in January 2012; and (2) told Burnside a few days later that if the PAC he chaired was not supportive, then he would be transferred from the patrol division to the jail. It was common knowledge that Burnside personally supported Kaelin's opponent and that "the PAC did not support or endorse Kaelin." A few weeks "after the PAC failed to endorse Kaelin," Kaelin made the threatened transfer, which Burnside described as something that "Kaelin and all those in Burnside's position understood ... to be a demotion rather than a reassignment." After Burnside worked in the jail for about 13 months, "his employment was terminated because of the dissemination of a recording containing a threat from Sheriff Kaelin against another officer." Burnside filed two claims of First Amendment retaliation. The district court denied Jim Kaelin's 12(b)(6) motion to dismiss on both claims on the basis of qualified immunity.

Kaelin argued that Burnside alleged too few facts relevant to the weighing of the competing interests in speech and efficiency "to determine whether [his speech in connection with his] membership and leadership role in the PAC outweighed [Kaelin's] interest in workplace efficiency." A plaintiff-favorable weighing is an essential element of a retaliation claim, so Kaelin argued that the impossibility of

weighing the competing interests because of the paucity of factual allegations meant that Burnside failed to plead retaliation on the basis of free speech. The Fifth Circuit pointed out, however, that at the pleading stage of a case, "there is a rebuttable presumption that no balancing is required to state a claim." In this case, "nothing in Burnside's complaint indicates that [his] interest in commenting on the election was surpassed by Kaelin's interest in workplace efficiency." Further, Kaelin did not try to obtain more facts by invoking the rule of *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (en banc): "When a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or on its own, require the plaintiff to reply to that defense in detail [in a reply to the answer under what is now FRCP 7(a)(7)]. By definition, the reply must be tailored to the assertion of qualified immunity and fairly engage its allegations. A defendant has an incentive to plead his defense with some particularity because it has the practical effect of requiring particularity in the reply." Thus, the Court affirmed with regards to the transfer claim.

The Court reversed with respect to the termination claim. Nothing in the complaint indicated that Burnside had anything to do with making the recording, or with disseminating it; all it said was that he was terminated because of the dissemination. "Without some direct allegation or reasonable inference that Burnside was involved with the recording in some way, there can be no violation of Burnside's First-Amendment rights based on the recording because we are missing a critical element of the claim: some connection to a constitutionally protected act."

## IX. 42 U.S.C. § 1981

***Campbell v. Forest Pres. Dist. of Cook Cnty., Ill.,* 752 F.3d 665 (7th Cir. 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.

## X. BIVENS SUIT

***De La Paz v. Coy, et al.,* 786 F.3d 367 (5th Cir., 2015)**

Customs and Border Patrol ("CBP") agents apprehended Daniel Frias and Alejandro Garcia de la Paz, both illegal aliens, in separate incidents miles from the U.S.-Mexico border, in the heart of Texas. Both allege that the agents stopped them only because they are Hispanic. Represented by the same attorney, both filed *Bivens* suits against the arresting agents, alleging Fourth Amendment violations. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court created a damage remedy against individual federal law enforcement officers who allegedly conducted a warrantless search of a suspect's home and arrested him without probable cause. The cause of action, the Court said, flowed from the necessity to enforce the Fourth Amendment in circumstances where the victim had no effective alternative remedy. Bivens established that, in certain circumstances, "the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."

On appeal, both cases presented the same fundamental question of first impression: can illegal aliens pursue Bivens claims against CBP agents for illegally stopping and arresting them? The Fifth Circuit concluded that Bivens actions are not available for claims that can be addressed in civil immigration removal proceedings. The Supreme Court has explained that federal courts may not step in to create a *Bivens* cause of action if "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."

Here, the court found Congress through the Immigration and Nationality Act (INA) and its amendments has indicated that the Court's power should not be exercised. The INA's comprehensive regulation of all immigration related issues combined with Congress's frequent amendments shows that the INA is "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." Such a system "should [not] be augmented by the creation of a new judicial remedy." Thus, the Fifth Circuit held that that these plaintiffs cannot pursue *Bivens* suits against the agents for allegedly illegal conduct during investigation, detention, and removal proceedings.

## XI. REMOVAL

***Dart Cherokee Basin Operating Company v. Owens,* 135 S.Ct. 547 (2014)**

On October 30, 2012, Brandon W. Owens filed a class action petition in state court that alleged that Dart Cherokee Basin Operating Company and Cherokee Basin Pipeline underpaid the members on the class on royalties they were owed from wells. The petition alleged that this underpayment constituted a breach of contract and sought damages without specifying an amount. On December 5, 2012, the defendants removed the case from state court to federal district court and cited that federal jurisdiction existed under the Class Action Fairness Act of 2005 (CAFA). CAFA requires that three elements be established for a class action case to fall under federal jurisdiction: at least one plaintiff and one defendant must be citizens of different states, the class must consist of at least 100 members, and the amount in controversy must exceed $5 million. The defendants in this case claimed that they met the requirements for removal to federal court under CAFA because the amount in controversy exceeded $8 million, but did not include specific evidence in the notice of removal. The federal district court held that defendants had not provided evidence that the amount in controversy exceeded $5 million in the notice of removal and therefore remanded the case back to state court.

The U.S. Court of Appeals for the Tenth Circuit held that the district court should not have remanded the case because requiring the party requesting the removal to produce evidence that the amount in controversy exceeds $5 million creates an evidentiary burden. The Court of Appeals held that that such evidence is wholly unnecessary unless the removal is contested. A party requesting that a case be

removed to federal court need only allege that the grounds for removal exist and need only prove those allegations if they are contested.

On appeal to the Supreme Court, Justice Ruth Bader Ginsburg delivered the opinion for the 5-4 majority. The Court held that a defendant's notice of removal to federal court must only include a plausible allegation that the amount in controversy exceeds the federal jurisdictional threshold, not evidentiary proofs. Because the requirements for a notice of removal track those for a normal pleading, the defendant seeking removal should similarly be allowed to allege in good faith that the amount in controversy is sufficient. Evidence only becomes necessary in response to a plaintiff's contestation of the removal.

## XII. JURY CONDUCT

***Warger v. Shauers*, 135 S.Ct. 521 (2014)**

In 2006, Gregory Warger was involved in an automobile collision with another car driven by Randy Shauers. Warger filed suit against Shauers for damages resulting from the crash, and Shauers filed a counter-suit. After an initial mistrial, a jury found for Shauers. Warger appealed on the basis that, following the verdict, Warger's attorney had been contacted by a jury member who expressed concern that the jury foreperson had improperly gained the sympathy of the other jurors by informing them all that her daughter had been in a similar type of automobile accident and that the verdict would have had a negative impact on her life had she been found responsible. Warger claimed that the foreperson's alleged misconduct should result in a new trial because it was improper outside influence, which tainted the jury's verdict, and because it was evidence that the foreperson had lied during jury selection.

The district court ruled that the concerned jury member's statement was inadmissible based on Federal Rule of Evidence 606(b), which bars the testimony of a juror concerning any statements made during the jury's deliberations for purposes determining the validity of a verdict, with an exception for testimony regarding whether an improper outside influence was used to persuade any juror. Specifically, the court ruled that the past life experiences of the foreperson did not constitute improper outside influence. While 606(b) does not explicitly bar juror testimony for the purposes of proving dishonesty by a potential juror during jury selection, in this case the evidence was barred by 606(b) because it was based on statements the foreperson made during the jury's deliberations. The U.S. Court of Appeals for the Eighth Circuit affirmed.

Justice Sonia Sotomayor delivered the opinion for the unanimous Court. On the issue of whether Federal Rule of Evidence 606(b) bars the testimony of a juror regarding statements made during deliberations for the purpose of showing alleged dishonesty by a prospective juror during jury selection, the Court held that a plain reading of Rule 606(b) precludes the use of juror testimony when a party is seeking a new trial on the basis of juror dishonesty during voir dire. Prior to Congress' enactment of the rule, judicial precedent had established the inadmissibility of testimony of jury misconduct for the purpose of impeaching a verdict, and the legislative history of Rule 606(b) indicates that Congress intended the rule to apply broadly. The Court also held that the rule did not raise any issue of constitutionality because juror impartiality continued to be assured by either party's ability to bring forward evidence of juror bias at any time before the verdict is rendered.

## XIII. ZONING

***T-Mobile South, LLC v. City of Roswell*, 135 S.Ct. 808 (2015)**

Telecommunications service provider T-Mobile South, LLC (T-Mobile) submitted an application to construct a 108–foot cell tower resembling a man-made tree (monopine) in Roswell, Georgia. The location of the site, though planned inside a vacant lot, would be in an area zoned for single-family residences within a well-established residential neighborhood. Following an outpouring of public opposition to the tower, Roswell's

Planning and Zoning Division recommended that the Mayor and city council impose certain conditions before approving the application. Specifically, the Planning and Zoning Division recommended that T-Mobile should relocate the site to another part of the property, erect a fence around the tower, and plant pine trees to shield it from residential owners' view. At the public hearing, city council members voted to deny the application.

Two days later, Roswell sent T-Mobile a letter notifying the company that the application was denied and referred the company to the minutes of the public hearing. T-Mobile sued Roswell and claimed that the city had not provided substantial evidence that would support a denial of the application. T-Mobile also alleged that, by prohibiting T-Mobile from building the structure, Roswell violated the Telecommunications Act of 1996 (TCA). The district court did not rule on the substantial evidence question and instead held that Roswell had not met the "in writing" component of the TCA, which required the government to state the reason(s) for denying an application. The district court ordered Roswell to grant the permit, and Roswell appealed. The U.S. Court of Appeals for the Eleventh Circuit held that Roswell had met the "in writing" requirement by issuing a written denial and referring to the minutes of the hearing for the reasoning.

Justice Sonia Sotomayor delivered the opinion for the 6-3 majority on the question of whether a document stating that an application has been denied without providing reasons for the denial comply with the "in writing" requirement of the Telecommunications Act. The Court held that the Telecommunications Act of 1996 does not require localities to provide reasons for their denial of construction applications in the written denial notification as long as the reasons appear in some other sufficiently clear written record. While the language of the Act requires localities to provide reasons for the denial of an application, it does not specify how those reasons should be presented. However, the reasons for denial must be made available at essentially the same time as the notice of denial. Because the reasons for denial in this case were issued 26 days after the date of the written denial, the Court held that the City of Roswell did not comply with the requirements of the Telecommunications Act.

## XIV. ADA

***Young v. United Parcel Service*, 135 S.Ct. 1338 (2015)**

Peggy Young was employed as a delivery driver for the United Parcel Service (UPS). In 2006, she requested a leave of absence in order to undergo in vitro fertilization. The procedure was successful and Young became pregnant. During her pregnancy, Young's medical practitioners advised her to not lift more than twenty pounds while working. UPS's employee policy requires their employees to be able to lift up to seventy pounds. Due to Young's inability to fulfill this work requirement, as well as the fact that she had used all her available family/medical leave, UPS forced Young to take an extended, unpaid leave of absence. During this time she eventually lost her medical coverage. Young gave birth in April 2007 and resumed working at UPS thereafter.

Young sued UPS and claimed she had been the victim of gender- and disability-based discrimination under the Americans with Disabilities Act and the Pregnancy Discrimination Act. UPS moved for summary judgment and argued that Young could not show that UPS's decision was based on her pregnancy or that she was treated differently than a similarly situated co-worker. Furthermore, UPS argued it had no obligation to offer Young accommodations under the Americans with Disabilities Act because Young's pregnancy did not constitute a disability. The district court dismissed Young's claim. The U.S. Court of Appeals for the Fourth Circuit affirmed.

Justice Stephen G. Breyer delivered the opinion for the 6-3 majority. The Court held that an interpretation of the Act that requires employers to offer the same accommodations to pregnant workers as all others with comparable physical limitations regardless of other factors would be too broad. There is no evidence that

Congress intended the Act to grant pregnancy such an unconditional "most-favored-nation status." However, Congress clearly intended the Act to do more than defining sex discrimination to include pregnancy discrimination. The Court held that a plaintiff may show that she faced disparate treatment from her employer according to the framework established in *McDonnell Douglas Corp. v. Green*, which requires evidence that the employer's actions were more likely than not based on discriminatory motivation, and that any reasons the employer offered were pretextual.

## XV. TITLE VII

***Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores*, 135 S. Ct. 2028 (2015)**

Abercrombie & Fitch Stores, Inc. ("Abercrombie") requires its employees to comply with a "Look Policy" that reflects the store's style and forbids black clothing and caps, though the meaning of the term cap is not defined in the policy. If a question arises about the Look Policy during the interview or an applicant requests a deviation, the interviewer is instructed to contact the corporate Human Resources department, which will determine whether or not an accommodation will be granted.

In 2008, Samantha Elauf, a practicing Muslim, applied for a position at an Abercrombie store in Tulsa, Oklahoma. She wore a headscarf, or hijab, every day, and did so in her interview. Elauf did not mention her headscarf during her interview and did not indicate that she would need an accommodation from the Look Policy. Her interviewer likewise did not mention the headscarf, though she contacted her district manager, who told her to lower Elauf's rating on the appearance section of the application, which lowered her overall score and prevented her from being hired.

The Equal Employment Opportunity Commission (EEOC) sued Abercrombie on Elauf's behalf and claimed that the company had violated Title VII of the Civil Rights Act of 1964 by refusing to hire Elauf because of her headscarf. Abercrombie argued that Elauf had a duty to inform the interviewer that she required an accommodation from the Look Policy and that the headscarf was not the expression of a sincerely held religious belief. The district court granted summary judgment for the EEOC. The U.S. Court of Appeals for the Tenth Circuit reversed and held that summary judgment should have been granted in favor of Abercrombie because there is no genuine issue of fact that Elauf did not notify her interviewer that she had a conflict with the Look Policy.

Can an employer be held liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant based on a religious observance or practice if the employer did not have direct knowledge that a religious accommodation was required?

The eight-to-one ruling, the Supreme Court held that even if the applicant does not inform the management of a religious practice, the 1964 civil rights law may be enforced against any employer who refuses to make an exception for that worker, when that refusal is based on at least a suspicion or hunch that the worker follows such a practice and wants to keep doing so, even if contrary to company policy. In a significant footnote, the ruling left open the possibility that an employer may still violate the law by failing to hire someone who follows a religious practice, even if the employer were completely ignorant of that fact. The footnote, and its implications, caused Justice Samuel A. Alito, Jr. to object in a separate opinion. While he supported overturning the appeals court, he did so for his own reasons, rather than those of the Scalia opinion: he would have made it clear that Abercrombie & Fitch can avoid a damages verdict if it had no knowledge of the young woman's religious needs. The retailer does have the option of making that argument when the case returns to the appeals court.

***Satterwhite v. City of Houston,* 602 Fed.Appx. 585 (5th Cir. March 3, 2015)**

Courtney Satterwhite, a former Assistant City Controller for the City of Houston, was demoted two pay grades after reporting his supervisor for using the phrase "Heil Hitler" at a meeting. After the District Court granted summary judgment to the city because "Satterwhite failed to establish a causal link between Satterwhite's activities and his demotion," Satterwhite took his case on up to the Court of Appeals.

The Fifth Circuit held that no reasonable person would believe that the single "Heil Hitler" incident is actionable under Title VII. The Supreme Court has made clear that a court determines whether a work environment is hostile "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Furthermore, "isolated incidents (unless extremely serious)" do not amount to actionable conduct under Title VII. The Court explained, "Satterwhite acknowledges that Singh's comment was a single and isolated incident. He could not have reasonably believed that this incident was actionable under Title VII, and therefore, it 'cannot give rise to protected activity.'"

## XVI. MISCELLANEOUS

***Veasey v. Perry,* 769 F.3d 890 (5th Cir. 2014)**

About two years after Texas enacted certain "voter identification requirements," and about 18 months after the law took effect, various plaintiffs sued on the ground that it "creates a substantial burden on the fundamental right to vote, has a discriminatory effect and purpose, and constitutes a poll tax." On October 9, 2014, the district court ruled in their favor, holding that the law "creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics and African-Americans, and was imposed with an unconstitutional discriminatory purpose. The district court further held that SB 14 constitutes an unconstitutional poll tax. Accordingly, the district court entered its final judgment, enjoining the voter ID requirements, on October 11, "just nine days before early voting begins [in Texas] and just 24 days before Election Day." Further, Texas had already applied the voter ID requirements in three previous elections. Texas moved for an emergency stay pending appeal.

The Fifth Circuit granted the stay, given that the judgment below substantially disturbs the election process of the State of Texas just nine days before early voting begins [and despite the fact that "[t]he Supreme Court has continued to look askance at changing elections laws on the eve of an election"]. Thus, the value of preserving the status quo here is much higher than in most other contexts.... [I]t will "be extremely difficult, if not impossible," for the State to adequately train its 25,000 polling workers at 8,000 polling places about the injunction's new requirements in time for the start of early voting on October 20 or even election day on November 4. The State represents that it began training poll workers in mid-September, and at least some of them have already completed their training. The State also represents that it will be unable to reprint the "election manuals that poll workers use for guidance," and so the election laws "will be conveyed by word of mouth alone," causing "a risk of interference with the right of other [Texas] citizens," because this word of mouth training will result in markedly inconsistent treatment of voters at different polling places throughout the State.

On October 18, 2014, the Supreme Court denied the plaintiffs' application to vacate the stay: "The applications to vacate the stay entered by the United States Court of Appeals for the Fifth Circuit on October14, 2014, presented to Justice Scalia and by him referred to the Court are denied. The motion for leave to file the response to the applications under seal with redacted copies for the public record is granted."

***McFadden v. United States,* 135 S. Ct. 2298 (2015)**

Petitioner McFadden was arrested and charged with distributing controlled substance analogues in violation of the federal Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), which identifies a category of substances substantially similar to those listed on the federal controlled substances schedules, 21 U.S.C. § 802(32)(A), and instructs courts to treat those analogues as schedule I controlled substances if they are intended for human consumption, § 813. Arguing that he did not know the "bath salts" he was distributing were regulated as controlled substance analogues, McFadden sought an instruction that would have prevented the jury from finding him guilty unless it found that he knew the substances he distributed had chemical structures and effects on the central nervous system substantially similar to those of controlled substances. Instead, the District Court instructed the jury that it need only find that McFadden knowingly and intentionally distributed a substance with substantially similar effects on the central nervous system as a controlled substance and that he intended that substance to be consumed by humans. McFadden was convicted. The Fourth Circuit affirmed, holding that the Analogue Act's intent element required only proofs that McFadden intended the substance to be consumed by humans.

In vacating and remanding the lower court's decision, the Supreme Court held that when a controlled substance is an analogue, § 841(a)(1) requires the Government to establish that the defendant knew he was dealing with a substance regulated under the Controlled Substances Act or Analogue Act. In addressing the treatment of controlled substance analogues under federal law, the Court first looked to the CSA, which, as relevant here, makes it "unlawful for any person knowingly ... to distribute ... a controlled substance." § 841(a)(1). The ordinary meaning of that provision requires a defendant to know only that the substance he is distributing is some unspecified substance listed on the federal drug schedules. Thus, the Government must show either that the defendant knew he was distributing a substance listed on the schedules, even if he did not know which substance it was, or that the defendant knew the identity of the substance he was distributing, even if he did not know it was listed on the schedules.

Because the Analogue Act extends that framework to analogous substances, the CSA's mental-state requirement applies when the controlled substance is, in fact, an analogue. It follows that the Government must prove that a defendant knew that the substance he was distributing was "a controlled substance," even in prosecutions dealing with analogues. That knowledge requirement can be established in two ways: by evidence that a defendant knew that the substance he was distributing is controlled under the CSA or Analogue Act, regardless of whether he knew the substance's identity; or by evidence that the defendant knew the specific analogue he was distributing, even if he did not know its legal status as a controlled substance analogue. A defendant with knowledge of the features defining a substance as a controlled substance analogue, § 802(32)(A), knows all of the facts that make his conduct illegal.

The Fourth Circuit did not adhere to § 813's command to treat a controlled substance analogue as a controlled substance listed in schedule I by applying § 841(a)(1)'s mental-state requirement. Instead, it concluded that the only mental-state requirement for analogue prosecutions is the one in § 813—that an analogue be "intended for human consumption." That conclusion is inconsistent with the text and structure of the statutes.

Neither the Government's nor McFadden's interpretation fares any better. The Government's contention that § 841(a)(1)'s knowledge requirement as applied to analogues is satisfied if the defendant knew he was dealing with a substance regulated under some law ignores § 841(a)(1)'s requirement that a defendant know he was dealing with "a controlled substance." That term includes only drugs listed on the federal drug schedules or treated as such by operation of the Analogue Act; it is not broad enough to include all substances regulated by any law. McFadden contends that a defendant must also know the

substance's features that cause it to fall within the scope of the Analogue Act. But the key fact that brings a substance within the scope of the Analogue Act is that the substance is "controlled," and that fact can be established in the two ways previously identified. Contrary to McFadden's submission, the canon of constitutional avoidance "has no application" in the interpretation of an unambiguous statute such as this one. But even if the statute were ambiguous, the scienter requirement adopted here "alleviate[s] vagueness concerns" under this Court's precedents.