RECENT FEDERAL CASES
OF INTEREST TO GOVERNMENTAL ENTITIES

TEXAS CITY ATTORNEYS ASSOCIATION
AUSTIN, TEXAS
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I. FIRST AMENDMENT

Garza v. Escobar, No. 19-40664 (5th Cir. August 28, 2020)

Bernice Garza was the Crime Victims Unit Coordinator for the 229th Judicial District Attorney's Office, which covers Duval, Jim Hogg, and Starr Counties in south Texas. She was fired because of political disagreements with her boss, Omar Escobar, Jr., the District Attorney.

In happier times, Garza and Escobar "were friends and were aligned with respect to local politics" working well together from 2012 until 2016. Soon after Escobar's reelection in 2016, Garza's relationship with Escobar "began to deteriorate" because "Escobar objected to the political views and activities of [Garza] and her family." Specifically, Escobar did not want Garza's sister, Galvan, to run for office because it would disrupt his own political plans. Their dispute continued for the next two years culminating in Escobar barring Garza from the office. Minutes later, a court officer escorted Garza off the premises. The human relations department told Garza she had been "suspended without pay pending the outcome of a current election fraud investigation in Starr County." Garza later learned her employment was terminated on April 4, 2018. Garza sued both Escobar and Starr County in federal district court under 42 U.S.C. § 1983, alleging political retaliation in violation of the First Amendment.

The Fifth Circuit affirmed the district court's dismissal of plaintiff's First Amendment claim alleging political retaliation, concluding Garza could be subjected to patronage dismissal without violating the Constitution. In this case, plaintiff's position as CVU Coordinator is a confidential or policymaking role, and one for which "party affiliation is an appropriate requirement for effective performance." The court also held that because plaintiff has not plausibly alleged a constitutional claim, her municipal liability claim was also properly dismissed.

Reagan National Advertising of Austin, Inc. v. City of Austin, No. 19-50354 (5th Cir. August 25, 2020)

Reagan National Advertising of Austin and Lamar Advantage Outdoor Company both filed applications to digitize existing billboards. The City of Austin denied the applications because its Sign Code does not allow the digitization of off-premises signs. Reagan and Lamar sued, arguing that the Sign Code's distinction between on-premises and off-premises signs violates the First Amendment.

The Fifth Circuit held that the City's Sign Code's on-premises/off-premises distinction is content based and the commercial speech exception does not apply. The court held that the Sign Code runs afoul of the First Amendment because the relevant provisions of the Sign Code are not narrowly tailored to serve the compelling government interest of protecting the aesthetic value of the City and public safety. In this case, the ordinance is underinclusive. Accordingly, the court reversed the district court's decision to the contrary and remanded.

Defense Distributed v. Grewal, No. 19-50723 (5th Cir. August 19, 2020)

Plaintiff Defense Distributed is a Texas company operated for the purpose of promoting popular access to firearms. To carry out this purpose, it produces and makes accessible information related to the 3D printing of firearms and publishes and distributes such information to the public. Defense Distributed began distributing files related to the 3D printing of firearms in December 2012. Defense Distributed's efforts were initially met with opposition from the United States Department of State. But,

after a period of litigation, the parties reached a settlement agreement that granted Defense Distributed a license to publish its files. Shortly thereafter, nine Attorneys General, including New Jersey Attorney General Grewal, filed suit on behalf of their respective states in the Western District of Washington to enjoin the State Department from authorizing the release of Defense Distributed's files. They argued that the State Department's license to Defense Distributed constituted an ultra viresabout-face that violated the Administrative Procedure Act and jeopardized the states' statutory and regulatory schemes for firearms. The Western District of Washington quickly issued a temporary restraining order, followed closely by a nationwide preliminary injunction.

Just before the Attorneys General sued in Washington, Defense Distributed and SAF brought the instant action in the Western District of Texas challenging the efforts of New Jersey's Attorney General and others to thwart plaintiffs' distribution of materials related to the 3D printing of firearms, alleging infringement of plaintiffs' First Amendment rights and state law claims. The district court granted the New Jersey's Attorney General's motion to dismiss for lack of personal jurisdiction, relying on *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008).

The Fifth Circuit held that the Attorney General has established sufficient minimum contacts with Texas to subject him to the jurisdiction of Texas' courts. The court held that Stroman is distinguishable from this case in at least two key respects: first, many of plaintiffs' claims are based on the Attorney General's cease-and-desist letter; and second, the Attorney General's assertion of legal authority is much broader than the public official in *Stroman*. Furthermore, the Attorney General failed to timely raise arguments regarding whether judgment in plaintiffs favor would offend traditional notions of fair play and substantial justice. The court applied the principles discussed in *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999), and *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482 (1984), and held that jurisdiction over the Attorney General is proper. Accordingly, the court reversed and remanded for further proceedings.

Barr v. American Association of Political Consultants Inc., 591 US _ (2020)

Congress enacted the Telephone Consumer Protection Act of 1991 to address intrusive and unwanted phone calls to Americans. One provision of that Act—the automatic call ban—prohibits phone calls to cell phones that use "any automatic telephone dialing system or an artificial or prerecorded voice." As passed, the Act recognized two exceptions to the ban: automated calls "for emergency purposes" and those made to a cell phone with "the prior express consent of the called party." In 2015, Congress amended the Act to add a third exception for calls made to cell phones "to collect a debt owed to or guaranteed by the United States." Moreover, automated calls made by the federal government itself are not barred by the automated call ban.

The American Association of Political Consultants, Inc. challenged this third provision of the Act, alleging that it violates the Free Speech Clause of the First Amendment by imposing a content-based restriction on speech. The district court granted summary judgment to the government, finding unpersuasive the free speech argument. The district court applied strict scrutiny review (testing whether the government had demonstrated the law is necessary to a "compelling state interest," that the law is "narrowly tailored" to achieving this compelling purpose, and that the law uses the "least restrictive means" to achieve that purpose) to the debt-collection exemption and ruled that it does not violate the Free Speech Clause. On appeal the U.S. Court of Appeals for the Fourth Circuit agreed with the lower court that strict scrutiny review applied but concluded that the debt-collection exemption does not satisfy that level of review. Finding that the provision was severable from the Act, the Fourth Circuit struck down only that provision.

In this matter, the Court was tasked with determining whether a provision of the Telephone Consumer Protection Act of 1991

exempting government debt collection calls from the ban on automated calls violates the First Amendment, and, if so, whether that provision severable from the rest of the Act. The Court affirmed the Fourth Circuit's judgment—that the robocall restriction's government-debt exception in 47 U.S.C. § 227(b)(1)(A)(iii) violates the First Amendment but is severable from the remainder of the statute.

A majority of the justices—Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh—believed that the statute at issue regulated speech based on its content and was thus subject to strict scrutiny. In their view, the law is a content-based restriction because it favors speech made for the purpose of collecting government debt over political and other speech. Under strict scrutiny, a law must be "necessary" to achieve a "compelling" state interest and must be "narrowly tailored" to achieve that interest. Justice Kavanaugh authored an opinion applying strict scrutiny and concluding that the government-debt exception fails this level of scrutiny because the Government did not sufficiently justify the differentiation between government-debt collection speech and other categories of robocall speech, such as political speech, issue advocacy, etc.

Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan argued in multiple opinions that the speech at issue in this case was commercial speech and thus restrictions on such speech were subject only intermediate scrutiny. Under this test, the restriction must only be "narrowly tailored to serve a significant governmental interest." Justice Sotomayor concurred in the judgment because, in her view, the provision at issue failed intermediate scrutiny. She argued that the government did not adequately explain "how a debt-collection robocall about a government-backed debt is any less intrusive or could be any less harassing than a debt-collection robocall about a privately backed debt." In contrast, Justice Breyer's partial dissent argued that the provision at issue does satisfy intermediate scrutiny, noting that the effect of the law is to disadvantage non-governmental debt collectors, who are already subject to substantial regulation, and the law is narrowly tailored to protect "the public fisc"—an important government interest.

A majority of the Court—Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, Kagan, and Kavanaugh—found the provision severable from the rest of the Act. Justices Thomas and Gorsuch dissented from this conclusion, arguing that the doctrine of severability amounts to rewriting legislation.

Batyukova v. Doege, No. 20-50425 (5th Cir. April 21, 2021)

Batyukova was sitting in her stopped vehicle in the left lane of a road when Doege, an off-duty Bexar County deputy, came upon her. He pulled behind her in his personal vehicle that was equipped with red and blue lights which he activated. Doege called 911, informed them he was an off-duty officer, and explained what was happening. Batyukova then began to exit her vehicle at which point Doege opened his door and yelled at her to show him her hands. Batyukova flipped Doege off and began screaming "f**k you" and "f**k America." Doege also alleges that she yelled "you're going to f&&king die tonight." When Batyukova began to walk towards him, still yelling, Doege pulled his gun and ordered her to stop. Instead, she reached behind her back, towards her waist. Doege fired his gun five times, striking her in the wrist, leg and abdomen.

Batyukova filed suit against Doege, alleging excessive force as well as retaliation for engagement in activity protected by the First Amendment. The District Court granted summary judgment based on qualified immunity. The Fifth Circuit affirmed, finding that Doege made a split second decision to use deadly force against a non-compliant person who made a movement consistent with reaching for a weapon. The Court further agreed with the District Court that Batyukova failed to present evidence that her speech was a but-for cause of the shooting. Doege did not fire at Batyukova when she was cursing at him but when she reached behind her back towards her waistband.

Hutcheson v. Dallas County, No. 20-10383 (5th Cir. April 12, 2021)

Hutcheson was high on cocaine and methamphetamine when he walked into the lobby of the Dallas Police Department. He staggered around the lobby and took a seat on a bench. When an officer came over, Hutcheson rose to speak to her. But when she placed her hand on his arm as if to restrain him, Hutcheson brushed her off and sat back down. Hutcheson then stood and staggered around the lobby for a minute before another officer took him to the ground.

Hutcheson was placed face down while officers attempted to handcuff him. At this point, Hutcheson began resisting. It took several officers to restrain him and one officer pushed his legs up toward his buttocks because he kept kicking around. Once he was secure, Hutcheson's legs were released. It was then discovered that Hutcheson had stopped breathing. The medical examiner's report listed the manner of death as "homicide" and that he died from a combination of narcotics and the stress from his struggle and restraint.

The District Court denied Plaintiffs' request for limited discovery and granted Defendants' motion to dismiss and summary judgment as to qualified immunity. On appeal, the Fifth Circuit affirmed the dismissal of the excessive force claim, finding that the officers used only the force necessary to restrain Hutcheson, rather than striking or using other force against him. Further, the fact that they tried to restrain Hutcheson gently before grabbing him and placing him on the floor weighs in favor of the reasonableness of their actions.

The Fifth Circuit also affirmed the denial of limited discovery. Before limited discovery is permitted, a plaintiff seeking to overcome qualified immunity must assert facts that, if true, would overcome that defense. The Court found that Plaintiffs failed to meet this burden. Plaintiffs likewise failed to identify any questions of fact that the court must resolve before determining qualified immunity.

Roque v. Harvel, No. 20-50277 (5th Cir. April 1, 2021)

Jason Roque called 9-1-1 to report a shirtless man waiving a gun (himself). His mother then called 9-1-1 to report her son wanted to kill himself. Officer Harvel was on patrol and heard dispatch radio "Gun Urgent" and then "Attempted Suicide." When Harvel and other officers arrived on scene, Jason was out front, pacing the sidewalk with a black gun in his waistband, and yelling "Shoot me!" The officers could not see his mother but heard her crying.

After one officer told him to put his hands up, Jason pulled the gun out (which was a BB gun) and stuck it to his head. An officer then ordered him to put the gun down. Jason then turned and faced the officers with the gun pointed in the air. Harvel shot Jason with a semi-automatic rifle. Jason doubled over, dropped the gun and stumbled towards the street (away from his mother and the officers). Harvel claimed he didn't see the gun fall and thought he was still a threat to his mother. Harvel then fired another shot, which missed, and seconds later, fired a third shot, which was fatal.

Jason's parents sued Harvel for excessive force. The District Court granted Harvel's motion for qualified immunity as to the first shot but not the next two shots. On appeal, the Fifth Circuit stated that they had jurisdiction but only to the extent the appeal concerned the purely legal question as to whether Harvel was entitled to qualified immunity on the facts that the District Court found sufficiently supported in the summary judgment record.

Regarding shots number two and three, the Fifth Circuit found that there was a factual dispute as to whether Jason was incapacitated after the first shot. If he was, then the second and third shots were excessive and unreasonable. Thus, the Fifth Circuit agreed that material fact disputes precluded summary judgment on the second and third shots.

II. FOURTH AMENDMENT

United States v. Reyes, No. 19-10291 (5th Cir. June 5, 2020)

Reyes was pulled over for speeding. When the officer asked for her license and registration, she volunteered that she was trying to get her kids to school (although there were no children in the car). Reyes stated her kids were in Abilene – 15 miles ahead. The officer asked Reyes to exit the vehicle and accompany him to his patrol car while he looked up her information. Reyes initially refused but finally agreed to sit in the patrol car while he ran her information. The officer was suspicious at this point and asked Reyes where she was heading. She gave an address and the officer said asked about her kids she was taking to school. Reyes responded that her kids were in Grand Prairie and this was someone else's kids. Reyes also stated that she had left Grand Prairie three hours ago to take the kids to school. The officer then asked who owned the vehicle as it had a temporary Oklahoma tag. Reyes replied it was her ex-husband's. Based on his training, education and experience, the officer suspected Reyes of trafficking narcotics and asked if he could search the vehicle. Reyes declined so the officer called a narcotics dog to sniff. After the dog alerted the officers, they searched the vehicle and found 127.5 grams of meth and a loaded gun.

Although Reyes plead guilty, she appealed the denial of her motion to suppress, claiming that the officer lacked reasonable suspicion to detain her beyond the time reasonably necessary to conduct an investigation of the traffic violation. Reyes further argued that, even if the officer had reasonable suspicion, he did not gain it until after he had already detained Reyes beyond the time that was reasonably necessary to conduct the traffic stop.

In affirming the denial of the motion to suppress, the Fifth Circuit found that the officer had reasonable suspicion to extend the traffic stop when looking at the totality of the circumstance – Reyes was pulled over in a well-known drug trafficking corridor, she drove a truck registered in someone else's name, she took unusual measures to protect the truck, she offered inconsistent and implausible stories about the purpose of her travel, and she had a conviction for meth. Further, because the traffic stop did not have the quality of a formal arrest – the officer encouraged her to bring her coffee and sit in the front seat, she wasn't patted down or restrained, and he let her leave the car to smoke a cigarette – Reyes was not entitled to the safeguards of *Miranda*.

United States v. Norbert, No. 20-60106 (5th Cir. March 16, 2021)

In affirming the District Court's grant of Norbert's motion to suppress evidence, the Fifth Circuit found that the officers did not have reasonable suspicion to conduct an investigatory stop. A phone call from an informant claiming to be the manager of an apartment complex where Norbert was stopped was not reliable. The caller did not provide her name or phone number and had no history of reliable reports of criminal activity. The officers also did not attempt to determine who made the call. Further, the information provided was not an emergency reported to 911 that required immediate action nor did it provide sufficient detail to be reliable in its assertion of illegality. Finally, the officers failed to corroborate or verify the information in any way.

United States v. Nelson, No. 19-41008 (5th Cir. March 12, 2021)

The Fifth Circuit affirmed the district court's denial of defendant's motion to suppress after defendant pleaded guilty pursuant to a conditional plea agreement to conspiracy to possess with intent to distribute 50 kilograms or more of marijuana.

The court concluded that the totality of the circumstances supported a finding that the law enforcement agent had reasonable suspicion to justify stopping defendant's vehicle. In this case, the agent noticed irregularities with the vehicle where the seal on the trailer was likely incompatible with a scan that seemingly showed a small amount of personal equipment inside,

and Vehicle and Cargo Inspection System images of the trailer were consistent with images of bundles of narcotics. The court also concluded that defendant was not subject to custodial interrogation and thus he was not entitled to Miranda warnings. Finally, defendant concedes that his argument, that Border Patrol agents lack authority to conduct investigative stops solely related to non-immigration offenses, is foreclosed under Fifth Circuit precedent.

United States v. Morton, No. 19-10842 (5th Cir. January 5, 2021)

The Fifth Circuit was presented with the question of whether the good faith exception to the Fourth Amendment's exclusionary rule does not allow officers to search the photographs on a defendant's cellphones for evidence of drug possession, when the affidavits supporting the search warrants were based only on evidence of personal drug possession and an officer's generalized allegations about the behavior of drug traffickers—not drug users.

The Fifth Circuit held that the officers' affidavits did not provide probable cause to search the photographs stored on the defendant's cellphones. Furthermore, the good faith exception did not apply because the officers' reliance on the defective warrants was objectively unreasonable. While respecting the "great deference" that the presiding judge is owed, the court further held that he did not have a substantial basis for his probable cause determination with regard to the photographs. Therefore, the digital images found in defendant's cellphones were determined to be inadmissible and the court vacated Defendant's conviction, remanding for further proceedings.

Joseph v. Bartlett, No. 19-30014 (5th Cir. November 20, 2020)

Kendole Joseph's family filed suit against police officers after Joseph died during the course of an arrest. Plaintiffs alleged violations of Joseph's Fourth Amendment rights, as well as claims of excessive force and failure to intervene. In this case, after a middle school official reported that Joseph was acting "strange" near the school, school resource officers approached Joseph. Joseph ran into a nearby convenience store and jumped behind the checkout counter. The school resource officers followed, with twelve additional officers joining them. About eight minutes after Joseph entered the store, the officers apprehended him and carried him to a police car after which he became unresponsive and was taken to the hospital, where he died two days later.

Joseph's family maintains that Joseph did not resist arrest, yet Officers Martin and Costa repeatedly tased and struck him, and nine other officers—Officers Leduff, Morvant, Thompson, Dugas, Varisco, Rolland, Faison, Verrett, and Bartlett—did nothing to stop the abuse. The officers tell another story.

Viewing the facts in the light most favorable to plaintiffs, the Fifth Circuit held that, if a jury found those facts to be true, Officers Martin and Costa Joseph's right to be free from excessive force during a seizure by failing to employ a measured and ascending response to the threat Joseph posed. In this case, Joseph was not suspected of committing any crime, was in the fetal position, and was not actively resisting. Nonetheless, Officers Martin and Costa inflicted twenty-six blunt-force injuries on Joseph and tased him twice, all while he pleaded for help and reiterated that he was not armed. Therefore, the actions of Officers Martin and Costa were disproportionate to the situation, in violation of the Fourth Amendment and the clearly established law. The Court held that they are not entitled to summary judgment on the constitutional claims.

However, the Court held that nine "bystander officers" are entitled to qualified immunity where plaintiffs failed to meet their burden to show that these officers violated clearly established law. The Court dismissed the appeal to the extent it challenges the district court's factfinding; affirmed the denial of summary judgment as to Officers Martin and Costa; and reversed the denial of summary judgment as to the nine bystander officers.

United States v. McKinney, No. 19-50801 (5th Cir. November 16, 2020)

Raymond McKinney entered a conditional guilty plea to the charge of being a felon in possession of a firearm. He reserved the right to challenge on appeal the denial of his motion to suppress evidence of the discovery of the firearm by an officer patting him down prior to questioning. McKinney was detained for questioning while standing on a sidewalk with others near a business that in recent days had been the location of multiple gang-related shootings.

The Fifth Circuit reversed defendant's conviction for being a felon in possession of a firearm. The Court concluded that the evidence before the district court did not support the conclusion that officers had reasonable suspicion of criminal activity to detain defendant for questioning or to subsequently frisk him. In this case, defendant was detained for questioning while standing on a sidewalk with others near a business that in recent days had been the location of multiple gang-related shootings. The Court stated that the body-camera videos and police report do not sufficiently explain the events leading up to the initiation of the investigatory detention. Accordingly, the Court vacated the district court's order denying defendant's motion to suppress and remanded for further proceedings.

United States v. Aguilar, No. 19-40554 (5th Cir. September 2, 2020)

Alfredo Aguilar, Jr. attempted to cross into the United States from Mexico with two female associates both of whom carried large cans filled with methamphetamine. After detaining Aguilar, United States Customs and Border Protection (CBP) agents forensically searched his cell phone without a warrant. Soon after, Aguilar was charged with multiple counts of narcotics conspiracy, possession, and importation. The district court denied Aguilar's motion to suppress the evidence found during the forensic search of his cell phone, and following a stipulated bench trial, found Aguilar guilty on all counts in the indictment. Aguilar appeals only the denial of the motion to suppress.

The Fifth Circuit affirmed the district court's denial of defendant's motion to suppress the evidence found during the forensic search of his cell phone. After determining that it had jurisdiction to hear the merits of the appeal, the court held that the border agents had a good faith, reasonable belief that they could search defendant's phone without obtaining a warrant. In this case, the CBP agent knew defendant had attempted to cross the border with two women who were carrying four cans that physical inspection and x-rays revealed to be suspicious; a K-9 unit had alerted the agents to the presence of narcotics in the cans, and defendant had implicated himself as the purchaser of the cans' contents; and thus there was clearly a particularized and objective basis for suspecting defendant of criminal activity.

United States v. Burgos-Coronado, No. 19-60294 (5th Cir. August 18, 2020)

Around midnight on May 18, 2018, State Troopers set up a "driver's safety checkpoint" on a highway approximately eight miles east of Starkville, Mississippi. The checkpoint was intended for the troopers to check for driver's licenses, insurance, seat belt usage, and other safety matters. After approximately 15 to 20 minutes of light traffic, the troopers stopped a Toyota with a Florida license plate traveling north, occupied by the three defendants (two males and one female). Upon inspecting the Toyota occupants' identifications, the trooper noticed that the female's Venezuelan passport did not have a stamp indicating her entry into the United States. The trooper further believed that because of the seating arrangement within the Toyota — male driver, empty passenger seat, male occupant in rear driver-side seat, and female occupant in rear passenger-side seat — he had a concern about the trip being abnormal "[f]rom a human trafficking aspect."

About 25 to 30 seconds after the Toyota was stopped, a Volkswagen arrived at the checkpoint. The troopers noticed that it too had a

Florida license plate, as well as an occupant with a Venezuelan passport. The driver of the Toyota confirmed that they were traveling together, while the driver of the Volkswagen denied this fact. These conflicting accounts put the troopers on "high alert." Ultimately, the troopers searched the Toyota and the Volkswagen and found evidence of credit card skimming in both.

The Fifth Circuit affirmed the district court's denial of defendants' motion to suppress evidence of credit card skimming found in a Toyota and a Volkswagen stopped at a driver's safety checkpoint. The Court held that the troopers had the minimum level of objective justification to support a reasonable suspicion of criminal activity – namely human trafficking – sufficient to justify prolonging the stop by inquiring further about where the Toyota occupants were going. During the justified extension, the Court explained that more facts were discovered to support reasonable suspicion and, eventually, a search of the vehicles.

United States v. Gallegos-Espinal, No. 19-20427 (5th Cir. August 17, 2020)

The Department of Homeland Security (DHS) suspected Cristofer Gallegos-Espinal (Gallegos) of participating in his mother's alien-smuggling conspiracy. But when federal agents persuaded Gallegos voluntarily to consent to a thorough search of his iPhone, they discovered evidence of an unrelated crime: possession of child pornography. This discovery led to a three-count indictment charging Gallegos with sex offenses with a minor and destruction of evidence. In the pretrial proceedings, the district court suppressed three incriminating videos that the government discovered in the course of an examination of extracted data from Gallegos's iPhone. The court ruled that Gallegos's written consent to a "complete search" of the iPhone could not support a review of extracted data three days after the phone was returned. The government filed this interlocutory appeal challenging the district court's suppression ruling.

The Fifth Circuit reversed and vacated the district court's suppression of evidence and remanded for further proceedings. The court held that defendant signed a consent form that, in its broad terms, encompasses the search and seizure conducted. Furthermore, defendant failed affirmatively to limit the scope of his broad consent.

Torres v. Madrid, 592 US _ (2021)

In 2014, Roxanne Torres was involved in an incident with police officers in which she was operating a vehicle under the influence of methamphetamine and in the process of trying to get away, endangered the two officers pursuing her. In the process, one of the officers shot and injured her. Torres pleaded no contest to three crimes: (1) aggravated fleeing from a law enforcement officer, (2) assault on a police officer, and (3) unlawfully taking a motor vehicle.

In October 2016, she filed a civil-rights complaint in federal court against the two officers, alleging claims including excessive force and conspiracy to engage in excessive force. Construing Torres's complaint as asserting the excessive-force claims under the Fourth Amendment, the court concluded that the officers were entitled to qualified immunity. In the court's view, the officers had not seized Torres at the time of the shooting, and without a seizure, there could be no Fourth Amendment violation. The U.S. Court of Appeals for the Tenth Circuit affirmed.

The question presented to the Court was whether physical force used to detain a suspect must be successful to constitute a "seizure" under the Fourth Amendment. The Court held that the application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person. Chief Justice John Roberts authored the majority opinion.

Under the Court's precedents, common law arrests are considered seizures under the Fourth Amendment, and the application of force to the body of a person with intent to restrain

constitutes an arrest even if the arrestee escapes. The use of a device, here, a gun, to effect the arrest, makes no difference in the outcome; it is still a seizure. There is no reason to draw an "artificial line" between grasping an arrestee with a hand and using some other means of applying physical force to effect an arrest. The key consideration is whether the conduct objectively manifests the intent to restrain; subjective perceptions are irrelevant. Additionally, the requirement of intent to restrain lasts only as long as the application of force. In this case, the officers' conduct clearly manifested intent to restrain Torres and was thus a seizure under the Fourth Amendment.

Justice Amy Coney Barrett took no part in the consideration or decision of the case.

Justice Neil Gorsuch authored a dissenting opinion, in which Justices Clarence Thomas and Samuel Alito joined, arguing that "neither the Constitution nor common sense" support the majority's definition of a seizure.

III. BIVENS

Oliva v. United States, No. 19-50795 (5th Cir. September 2, 2020)

Oliva attempted to enter a VA hospital. The entrance was protected by VA police and metal detectors. While Oliva stood in line for the metal detector, he spoke with an officer. The conversation escalated into a physical altercation. VA police wrestled Oliva to the ground in a chokehold and arrested him. Oliva exhausted his administrative remedies and then sued the federal officers for damages under "*Bivens*" and sued the United States under the Federal Tort Claims Act. The security video is inconsistent with Oliva's account of the facts in certain respects. With respect to the Fourth Amendment claim, the district court held that "this case does not present a new *Bivens* context" and allowed the claims to proceed.

The Fifth Circuit reversed and remanded for dismissal of the claims against the officers. *Bivens* claims generally are limited to manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment; discrimination on the basis of sex by a congressman against a staff person in violation of the Fifth Amendment; and failure to provide medical attention to an asthmatic prisoner in federal custody in violation of the Eighth Amendment. Extending *Bivens* to new contexts is a "disfavored judicial activity." This case arose from events at a hospital, not a private home, and involved a metal detector, not a warrantless search. The context is new and no special factors warrant extending *Bivens*.

Byrd v. Lamb, No. 20-20217 (5th Cir. March 9, 2021)

Byrd was at a bar trying to find out why his ex-girlfriend was kicked out of a bar when he was confronted by Agent Lamb, the father of a man who had been with the ex-girlfriend that night. Byrd claims that Agent Lamb threatened him with a gun and said he would blow his head off. Byrd called the police, but when they arrived, Agent Lamb identified himself as an agent with Homeland Security and Byrd was immediately handcuffed and detained for nearly four hours. Eventually, the officers reviewed security footage and released Byrd. They also arrested Agent Lamb for aggravated assault with a deadly weapon.

Byrd filed a Bivens action against Agent Lamb for excessive force to effectuate a seizure and against the officers for unlawfully detaining him. The District Court granted the officers' motion to dismiss based on qualified immunity but denied Agent Lamb's motion. On appeal, the Fifth Circuit reversed the decision as to Lamb, pointing out that there are only three situations where Bivens applies: (1) manacling the plaintiff in front of his family in his home and strip-searching him in violation of the 4th Amendment; (2) discrimination on the basis of sex by a congressman against a staff person in violation of the 5th Amendment; and (3) failure to provide medical attention to an asthmatic prisoner in federal custody in violation of the 8th Amendment. "Virtually everything else is a 'new context,'" including Byrd's claim. The Fifth Circuit rejected Byrd's request to extend Bivens and reversed and remanded to the

District Court with instructions to dismiss the claims against Agent Lamb.

IV. TITLE VII

Bostock v. Clayton County, 590 US _ (2020)

Gerald Bostock, a gay man, began working for Clayton County, Georgia, as a child welfare services coordinator in 2003. During his ten-year career with Clayton County, Bostock received positive performance evaluations and numerous accolades. In 2013, Bostock began participating in a gay recreational softball league. Shortly thereafter, Bostock received criticism for his participation in the league and for his sexual orientation and identity generally. During a meeting in which Bostock's supervisor was present, at least one individual openly made disparaging remarks about Bostock's sexual orientation and his participation in the gay softball league. Around the same time, Clayton County informed Bostock that it would be conducting an internal audit of the program funds he managed. Shortly afterwards, Clayton County terminated Bostock allegedly for "conduct unbecoming of its employees."

Within months of his termination, Bostock filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Three years later, in 2016, he filed a pro se lawsuit against the county alleging discrimination based on sexual orientation, in violation of Title VII of the Civil Rights Act of 1964. The district court dismissed his lawsuit for failure to state a claim, finding that Bostock's claim relied on an interpretation of Title VII as prohibiting discrimination on the basis of sexual orientation, contrary to a 1979 decision holding otherwise, the continued which was recently affirmed in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017). Bostock appealed, and the US Court of Appeals for the Eleventh Circuit affirmed the lower court. In addition to noting procedural deficiencies in Bostock's appeal, the Eleventh Circuit panel pointed out that it cannot overrule a prior panel's holding in the absence of an intervening Supreme Court or Eleventh Circuit en banc decision.

The issue presented to the Court is whether Title VII of the Civil Rights Act of 1964, which prohibits against employment discrimination "because of . . . sex" encompass discrimination based on an individual's sexual orientation. The Court held that an employer who fires an individual employee merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964. Justice Neil Gorsuch authored the opinion for the 6-3 majority of the Court.

Title VII prohibits employers from discriminating against any individual "because of such individual's race, color, religion, sex, or national origin." Looking to the ordinary public meaning of each word and phrase comprising that provision, the Court interpreted to mean that an employer violates Title VII when it intentionally fires an individual employee based, at least in part, on sex. Discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat employees differently because of their sex—the very practice Title VII prohibits in all manifestations. Although it acknowledged that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons, the Court gave no weight to legislative history because the language of the statute unambiguously prohibits the discriminatory practice.

Justice Samuel Alito authored a dissenting opinion, in which Justice Clarence Thomas joined, criticizing the majority for attempting to "pass off its decision as the inevitable product of the textualist school of statutory interpretation," but actually revising Title VII to "better reflect the current values of society.

Justice Brett Kavanaugh authored a dissenting opinion arguing that, as written, Title VII does not prohibit discrimination on the basis of sexual orientation (or by extension, transgender status).

Altitude Express v. Zarda, (citation pending) (2020)

Donald Zarda worked in 2010 as a sky-diving instructor at Altitude Express. Part of his job was to participate in tandem skydives with clients, in which he was necessarily strapped in close proximity to the client. A gay man, Zarda sometimes told female clients about his sexual orientation to address any concern they might have about being strapped to a man for a tandem skydive. On one occasion after Zarda informed a female client about his sexual orientation and performed the tandem jump with her, the client alleged that Zarda had inappropriately touched her and disclosed his sexual orientation to excuse his behavior. In response to this complaint, Zarda's boss fired him. Zarda denied touching the client inappropriately and claimed that he was fired solely because of his reference to his sexual orientation.

Zarda filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) claiming that he was fired because of his sexual orientation and also because of he did not conform to male gender stereotypes. He brought a claim in federal court alleging, among other things, that Altitude Express violated Title VII of the Civil Rights Act of 1964 by terminating him because of his sexual orientation. The district court ruled for Altitude Express, finding that Title VII does not protect against discrimination based on sexual orientation. After the district court's ruling, the EEOC issued an opinion in a separate case (persuasive but not binding on federal district courts) that Title VII's "on the basis of sex" language necessarily includes discrimination "on the basis of sexual orientation." In light of this decision, Zarda moved for the district court to reinstate his Title VII claim, but the district court denied the motion, citing binding Second Circuit precedent, *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005).

Zarda appealed to the US Court of Appeals for the Second Circuit, which ruled for Altitude Express as well. The panel declined Zarda's request that it reconsider its interpretation of Title VII and overturn *Simonton* and *Dawson*, as only the court sitting en banc can do that. The Second Circuit then agreed to rehear the case en banc and expressly overruled *Simonton* and *Dawson*, finding, consistent with the EEOC's position, that Title VII's prohibition on discrimination because of sex necessarily includes discrimination because of sexual orientation.

This case presented the same issue as previously ruled upon by the Court in Bostock – whether Title VII of the Civil Rights Act of 1964, which prohibits against employment discrimination "because of . . . sex" encompass discrimination based on an individual's sexual orientation. Again, the Court held that an employer who fires an individual employee merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964. Justice Neil Gorsuch authored the opinion for the 6-3 majority of the Court.

The Court held that Title VII prohibits employers from discriminating against any individual "because of such individual's race, color, religion, sex, or national origin." Looking to the ordinary public meaning of each word and phrase comprising that provision, the Court interpreted to mean that an employer violates Title VII when it intentionally fires an individual employee based, at least in part, on sex. Discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat employees differently because of their sex—the very practice Title VII prohibits in all manifestations. Although it acknowledged that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons, the Court gave no weight to legislative history because the language of the statute unambiguously prohibits the discriminatory practice.

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Title VII to "better reflect the current values of society.

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Lyons v. Katy Independent School District, No. 19-20293 (5th Cir. June 29, 2020)

Lyons was employed by Katy ISD as a middle school physical education teacher and coach. In April 2014, Lyons went to the school principal to discuss his announced new policy that PE teachers must coach three sports. Lyons expressed that she preferred to coach only two sports (specifically, she didn't want to coach basketball) but never stated she was unwilling to coach three sports.

That summer, Lyons had lap band surgery. While she was recovering at home, the in-school suspension ("ISS") teacher unexpectedly resigned. The principal then reassigned Lyons from PE to ISS and told she would not be required to coach. Lyons filed a grievance with the school, claiming her reassignment constituted disability-based discrimination and then filed a charge with the EEOC. After exhausting her administrative remedies, Lyons filed suit claiming disability-based discrimination, retaliation, and harassment.

After Katy ISD was granted summary judgment, Lyons appealed the disability-based discrimination and retaliation claims. The Fifth Circuit affirmed, finding that Lyons' claim for "regarded as disabled" did not apply to impairments that are transitory and minor (an impairment with an actual or expected duration of 6 months of less). Further, while the Fifth Circuit found error in the district court's determination that Lyons failed to establish a prima facie case of retaliation, the Fifth Circuit still affirmed because Plaintiff failed to point to evidence that Katy ISD's legitimate, non-discriminatory reason for its actions were pretextual. Katy ISD proffered that Lyons was removed from coaching basketball because she had stated she didn't want to coach basketball.

Newburry v. City of Windcrest, No. 20-50067 (5th Cir. March 22, 2021)

Newburry was a female police trainee for the City. In her first "probationary" year, she had several encounters with another female officer which resulted in Newburry alleging sexual harassment. After the City hired an outside law firm to investigate, it was concluded that the officer had been rude to Newburry but not sexually harassing her. Newburry resigned and filed suit alleging, among other things, sexual harassment in violation of Title VII. The City moved for and was granted summary judgement on all claims.

In affirming the dismissal, the Fifth Circuit reviewed the factors in determining whether the alleged conduct was sex discrimination in a same-sex situation: (1) was the harasser homosexual and motivated by sexual desire; (2) was the harassment framed "in such sex-specific and derogatory terms…as to make it clear that the harasser was motivated by general hostility to the presence" of a particular gender in the workplace; or (3) did the plaintiff offer direct evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." In this instance, Newburry failed to offer any evidence of these factors.

Wright v. Union Pacific Railroad Co., No. 20-20334 (5th Cir. March 5, 2021)

Wright worked for Union Pacific from 1996 to 2018. In 2013, Wright began working as a claims rep at Union Pacific's Palestine, Texas location. In 2015. Wright lodged complaints of discrimination and retaliation both internally and with the EEOC. Union Pacific terminated Wright from the claims rep position in 2016 but as a union member, Wright had "bumping" rights that allowed her to seek another position. She then began working as a materials handler at a Union Pacific warehouse.

In August 2016, Wright sued Union Pacific for discrimination and retaliation she allegedly experience at the Palestine location. The case settled in January 2018. Five months later, Wright disagreed with her supervisor over her pay. The relationship between the two then deteriorated, with her supervisor writing her up on numerous occasions. Wright alleged this caused a hostile work environment and report her supervisor to Union Pacific. More disputes occurred and eventually Wright was terminated for insubordination.

Wright filed suit, claiming that Union Pacific violated Title VII for terminating her in retaliation for her 2016 lawsuit. After the District Court dismissed the case, the Fifth Circuit reversed the Title VII dismissal, finding that Wright had plausibly alleged a causal link between her 2018 internal complaint and her subsequent suspension and termination (but not the 2016 lawsuit).

Campbell v. Wilkinson, No. 20-11002 (5th Cir. February 19, 2021)

The Fifth Circuit reversed the district court's dismissal of plaintiff's claims of discrimination and retaliation under Title VII of the Civil Rights Act. The district court dismissed the suit under Federal Rule of Civil Procedure 41(b) on the ground that plaintiff's counsel failed to retain local counsel as required by local rules. The Fifth Circuit held that dismissal was unwarranted because Berry v. CIGNA/RSI-CIGNA, 975 F.2d 1188 (5th Cir. 1992), sets forth a strict framework that district courts must meet to justify dismissal with prejudice—and one that the district court plainly failed to meet here. In this case, the record shows neither a clear record of delay or contumacious conduct, nor the futility of lesser sanctions, nor any aggravating factor. Accordingly, the Court remanded for further proceedings.

Stelly v. Duriso, No. 19-20160 (5th Cir. December 11, 2020)

Plaintiff Rhonda Stelly worked with Defendant Paul Duriso at two union hiring halls in south Texas for over a year. In that time, Stelly alleged that Duriso repeatedly asked her offensive, threatening, and humiliating questions relating to her gender. Stelly eventually sued the unions she was affiliated with, as well as a maritime association that used the hiring halls, for sexual harassment under federal employment law, arguing that Duriso's conduct created a hostile work environment. Stelly also sued Duriso himself for intentional infliction of emotional distress ("IIED") under Texas state law. The district court entered a default judgment in plaintiff's favor on the IIED claim and plaintiff ultimately prevailed at trial against the other defendants.

The Fifth Circuit held that a party's failure to file a motion to set aside a default judgment in the district court does not prevent the party from appealing that judgment to the court. On the merits, the court vacated the default judgment on the IIED claim, concluding that plaintiff could not pursue an IIED against defendant in light of the other statutory remedies available to plaintiff. The court explained that a plaintiff generally cannot sustain an IIED claim if the plaintiff could have brought a sexual harassment claim premised on the same facts. In this case, the gravamen of plaintiff's IIED claim is for sexual harassment; plaintiff used defendant's conduct as a basis for her Title VII claims against the other defendants; plaintiff ultimately prevailed on those claims against the union; and the availability of those statutory remedies on the same facts forecloses her IIED claims against defendant. Accordingly, the court remanded for further proceedings.

Miller v. Sam Houston State University, No. 19-20752 (5th Cir. January 29, 2021)

Miller joined SHSU as a tenure-track Assistant Professor of Psychology in the University's Clinical Psychology Doctoral Program ("Clindoc Program") in the Department of Psychology and Philosophy in August 2007. In this position, Miller supervised students in the Clindoc Program, taught practicum courses, and served on students' dissertation and thesis committees. According to SHSU, Miller was "lacking in

collaborative and attentive generosity towards her colleagues." She complained about her heavy workload, which she believed to be disproportionate compared to that of her colleagues. Miller also disagreed with other members of the faculty while serving on dissertation and thesis committees. She was removed from one committee due to her inflexibility and voluntarily offered to step down from another due to conflicts with other committee members. Miller contends these disagreements were retaliatory because of her sex and the complaints that she raised concerning her clinical workload. Despite these issues, Miller applied for tenure at SHSU in late 2012. But her reviewers recommended that Miller's tenure and promotion be denied due to her lack of collegiality. SHSU informed Miller of its decision to deny tenure on March 27, 2013.

Thereafter, Miller filed charges of sex discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC) and the Texas Workforce Commission. She then utilized the Texas Public Information Act to obtain voluminous documentation from SHSU. A few months later, SHSU denied Miller a merit-based salary increase for the 2013-2014 academic year. Miller filed a formal grievance with SHSU, based on the same allegations as her EEOC charge (i.e., that her tenure decision was adversely affected by sex discrimination and retaliation). During this time, Miller applied for one of three open faculty positions at UHD. Ultimately, UHD filled all three open positions with candidates who scored lower on UHD's hiring metrics than Miller. According to Dean Fulton, UHD's decision not to hire Miller was "based entirely on [] concerns regarding [] Miller's teaching and service due to her tenure denial at SHSU." The dean further stated that she was never "made aware that [] Miller had filed a charge of discrimination or other complaint against SHSU with any federal or state authorities." Miller's employment with SHSU ended on May 31, 2014.

Plaintiff filed suit against SHSU and TSUS under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act, alleging sex discrimination, retaliation, and a hostile work environment. Plaintiff then filed a separate action against UHD and UHS under Title VII, alleging that UHD's denial of employment constituted retaliation.

The Court noted that from the outset of Miller's suit, the district judge's actions evinced a prejudgment of Miller's claims. At the beginning of the Initial Case Management Conference, the judge dismissed sua sponte Miller's claims against TSUS and UHS, countenancing no discussion regarding the dismissal. The court then summarily denied Miller's subsequent motion for reconsideration, denied Miller's repeated requests for leave to take discovery (including depositions of material witnesses), and eventually granted summary judgment in favor of SHSU and UHD, dismissing all claims.

The Fifth Circuit concluded that the district court erred in its sua sponte dismissal of TSUS and UHS where the district court failed to give plaintiff an adequate opportunity to respond before it dismissed her claims against TSUS and UHS with prejudice. It further held that the district court erred when it denied plaintiff's motion for reconsideration. The Court also concluded that the district court abused its discretion by repeatedly denying plaintiff's requests for discovery, including her requests to depose witnesses with knowledge material to her claims.

The Fifth Circuit reversed the district court's dismissal of all of plaintiff's claims and remanded, directing that plaintiff's cases be reassigned to a new district judge for further proceedings. The court noted that a litigant has the fundamental right to fairness in every proceeding; fairness is upheld by avoiding even the appearance of partiality; and when a judge's actions stand at odds with these basic notions, the court must act or suffer the loss of public confidence in our judicial system.

Lindsley v. TRT Holdings, Inc., No. 20-10263 (5th Cir. January 7, 2021)

Sarah Lindsley started her sixteen-year career with Omni Hotels as a server at the Omni Tucson National Resort. Working her way up, Lindsley was first promoted to an hourly supervisor position within the resort's food and beverage division in 2007, then to an outlet manager position within the same division in 2008, and finally to a general manager position at the resort's steakhouse in 2009.

For most of her time in Tucson, Lindsley was supervised by David Morgan. She alleges that Morgan engaged in inappropriate behavior, including running his fingers through her hair and sexually harassing other female servers. In 2010, Lindsley successfully applied to be the assistant director of the food and beverage division at the Omni hotel in Corpus Christi. At first, she reported to Daniel Cornelius, Omni Corpus Christi's food and beverage director. When Cornelius resigned, Lindsley took Cornelius's position. Her starting salary as food and beverage director was $70,851. That was $11,649 lower than Cornelius's starting salary. Her starting salary was also $6,149 and $4,149 lower than Cornelius's two male predecessors, Jason Pollard and Robert Walker. As a result, she lodged a complaint with human resources, but she did not receive a salary increase. Plaintiff further alleges that while she was in Corpus Christi, Morgan—her former supervisor in Tucson—became corporate vice president of food and beverage and continued to sexually harass her.

In 2015, Lindsley was asked to interview for the food and beverage director position at the Omni hotel in Houston. She emailed Morgan twice to gain his support for the position but received no response. Nonetheless, Lindsley explains, the interview "went so well that the Houston Human Resources Director discussed salary, relocation, and an offer letter with her." Then Lindsley had a final, ten-minute interview with Barry Sondern, Omni Houston's general manager. What happened during that ten-minute interview depends on who you ask. Lindsley says Sondern informed her that Morgan said she was not qualified for the position. She says Sondern explained that "he ha[d] to go with the best candidate" and that he had "two other applicants that had higher qualities than [she] did." But Sondern says that the interview was just a formality and that he had already decided to hire her. Sondern also says that Morgan expressed support for Lindsley. And after the interview, Sondern says he instructed human resources at Omni Houston to move forward with hiring Lindsley. Afterwards, Lindsley withdrew her name from consideration, believing that she would be rejected anyway. Sondern understood this to mean that Lindsley was offended by some of his interview questions, specifically about her working relationship with her supervisor. As Lindsley explained in her withdrawal email: "I will be taking myself out of the consideration, due to concerns shared with my potential future direct report that I feel tarnished my reputation and his perception of me."

In September 2015, Lindsley filed a charge of discrimination with the EEOC after which Lindsey claims Omni took several retaliatory actions. In January 2016, Lindsley met with Omni Corpus Christi's human resources director, Susan Gilbert, to discuss the possibility of leave under the Family and Medical Leave Act (FMLA) on account of mental health issues stemming from "continued workplace discrimination and retaliation." Gilbert provided Lindsley with incorrect information regarding FMLA leave, informing her that she was an essential employee and that she would lose her position if she took leave. Gilbert later corrected herself, and Lindsley took leave in March 2016, returning one month later, in April 2016. Lindsley alleges that Omni continued to retaliate against her after she returned from leave. Lindsley took FMLA leave again in May 2016 and then left Omni in June 2016.

Based upon the foregoing, Plaintiff filed suit against Omni in October of 2017, alleging

(1) pay discrimination under Title VII of the Civil Rights Act of 1964, the Texas Labor Code, and the Equal Pay Act; (2) promotional discrimination under Title VII and the Texas Labor Code; and (3) retaliation for filing a charge with the EEOC and for taking leave under the Family Medical Leave Act (FMLA), Title VII, the Texas Labor Code, and the Equal Pay Act. The district court granted summary judgment to Omni.

In regard to the pay discrimination claims as it pertains to the three men who previously held the same position as plaintiff yet were paid more, the Fifth Circuit concluded that the district court erred in concluding that plaintiff failed to establish a prima facie case. Rather, plaintiff showed that she held the same position as two other employees did, at the same hotel, just a few years after they did, and that she was paid less than they were (as well as being paid less than some males that she supervised). The Court further concluded that Omni failed to set forth a plausible, non-discriminatory explanation for the pay disparity. Therefore, the Court reversed in part and remanded. The Court affirmed the district court's grant of summary judgment for plaintiff's Equal Pay Act claim insofar as it relies on other unnamed male food and beverage directors from different Omni hotels, but remanded for a determination of whether plaintiff can establish a prima facie case with respect to those comparators under Title VII and the Texas Labor Code.

In regard to the promotional discrimination claims, the court affirmed the district court's grant of summary judgment to Omni because plaintiff withdrew her name from consideration and understood that she would have been given the offer if she reconsidered. In this case, plaintiff was not rejected by Omni. Rather, she rejected the opportunity from Omni. In regard to the retaliation claims, plaintiff failed to establish a prima facie case of retaliation because she could not demonstrate an adverse employment action. Furthermore, plaintiff failed to establish adverse employment action in response to her requesting and taking FMLA leave; plaintiff puts forth no evidence that the deletion of the computer files was in any way motivated by retaliation; and plaintiff's constructive discharge claim failed.

Badgerow v. REJ Properties, Inc., No. 19-30584 (5th Cir. September 11, 2020)

Denise Badgerow is a former Associate Financial Advisor (AFA) for REJ Properties, Inc. Badgerow worked at Louisiana-based REJ from January 2014 to July 2016. In July 2016, REJ terminated Badgerow's employment and Badgerow filed this gender discrimination suit.

REJ was a small private financial advisory practice affiliated with Ameriprise Financial Services, Inc. The principals of REJ, during the relevant time of this lawsuit, were Gregory Walters, Thomas Meyer, and Ray Trosclair, all of whom were Ameriprise Franchise Financial Advisors. Walters originally hired Badgerow as a paraplanner, but she was later promoted to serve as one of his AFAs. Under REJ's structure, each financial advisor was a franchisee of Ameriprise, and an AFA obtained her license by working under one of the franchisees. Further, Badgerow testified that because she worked under Walters, he was the only REJ principal who could fire her. Badgerow's promotion to the AFA position enabled her to earn commissions, but REJ deducted Badgerow's salary from her earned commissions when the commissions exceeded the amount of her salary draw. According to Badgerow, the salary draw against commissions compensation scheme violated an agreement she had with Walters to pay her $30,000 in salary plus commissions. During Badgerow's tenure at REJ, three senior male AFAs - David Ponson, Lloyd Kern, and Andrew Walters - were paid a fixed salary plus commissions. Evan Weibel, who began working as an AFA approximately seven months before Badgerow, was also paid a base salary. But Nathan Walters, Christopher Callahan, and John Meyer, who became AFAs after Badgerow, were paid in salary draws against commissions, the same as Badgerow. According to Badgerow, Thomas Meyer, one of the principals, would bully her through

Skype and text messages. For example, Meyer, although he had no direct authority over her, would message Badgerow to criticize how she clocked in and out on her timecard. Badgerow felt that Meyer intentionally singled her out for unfair treatment, and she testified that she believed Meyer's behavior towards her was because she is a woman. Badgerow did not support her opinion with other testimony that tied Meyer's messages to her gender. Badgerow, however, testified that Gregory Walters once told her that Meyer was a misogynist and speculated that Meyer "did not want a female . . . as a financial advisor." Walters, however, did not testify to that effect. Badgerow claims that Meyer's bullying included enlisting others to spread rumors that she had engaged in sexually suggestive conduct.

On July 13, 2016, Badgerow discussed concerns specifically about REJ's failure to comply with Ameriprise regulations regarding pay and how REJ treated her with Marc Cohen, an Ameriprise compliance officer who visited the local office annually. Badgerow told Cohen that she "was not sure if she was not treated fairly because she was not family or because she is a woman." On July 26, 2016, Cohen told Walters about the conversation he had had with Badgerow and advised Walters that he should consider consulting an attorney. That same day, Walters terminated Badgerow's employment. According to Walters, he fired Badgerow because of the stress of dealing with constant complaints about Badgerow from her coworkers.

Plaintiff filed suit against REJ alleging claims of hostile work environment, gender discrimination, disparate pay, Title VII and Louisiana Employment Discrimination Law retaliation, 42 U.S.C. 1985 conspiracy, and breach of contract.

The Fifth Circuit affirmed the district court's grant of summary judgment on plaintiff's disparate pay, hostile work environment, and breach of contract claims. The Court also affirmed the district court's denial of attorney's fees. However, the Court held that Plaintiff had satisfied her burden under the McDonnell Douglas framework to show that whether her termination was pretext for unlawful retaliation remains a disputed issue of fact that must be determined by the appropriate fact finder. Therefore, the court reversed and vacated the district court's grant of summary judgment on plaintiff's Title VII retaliation claim.

Simmons v. UBS Financial Services, Inc., No. 20-20034 (5th Cir. August 24, 2020)

Simmons was employed by Prelle Financial Group as a third-party wholesaler of life-insurance products to clients of UBS Financial Services, Incorporated ("UBS" or "the company"). Simmons frequently worked out of UBS's offices. Simmons's daughter, Jo Aldridge, was a UBS employee who submitted an internal complaint of pregnancy discrimination and filed a charge with the EEOC. Aldridge eventually resigned and settled her claims. In the months that followed, Simmons's third-party relationship with UBS deteriorated. Allegedly in retaliation for his daughter's complaints, UBS revoked Simmons's right of access to the UBS offices and then eventually forbade him from doing business with its clients. That effectively ended Simmons's employment at Prelle Financial, and he left.

Simmons sued, among others, UBS. He theorized that the company "retaliated against his daughter by taking adverse actions against him." UBS promptly moved to dismiss, contending that because Simmons was not a UBS employee, he could not sue under Title VII. The district court agreed and dismissed with prejudice, holding that Simmons's nonemployee status forecloses his statutory standing to sue. Simmons appeals.

The Fifth Circuit affirmed the district court's dismissal of plaintiff's complaint alleging retaliation under Title VII, based on lack of statutory standing. The court agreed with the district court and held that plaintiff's nonemployee status forecloses his statutory standing to sue because Title VII claims require an employment relationship between plaintiff and defendant. The court held that plaintiff's

daughter's status as an employee is not enough to deposit plaintiff into federal court. Rather, plaintiff must show that his personal interests are arguably covered, which he has failed to do.

Brown v. Wal-Mart Stores East, LP, No. 19-60719 (5th Cir. August 14, 2020)

Plaintiff-Appellant Lashawnda Brown, an assistant manager at Wal-Mart Stores East, L.P. (Wal-Mart), was fired after she reported her supervisor, Aurelio Quinn, for sexually harassing other Wal-Mart employees. According to Wal-Mart, Brown was terminated because she violated Wal-Mart's Investigation and Detention of Shoplifters Policy (AP-09). Brown sued Wal-Mart for retaliation and wrongful termination. The district court granted summary judgment for the defendants, dismissing all of Brown's claims. Brown appealed the district court's dismissal of her Title VII retaliation claim against Wal-Mart.

The Fifth Circuit affirmed the district court's grant of summary judgment for defendants, holding that plaintiff has met her prima facie burden of causation by showing close enough timing between the protected activity and the adverse employment action. However, the temporal proximity between plaintiff's protected activity and her termination is relevant to, but not alone sufficient to demonstrate, pretext. The court also held that a reasonable jury could not find that the supervisor's actions were the but-for cause of Wal-Mart's termination of plaintiff based on the record.

Olivarez v. T-Mobile USA, Inc., No. 20-20463 (5th Cir. May 12, 2020)

Plaintiff filed suit against T-Mobile and Broadspire, alleging transgender discrimination under Title VII of the Civil Rights Act of 1964. Plaintiff's claims stemmed from his treatment while working as a retail employee at a T-Mobile store.

The Fifth Circuit held that, under Bostock v. Clayton County, 140 S. Ct. 1731 (2020), a plaintiff who alleges transgender discrimination is entitled to the same benefits—but also subject to the same burdens—as any other plaintiff who claims sex discrimination under Title VII. In this case, the court concluded that plaintiff does not allege facts sufficient to support an inference of transgender discrimination—that is, that T-Mobile would have behaved differently toward an employee with a different gender identity. The court explained that, where an employer discharged a sales employee who happens to be transgender—but who took six months of leave, and then sought further leave for the indefinite future, that is an ordinary business practice rather than discrimination. Finally, the court concluded that plaintiff's remaining issues on appeal are likewise meritless. Accordingly, the court affirmed the district court's judgment.

Watkins v. Tregre, No. 20-30176 (5th Cir. May 7, 2020)

Denise Watkins is a black woman who is suffering from severe anxiety. She was a shift supervisor in the dispatch department of the St. John the Baptist Parish Sheriff's Office, where she had worked for 17 years - on and off. The events that led to this lawsuit occurred in a tight time span, between late January and early March 2018.

On January 30, Plaintiff's supervisor commended her and three other dispatchers for "superb work" and such recognition was provided to the Sheriff. However, just ten days later, Plaintiff was counseled on her "poor performance" including sleeping on the job, missing license-plate-recognition hits, making personal phone calls while on duty, and failing to ensure that emergency units promptly were dispatched. No disciplinary measures were taken.

On February 20, Plaintiff provided her supervisor with doctor's note that stated "[d]ue to diagnosis of anxiety, [Watkins] requires 3 24 hour shifts/periods 'off' and free of responsibility per week." Senior 911 Commander Baker passed the note up his chain of command and alerted human resources. Two

days after receiving notice of Watkins's medical condition, her supervisor filed a disciplinary-review-board request, seeking review of the charges against Watkins. He charged that Watkins had engaged in "[c]onduct and work performance unsuitable for an employee of St. John the Baptist Sheriff's Office." The complaint was based upon the aforementioned performance issues, and most of the infractions had occurred days or even weeks before the medical leave request. Watkins responded to the allegations. The Board only reviewed the claim of Watkins' sleeping on the job and recommended that she be fired. Watkins was terminated on March 2.

It was noted that Watkins, however, was not the only dispatch supervisor who had been caught sleeping on the job. Joe Oubre, a white male dispatch supervisor, also was caught, but he was not fired; he had only received "counseling."

Plaintiff filed suit against the Sheriff for race discrimination under Title VII of the Civil Rights Act of 1964 and for retaliatory discharge under the Family Medical Leave Act (FMLA). The district court granted summary judgment against plaintiff.

The Fifth Circuit vacated the district court's judgment, concluding that there is a genuine dispute of material fact as to whether the sheriff's proffered reason for firing plaintiff -- sleeping on the job -- is pretext for Title VII race discrimination and FMLA retaliation. In regard to plaintiff's Title VII claim, the court explained that plaintiff has produced substantial evidence of pretext based on disparate treatment. In this case, the sheriff treated plaintiff worse than a similarly situated white male who also was caught sleeping on the job. In regard to the FMLA claim, the court explained that the record reflects that "sleeping on the job" is not an infraction that results in termination, the sheriff tolerated "sleeping on the job" by at least one other dispatch supervisor, and the sheriff could not recall any dispatcher that he had ever fired for this reason. Furthermore, when combined with the discredited reason of "sleeping on the job," the near-immediate temporal proximity of the discharge to the protected activity leaves no room to doubt that plaintiff has carried her summary-judgment burden of producing substantial evidence that the sheriff would not have fired her but for her FMLA-protected activity.

V. SECTION 1983

Caniglia v. Strom, 593 US _ (2021)

Edward Canaglia and his wife Kim got into a heated argument, during which Canaglia displayed a gun and told Kim something to the effect of "shoot me now." Fearing for her husband's state of mind, Kim decided to vacate the premises for the night. The next morning, she asked an officer from the Cranston Police Department to accompany her back to the house because she was worried that her husband might have committed suicide or otherwise harmed himself.

Kim and several police officers went to the house, and while the encounter was non-confrontational, the ranking officer on the scene determined that Canaglia was imminently dangerous to himself and others and asked him to go to the hospital for a psychiatric evaluation, which Canaglia agreed to. While Canaglia was at the hospital, the ranking officer (with telephone approval from a superior officer) seized two of Canaglia's guns, despite knowing that Canaglia did not consent to their seizure.

Caniglia was evaluated but not admitted as an inpatient. In October of 2015, after several unsuccessful attempts to retrieve his firearms from the police, Caniglia's attorney formally requested their return, and they were returned in December. Subsequently he filed a lawsuit under Section 1983 alleging the seizure of his firearms constituted a violation of his rights under the Second and Fourth Amendments. The district court granted summary judgment to the defendants, and the Caniglia appealed. Although the U.S. Supreme Court has recognized "community caretaking" as an exception to the Fourth Amendment's warrant requirement in the context of a vehicle search, whether that concept applies in the context of a private home was a

matter of first impression within the First Circuit. The appellate court held that the doctrine does apply in the context of a private home and affirmed the lower court's decision.

The question presented to the Court was whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extend to the home. In a unanimous opinion authored by Justice Thomas, the Court held that the "community caretaking" exception to the Fourth Amendment's warrant requirement, described in *Cady v. Dombrowski*, 413 U.S. 433 (1973), does not extend to the home. As such, the police officers' seizure of the petitioner's guns from his home violated his Fourth Amendment right against warrantless searches and seizures.

The lower court's conclusion that the "community caretaking" exception permitted the officers to seize the petitioner's guns relied on an extension of Cady, which held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. The Court's jurisprudence makes clear that vehicle searches are different in kind from home searches, the latter of which are subject to the highest level of protection the Constitution affords. The Court has repeatedly declined to expand the scope or number of exceptions to the warrant requirement to permit warrantless entry into the home, and it declined to do so here.

Chief Justice John Roberts authored a concurring opinion, which Justice Stephen Breyer joined, to clarify that the Court's decision does not disturb the Court's holding in *Brigham City v. Stuart*, 547 U.S. 398 (2006), that a peace officer does not need a warrant to enter a home in situations where there is a "need to assist persons who are seriously injured or threatened with such injury."

Justice Samuel Alito authored a concurring opinion to note that while he agrees with the Court's opinion, there are certain related questions the Court did not decide.

Alvarez v. Akwitti, No. 20-50464 (5th Cir. May 5, 2021)

Alvarez, a Texas state prisoner, filed a handwritten complaint, alleging that he needed protection from a sexually violent predator inmate. In response, a committee of prison guards required Alvarez to identify that inmate publicly and Akwitti, an assistant prison warden and chair of the committee, called Alvarez a "snitch" and refused to grant him a transfer for that same reason. After that same inmate attacked Alvarez, Alvarez filed a Section 1983 suit against Akwitti, alleging a violation of his Eighth Amendment rights by Akwitti in deliberately failing to protect him. However, the District Court dismissed Alvarez's suit sua sponte before Akwitti filed a response.

The Fifth Circuit vacated the dismissal and remanded to the District Court for consideration of Alvarez's allegations as well as any response from Akwitti. In doing so, the Fifth Circuit pointed out that the District Court did not consider whether Alvarez had stated a valid Eighth Amendment claim by alleging that Akwitti deliberately exposed him to an excessive risk of harm by refusing his transfer request and calling him a "snitch."

Cloud v. Stone, No. 20-30052 (5th Cir. April 6, 2021)

Cloud was pulled over for speeding but refused to sign the speeding ticket. This is an arrestable offense in Louisiana. The officer told Cloud to get out of the car and attempted to place him in handcuffs. Cloud began to resist and the two struggled, with the officer deploying his taser to no avail. The officer then released his canine and Cloud managed to grab a revolver from his truck. The two continued to struggle, with the revolver going off, hitting the officer in the chest (he was protected by his vest). The officer was able to wrest the revolver away from Cloud and throw it to the side. Cloud lunged past the officer, diving for the gun, at which point the officer shot Cloud twice in the back. Cloud was pronounced dead at the scene.

Cloud's parents filed suit against the officer, claiming excessive force. The District Court granted summary judgment as to the officer, finding that he did not use excessive force. The Fifth Circuit affirmed, concluding that the officer had reasonable ground to tase Cloud after Cloud continued to resist arrest. Further, the officer was justified to use deadly force when Cloud lunged for the revolver that had already discharged and struck the officer in the chest. At a minimum, the officer knew that a loaded revolver lay on the ground behind and to his side and that Cloud's movement was towards the gun. Accordingly, the Fifth Circuit found no constitutional violation.

Anokwuru v. City of Houston, No. 20-20295 (5th Cir. March 16, 2021)

After the DA dismissed charges against Anokwuru finding no probable cause that he had committed an offense, Anokwuru filed suit against the City asserting claims for false arrest and malicious prosecution under both Section 1983 and state law. Anokwuru claimed that he was wrongfully arrested based on the similarity of his name "to the real suspect" and Houston PD's failure to use a line up procedure before his arrest. After several rounds of 12(b)(6) motions to dismiss and amended complaints, the District Court finally granted the motions.

In affirming the decision, the Fifth Circuit found that Anokwuru's constitutional claims for false arrest failed, because the arrest was reasonable. Anokwuru failed to allege anything akin to the officer "deliberately or recklessly" providing false information to either the grand jury or the magistrate judge. The Fifth Circuit further held that there is no free standing right under the Constitution to be free from malicious prosecution. Finally, there was no evidence that the City's training practices were inadequate or that the City was deliberately indifferent to Anokwuru's rights.

Cunningham v. Castloo, No. 20-40082 (5th Cir. December 18, 2020)

The Fifth Circuit reversed the district court's denial of qualified immunity to defendant in an action brought by plaintiff, alleging 42 U.S.C. 1983 claims premised on the denial of a name-clearing hearing in violation of procedural due process. The court held that the alleged violative nature of Defendant Sheriff Castloo's "particular conduct" was not clearly established as unconstitutional.

In this case, Sheriff Castloo's subordinates – Chief Deputy Sanders, Lieutenant Burge, and Captain Holland – met with Cunningham and fired her for "improper use of chain of command and lying," without further explanation. In responses, Cunningham asked "to speak with the Sheriff," but Sheriff Castloo's subordinates did not "allow" her to do so. Sheriff Castloo was not present at the meeting, and there was no evidence that he instructed his subordinates to deny Cunningham's request "to speak with" him. The Court held that the law was not clearly established that plaintiff's request "to speak with" Sheriff Castloo constituted a request for a name-clearing hearing in the context of the court's "stigma-plus-infringement" test, such that denying the request would amount to a procedural-due-process violation.

Haddock v. Tarrant County, No. 19-11327 (5th Cir. May 18, 2021)

Plaintiff filed suit against seven district judges of Tarrant County's family law courts in their official capacities, District Judge Patricia Baca-Bennett in her personal capacity, and the County under 42 U.S.C. 1983, alleging that she was fired for refusing to support a political candidate and for her husband's political activity.

Tarrant County family courts are presided over by seven elected district judges, who, in turn, are assisted by seven appointed associate judges. Haddock was an associate judge for nearly twenty years. In 2016, Haddock and fellow associate judge James Munford indicated interest in running for a district judge position. It was believed they would run against one another for the 322nd district seat. Munford's wife repeated harsh allegations against Haddock publicly and

although Haddock ultimately decided not to run, she and her husband did not appear to have reconciled with Munford and his wife. During the campaign, although Haddock herself allegedly did not engage in any overt political activity, her husband campaigned against Munford. Despite requests from District Judge Baca-Bennett, Haddock refused to publicly support Munford or "get her husband under control." Plaintiff alleges that Baca-Bennett subjected her to "badgering, threats, back-biting, undermining and maligning, and a campaign to orchestrate the termination of [Haddock's] employment."

Following unsuccessful complaints to Tarrant County's human resources department, Haddock eventually sued Baca-Bennett and Tarrant County for subjecting her to a hostile work environment in retaliation for her husband's political activity and her own refusal to support Munford. Fewer than ninety days later, she was terminated by a majority of the seven district judges. She amended her complaint to address her termination, add the District Judges in their official capacities as defendants, and demand reinstatement or front pay in lieu thereof.

The Fifth Circuit affirmed the district court's dismissal of the suit, holding that plaintiff was in a policymaking and confidential employee lawfully subject to patronage termination. The court also held that the district court correctly dismissed plaintiff's claims against the County because plaintiff failed to plead a constitutional violation. Furthermore, because Baca-Bennett did not violate plaintiff's constitutional rights, this is enough for Baca-Bennett to be entitled to qualified immunity. Even if plaintiff's rights had been violated, Baca-Bennett certainly did not have "fair warning that [her] conduct violate[d] a constitutional right."

Arnold v. Williams, No. 19-30555 (5th Cir. October 23, 2020)

Sidney Arnold and his brother lived in a garage apartment attached to a house while they worked for the homeowner. On March 18, 2017, Arnold awoke around 2:00 AM to discover Deputy Steven Williams, an officer of the East Baton Rouge Parish Sherriff's Office, just outside the garage apartment, standing under the carport. Deputy Williams told Arnold that he saw an open door on the house, and he pointed to the open door. Arnold stepped out of the garage apartment to see where Deputy Williams was pointing. Deputy Williams then asked Arnold for his name and driver's license. Arnold gave his name but told Deputy Williams that he did not have a driver's license. Further, he told the deputy that the open door led to a laundry room but that the house could not be accessed from that laundry room. Deputy Williams then "told" Arnold to come to his police car so he could determine Arnold's identity. Arnold declined and said, "No, sir, I will wake the lady who owns the home and she will tell you who I am and that I live here and work for her." Arnold then knocked on the homeowner's window. The homeowner emerged and confirmed that both Arnold and his brother lived in the garage apartment. Deputy Williams, however, was not satisfied with the homeowner's word, "and he reached to grab Sidney Arnold and Sidney Arnold ran."

Arnold ran towards the backyard and Deputy Williams gave chase. Arnold attempted to climb a fence, but instead he fell over it and dislocated his shoulder. Arnold was apprehended and taken to the hospital. Arnold was ultimately arrested and jailed for twenty days. All charges, however, were dropped for lack of probable cause.

Arnold sued Williams pursuant to 42 U.S.C. § 1983 for violation of various constitutional rights and under Louisiana tort law. Plaintiff filed suit against defendant under 42 U.S.C. 1983 for violations of various constitutional rights and under Louisiana tort law. The district court disposed of all claims either through Federal Rule of Civil Procedure 12(b)(6) dismissal or Rule 56 summary judgment.

The Fifth Circuit reversed the district court's dismissal of the unreasonable search claim and remanded for the district court to consider qualified immunity before proceeding

to the merits of the case. The court held that plaintiff's complaint plausibly alleges a trespassory search of his home where the officer's search of the curtilage of plaintiff's home was unreasonable insofar as it infringed on plaintiff's reasonable expectation of privacy and exigent circumstances were lacking. However, the court held that the complaint lacks allegations that would allow the court to draw all reasonable inferences in plaintiff's favor and to conclude that he plausibly alleged a seizure within the meaning of the Fourth Amendment. Therefore, the court affirmed the dismissal of the unreasonable seizure claim.

The court affirmed the district court's dismissal of plaintiff's remaining section 1983 claims, holding that plaintiff failed to state a false arrest/false imprisonment claim because he failed to plausibly allege that his ultimate arrest was false; plaintiff failed to state a claim for malicious prosecution because, as the district court correctly observed, there is no freestanding right under the Constitution to be free from malicious prosecution; and plaintiff failed to state a claim for a violation of procedural and substantive due process because resort to a generalized remedy under the Due Process Clause is inappropriate where a more specific constitutional provision provides the rights at issue. The court also affirmed the district court's dismissal of plaintiff's claim for intentional infliction of emotion distress under Louisiana law, the district court's grant of summary judgment, and the three evidentiary rulings appealed by plaintiff.

Cotropia v. Chapman, No. 19-20688 (5th Cir. October 22, 2020)

Plaintiff filed a 42 U.S.C. 1983 action against defendant, an investigator for the Texas Medical Board (TMB), alleging that defendant searched his medical office and seized documents without a warrant.

The Fifth Circuit affirmed the district court's grant of defendant's motion for summary judgment based on qualified immunity. The court held that defendant violated plaintiff's constitutional rights when she copied documents in plaintiff's office without any pre-compliance review of the administrative subpoena. However, at the time, it was not clearly established that defendant's search per Texas Occupations Code 153.007(a) and 168.052, and 22 Texas Administrative Code 179.4(a) and 195.3 was unconstitutional. Therefore, defendant's right to a pre-compliance review was not clearly established at the time of the search. In this case, the TMB had received a complaint that plaintiff was operating an unregistered pain management clinic (PMC); even though plaintiff's license had been revoked at the time of the search, the Board still had the power to take disciplinary action against him, to issue administrative penalties, and to seek injunctions; and thus, defendant's search served an administrative purpose, even if the TMB ultimately declined to take further administrative action against plaintiff.

Taylor v. McDonald, No. 18-11572 (5th Cir. October 15, 2020)

During Taylor's imprisonment at the Robertson Unit of TDCJ, he overdosed on an unknown number of pills. He was hospitalized, and upon his return to Robertson the doctors deemed the overdose a possible suicide attempt. Taylor consented to be admitted to Montford, which provides in-patient psychiatric care. But he was not transferred back to his normal housing for two months after withdrawing consent, with no intervening involuntary commitment proceedings. For part of that time, he was monitored in a Suicide Prevention Program.

Taylor filed suit under 42 U.S.C. 1983, alleging that defendants' failure to transfer him back to his normal housing without commitment proceedings violated his due process rights under *Vitek v. Jones*, 445 U.S. 480 (1980). In *Jones*, the Supreme Court held that "the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections." Taylor alleges that

delaying his discharge by weeks after he reiterated his withdrawal of consent violated those same rights.

The Fifth Circuit affirmed the district court's grant of summary judgment for defendants based on qualified immunity. In this case, defendants did not violate plaintiff's clearly established rights by keeping him in a normal cell in the Montford Unit after moving him from the A1-3 Row Suicidal Prevention Program. The Court explained that, although plaintiff withdrew his consent a full month before ultimately being transferred back to Robertson Unit (not to mention his initially withdrawing consent a month before that), the only notable condition of his confinement after being transferred out of the A1-3 Row was that he was kept under close observation. The Court concluded that it is not clearly established that observation of that sort is a qualitatively different condition that triggers a liberty interest. Furthermore, even viewing the A1-3 Program in the light most favorable to plaintiff, the Program is not factually similar enough to any behavioral change program that the court has held triggers a liberty interest to constitute clearly established law.

Rountree v. Lopinto, No. 20-30111 (5th Cir. October 2, 2020)

On February 6, 2019, Mary Rountree drove her son's car - a Saturn - to a doctor's appointment at Ochsner Hospital. She returned to the car after the appointment, dismayed to find it blocked into its parking space by an SUV. Undeterred, she backed the Saturn out of the parking spot, running into the SUV as she did. She got out briefly to check for damage and then drove away. The incident was caught on video, and a complaint was filed with the Sheriff's Office.

On February 15, the Sheriff's Office sent James Rountree - the Saturn's owner, Mary Rountree's son, and the plaintiff - a letter informing him that his car had been involved in an accident and requesting that he set up an appointment with the hit-and-run office within seven days. Plaintiff was in London, where he lived. James A. Rountree ("plaintiff's father") - Mary Rountree's husband and attorney of record for this case - responded to the letter on February 25. He acknowledged that the Saturn belonged to his son but averred that, according to a "confidential source," no hit and run had occurred because there was no damage to either car. According to the police report, on February 28, Jerome Green, the investigating officer, spoke to plaintiff's father on the phone. Plaintiff's father informed Green that he would not cooperate with the investigation and again denied that a hit and run had occurred. Shortly thereafter, Green went to plaintiff's parents' apartment in an unsuccessful effort to speak with either plaintiff or Mary Rountree. On the heels of that failed attempt, Green inspected the parking lot of the apartment complex and came across the Saturn. He noted damage to the driver's-side rear bumper - consistent with where he expected damage to be after reviewing the surveillance tape. Green called a wrecker and had the Saturn towed. He returned to the apartment and knocked on the door, but no one answered. Green left a notice at the door and exited the apartment complex. After some back and forth between the two, the Sheriff's Office sent plaintiff's father a letter on March 26, informing him that the evidentiary hold on the vehicle had been released. On March 29, plaintiff's father and Mary Rountree went to the towing yard to recover the Saturn, but, because it was registered in plaintiff's name, the towing company refused to release the vehicle to his parents. Plaintiff visited the United State sin April and paid $1,674.58 to have the Saturn released. Plaintiff sued, asserting that the seizure was unlawful and seeking damages. Lopinto moved for summary judgment. He asserted that the seizure was lawful and, in the alternative, that he was entitled to qualified immunity. After a hearing, the district court held that the seizure was lawful and, even if it wasn't, Lopinto was protected by qualified immunity.

The Fifth Circuit affirmed the district court's dismissal of plaintiff's claim alleging that the seizure of his vehicle violated his clearly established constitutional rights under the Fourth Amendment. The court held that the warrantless

seizure was constitutional, because there was probable cause to believe that the vehicle was an instrument or evidence of crime. Therefore, the officer is entitled to qualified immunity.

Walsh v. Hodge, No. 19-10785 (5th Cir. September 15, 2020)

Plaintiff, a former medical school professor at the University of North Texas Health Science Center, filed suit against various professors and school administrators under 42 U.S.C. 1983, alleging that they violated his Fourteenth Amendment procedural due process rights. Defendants voted to recommend firing plaintiff after conducting a hearing to address a student's sexual harassment claim against him. Plaintiff asserted that Defendants denied him both a fair tribunal and a meaningful opportunity to be heard. Defendants moved for summary judgment on the basis of qualified immunity, and the district court partially denied the motion.

The Fifth Circuit reversed the district court's denial of qualified immunity and rendered judgment in favor of defendants, holding that plaintiff's deprivations of due process were not clearly established constitutional rights. In this case, the court found no merit in plaintiff's claim that one of the defendants was not impartial because the defendant knew the accuser in a university proceeding, and concluded that this was not enough to establish a due process claim of bias. The court also held that, although the Committee should have heard the accuser's testimony, it was not clearly established at the time that, in university disciplinary hearings where the outcome depends on credibility, the Due Process Clause demands the opportunity to confront witnesses or some reasonable alternative. Therefore, the district court erred in denying defendants' motion for summary judgment.

Nerio v. Evans, No. 19-50793 (5th Cir. September 10, 2020)

This is a case of mistaken identity. Carlos Nerio argues that narcotics officers violated the Constitution when they mistakenly arrested him instead of his half-brother—also named Carlos Nerio. The district court granted qualified immunity to the officers.

Narcotics officers from the Texas Department of Public Safety ("DPS") used court-authorized pen registers and wiretaps to collect evidence of a meth deal in Austin. The meth purchaser's phone number was registered to Carlos Nerio. A DPS surveillance unit also witnessed a meth purchase. The purchaser was driving a silver Chevrolet pickup truck with a license plate that also was registered to Carlos Nerio. DPS officers attempted to use Nerio's phone and truck to find his address. Officers traced Nerio's phone number to 7112 Ed Bluestein Boulevard. That's a Cricket Wireless store - not Nerio's residence. Officers traced the Chevy truck to a house on Tapo Lane in Austin. They also confirmed that Carlos Nerio lived at the Tapo Lane address. The problem is that the Carlos Nerio who purchased the Cricket phone and lived on Tapo Lane ("Tapo Lane Nerio") is not the Appellant Carlos Nerio ("Appellant Nerio"). The two Nerios are half-brothers; they share a father and (obviously) names. The record abounds with mistakes over which Nerio is which. Appellant Nerio went by at least three different variations of "Carlos Nerio." And the name confusion was so severe that Appellant Nerio's own lawyer misidentified him in an affidavit.

One of the officers supervising the meth investigation, Lieutenant Leggett, asked for driver's license information for the Carlos Nerio who drove the silver Chevy truck to the meth deal - that is, the Tapo Lane Nerio. Then, for reasons unrevealed in the record, some unidentified DPS official found and produced license information for Appellant Nerio. Leggett sent Appellant Nerio's license information to Officer King. King showed Appellant Nerio's license photo to the DPS surveillance unit and the surveillance officers confirmed that Appellant Nerio was present at the drug deal. But at least one member of the surveillance unit, Officer Evans, eventually learned that the driver's license database contained information for two different individuals named Carlos Nerio. King

met with an assistant DA, and they decided to seek an arrest warrant for Appellant Nerio. King then tasked Evans with drafting an affidavit and applying for the warrant. Evans dutifully did so. His affidavit described the extensive investigation that led to Appellant Nerio's identification, though it did not mention that two Nerios appeared in the driver's license database. A magistrate authorized the warrant. DPS officers then executed the warrant and arrested Appellant Nerio. He was charged with conspiracy to commit felony manufacturing/delivery of a controlled substance. Local news covered the arrest. As a result, Appellant Nerio lost his job.

Eventually, however, he convinced the local DA to drop the charges against him. Appellant Nerio then sued Evans and King under 42 U.S.C. § 1983. He framed his complaint in terms of false arrest and false imprisonment and claimed that the pair of officers violated his rights under the Fourth and Fourteenth Amendments. The officers moved to dismiss the suit. The district court dismissed the Fourteenth Amendment claims but denied the rest of the officers' motion to dismiss. Next, the officers moved for summary judgment. The district court referred the matter to a magistrate. The magistrate determined that a lack of "clearly established law" on mistaken-identity arrests meant Evans and King weren't on notice that their conduct might be unconstitutional. The district court agreed and entered summary judgment in favor of Evans and King on the basis of qualified immunity. Nerio appealed and limited his challenge to the judgment concerning Evans.

The Fifth Circuit affirmed the district court's grant of qualified immunity to police officers in an action brought by plaintiff alleging that the officers violated the Constitution when they mistakenly arrested him instead of his half-brother who has the same name. The court held that Officer Evans is entitled to qualified immunity where it was not clearly established at the time that Evans' conduct was unconstitutional. In this case, Evans relied on a wiretap to identify a potential drug deal, then surveilled that exchange, traced phones and license plates back to a particular name, and eventually arrested a man by that name. The court rejected defendant's claim under Franks v. Delaware, 438 U.S. 154 (1978), because defendant has not shown that Evans acted recklessly. Rather, everything in the record suggests that the officer made an honest mistake.

Sewell v. Monroe City School Board, No. 18-31086 (5th Cir. September 10, 2020)

Plaintiff filed a civil rights action alleging that school administrators discriminated against him because he is an African American male. In this case, on the first day of high school, the Dean of Students asked teachers to send students with dyed hair to his office. All the students sent to the Dean's office were African American. The Dean and the Principal did not let plaintiff attend class that day because of his "two toned" blonde hairstyle. On the second day of school, Sewell's mother, Bonnie Kirk, met first with Martin and then with superintendent Brent Vidrine. Kirk told both that she believed school administrators were discriminating against Sewell because he is an African American male. When Sewell returned to school, Rankins "ridiculed" him "every other day" by calling him a "thug" and a "fool." At one point, Rankins asked Sewell if he "was gay with 'that mess' in his head." Rankins also discouraged other students from talking with Sewell. Sewell became "depressed" and "sad." In November, school officials suspended Sewell. Sewell alleges that Rankins "encouraged" a female student to "lie" and accuse him of sexual assault. Rankins told Sewell that he "wouldn't be getting in so much trouble if his hair were not that color." Martin soon recommended Sewell for expulsion. When Kirk spoke to Martin about her recommendation, Martin mentioned Sewell's hair too. School officials provided Kirk with documentation about the suspension and expulsion just two days before Sewell's expulsion hearing.

Kirk filed a complaint with the U.S. Department of Education's Office of Civil Rights. After the hearing, the board's expulsion

committee voted not to expel Sewell. The committee's chair explained that it chose not to suspend Sewell because the timing of events was suspicious; school officials did not complete expulsion documentation until four days after the alleged assault and did not deliver the documentation to Kirk until ten days after that. In the spring, media reports, including one in the New York Daily News, reported on what had happened to Sewell. The media attention led to school officials' "ostracizing" and "ridicul[ing]" him "even more." Sewell was "distraught and traumatized."

Although many students of all races, male and female, wore dyed hair to school, plaintiff was the only one disciplined for violating the school's hair policy during the school year.

Kirk filed this lawsuit in November 2017; Sewell has since turned 18 and has been substituted as the plaintiff. The amended complaint alleges claims under Title VI, Title IX, section 1983, section 1981, and the Family Educational Rights and Privacy Act (FERPA), as well as claims under Louisiana law. It names as defendants the Monroe City School Board, Superintendent Vidrine, Dean Rankins, Principal Martin, and the school board's insurer. The district court granted defendants' motion to dismiss for failure to state a claim.

The Fifth Circuit held that plaintiff's intentional discrimination claim was untimely, but his harassment claim was timely based on the continuing violation doctrine. The court reversed the dismissal of plaintiff's harassment claims under Title VI and Title IX against the Board, holding that plaintiff plausibly alleged that the Dean's harassment of plaintiff stemmed from a discriminatory view that African American males should not have two-toned blonde hair. Furthermore, the harassment may well have been so severe, pervasive, and offensive that it denied plaintiff an educational benefit, and it is plausible that the school board knew about the harassment, did little to ensure plaintiff was safe, and was therefore deliberately indifferent. However, the court held that plaintiff has not pleaded that the school board officials were deliberately indifferent to the Dean's retaliatory conduct. Therefore, the court affirmed the dismissal of plaintiff's retaliation claim.

Morgan v. Chapman, No. 18-40491 (5th Cir. August 7, 2020)

The Fifth Circuit began its opinion by noting that this matter "is another in a long line of cases involving the Texas Medical Board serving instanter subpoenas on medical clinics." It reiterated that it has previously held that those subpoenas - which do not allow for court review and demand immediate compliance - are unconstitutional.

In this case, Plaintiff alleges that a team of law enforcement officers and Medical Board investigators locked down his clinic, rifled through private patient records, and seized confidential files. Plaintiff alleges that Defendant, a Medical Board investigator, used those illegally-obtained files to fabricate evidence and get him indicted on trumped-up charges of running a pill mill. In the criminal action, the state court agreed with the plaintiff in this case that Defendant Chapman, a Medical Board investigator, used illegally-obtained files to fabricate evidence and to indict plaintiff on trumped-up charges of running a pill mill. Here, plaintiff filed a civil suit under 42 U.S.C. 1983 against Chapman and another government agent for violating his constitutional rights by using instanter subpoenas to illegally search his clinic, resulting in the illegal seizure of property and patient records.

The Fifth Circuit reversed the district court's judgment and held that Chapman was not entitled to absolute immunity as an investigator and, because Chapman fulfilled the fact-finding role generally filled by law enforcement, she is only entitled to the level of immunity available to law enforcement -- qualified immunity. The court also held that malicious prosecution and abuse of process are not viable theories of constitutional injury. The court agreed with defendants that malicious prosecution and abuse of process are torts, not constitutional violations.

However, the court remanded for the district court to decide whether plaintiff has waived his Fourth Amendment claims and whether he should be allowed to amend his complaint a third time to add a due process claim.

Bryant v. Gillem, No. 19-11284 (5th Cir. July 9, 2020)

On August 24, 2016, a district attorney investigator, Mike Chapman, determined from radar that a Ford Explorer was being driven at 45 m.p.h. in a 35 m.p.h. zone on U.S. Highway 287 in Childress, Texas. Plaintiff-decedent Jonathan Bryant was the driver, and he had a passenger. Chapman activated his patrol car's emergency lighting to initiate a traffic stop, but Bryant accelerated leading to a high speed chase lasting approximately 14 minutes and reaching speeds over 115 miles per hour. Chapman considered this driving to be so dangerous to the public that he used his Glock pistol to fire into Bryant's vehicle four different times, with approximately 19 rounds discharged. After the fourth time, Bryant slammed on his brakes and began driving off the right side of the highway. Chapman rammed into the rear of Bryant's vehicle, forcing it off the road into knee-high grass. Bryant and a passenger exited the vehicle with their hands raised and then laid on the ground in compliance with the officers' commands to do so. Chapman appeared on video holding his pistol in both hands, and he walked to the passenger side of the vehicle to secure the passenger.

Another officer, Chief Deputy Sheriff Gillem of the Childress County Sheriff's Office had assisted Bryant in the chase. At one point in the video, Deputy Gillem walks into view of Chapman's dash camera. As he approached Bryant, who was still on the ground in the grass, Gillem held his pistol with both hands and pointed it at Bryant. Bryant immediately put both hands in the air, then placed them on his back. Gillem then put his pistol into his left hand, knelt alongside Bryant, and drove his right knee into Bryant's back. Still holding the firearm with his left hand and reaching with his right for Bryant's hands, Gillem fired his pistol into Bryant's left shoulder - accidentally, Gillem claims. Only five seconds elapsed from Gillem's coming into the view of the camera and the shooting. After shooting Bryant, Gillem immediately holstered the weapon and requested medical assistance. At this point in Gillem's dash-camera video, Gillem yelled, "Hey, get me an ambulance! He's shot. I shot him. Get an ambulance. Shot him in the arm. Get an ambulance." Gillem also made statements such as, "I'm not going to let you die," and "I messed up. I messed up. I had him on the ground, and I went and got his arm, and as soon as I did, 'pow!" Texas Rangers investigated the shooting but the investigation was subsequently closed after a grand jury failed to indict Gillem. When deposed in the civil suit, Gillem acknowledged having received training about holstering his weapon and trigger safety. He admitted to making a mistake. Another declaration was submitted in which Margo Frasier, the former Sheriff of Travis County, Texas, stated her opinion as a putative expert that Gillem's actions were objectively reasonable.

Bryant brought suit under 42 U.S.C. § 1983 against Gillem and other now-dismissed parties, alleging a violation of his Fourth Amendment rights. The operative complaint brought one claim against only Gillem for violation of the Fourth Amendment. Gillem moved for summary judgment based on a defense of qualified immunity. The district court granted the motion and dismissed the case with prejudice. Bryant timely appealed.

The Fifth Circuit affirmed the district court's grant of summary judgment based on qualified immunity with relation to the accidental shooting. The court held that the district court did not err in admitting opinion evidence that the shooting was accidental. The court also held that there is no fact dispute that the officer unintentionally kept his firearm in his hand as he sought to restrain Bryant. Therefore, plaintiff failed to show a violation of any Fourth Amendment rights.

Wooten v. Roach, No. 19-40315 (5th Cir. July 6, 2020)

In March 2008, Wooten defeated Judge Charles Sandoval in the Republican primary election for a seat on the 380th District Court in Collin County, Texas. She went on to win the general election and took the bench in January 2009. Plaintiff alleges that the day after the primary, Sandoval went to the Collin County District Attorney's Office ("CCDAO") to demand that the office investigate Wooten and "find a crime." CCDAO obliged and began investigating Wooten's alleged misbehavior—without the assistance of any law enforcement entity. Defendant, Christopher Milner, the head of CCDAO's Special Crimes Unit, led the investigation. John Roach, Sr., as District Attorney, oversaw CCDAO during the relevant period.

Plaintiff further alleges that CDAO investigated bribery allegations and eventually prosecuted her even though it knew her actions were not criminal. According to Plaintiff, CCDAO wanted Wooten to leave the bench because it disagreed with her rulings in some criminal cases. Throughout Milner's investigation, he requested assistance from the-Texas Attorney General, Greg Abbott, and Assistant Attorney General Harry White.

Wooten filed suit under 42 U.S.C. 1983 against state and local law enforcement officials, alleging that they violated the Constitution by investigating and prosecuting her in retaliation for unseating an incumbent judge and making rulings they disagreed with. At issue in this appeal was whether defendants are entitled to absolute prosecutorial immunity for their alleged acts.

On the merits, the Fifth Circuit held that Defendants Roach, White, and Abbott are each entitled to absolute prosecutorial immunity. However, the court held that Defendant Milner is not shielded by absolute prosecutorial immunity because he was performing investigative functions that do not qualify for absolute immunity. Accordingly, the court affirmed in part, reversed in part, and remanded for further proceedings.

Tucker v. City of Shreveport, No. 19-30247 (5th Cir. May 18, 2020)

Plaintiff filed a 42 U.S.C. 1983 action against police officers and the City of Shreveport, alleging that members of the police department used excessive force in effecting his arrest. Specifically, plaintiff alleges that the police officers' conduct - forcing him to the ground and then beating him in order to place him in handcuffs - violated his rights protected by federal and state constitutional law, as well as Louisiana tort law. The district court granted summary judgment in favor of the officers in their official capacities on all claims and denied summary judgment as to all of plaintiff's claims against the City, as well as his section 1983 and Louisiana law claims against the officers in their individual capacities. The officers appealed.

The Fifth Circuit reversed and remanded, concluding that the district court erred in concluding that factual issues preclude application of qualified immunity as to plaintiff's claims against the officers in their individual capacities. In this case, the facts and circumstances in their entirety created a scenario sufficiently "tense, uncertain, and rapidly evolving" to place the officers' takedown of plaintiff, even if mistaken, within the protected "hazy order between excessive and acceptable force," established by then-existing Fourth Amendment excessive force jurisprudence. Furthermore, the district court erred in not granting summary judgment in the officers' favor relative to the force used against plaintiff while he was on the ground.

VI. ADEA

Our Lady of Guadalupe School v. Morrissey-Berru, 591 US _ (2020)

Agnes Deirdre Morrissey-Berru was a teacher at Our Lady of Guadalupe School and brought a claim against the school under the Age Discrimination in Employment Act (ADEA). The district court granted summary judgment in

favor of the school on the basis that Morrissey-Berru was a "minister." In Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, the Supreme Court first recognized a ministerial exception, which exempts religious institutions from anti-discrimination laws in hiring employees deemed "ministers."

The U.S. Court of Appeals for the Ninth Circuit reversed the lower court, finding that Morrissey-Berru was not a "minister"; she had taken one course on the history of the Catholic church but otherwise did not have any religious credential, training, or ministerial background. Given that she did not hold herself out to the public as a religious leader or minister, the court declined to classify her as a minister for the purposes of the ministerial exception.

The question presented to the Court was whether the First Amendment's religion clauses prevent civil courts from adjudicating employment-discrimination claims brought by an employee against her religious employer, when the employee carried out important religious functions but was not otherwise a "minister." The Court held that the "ministerial exception," which derives from the religion clauses of the First Amendment, prevents civil courts from adjudicating the former employee's discrimination claims in this case, and in the consolidated case, St. James School v. Biel, against the religious schools that employed them. Justice Samuel Alito authored the 7-2 majority opinion.

The Court noted that courts generally try to stay out of matters involving employment decisions regarding those holding certain important positions with churches and other religious institutions, and the Court formally first recognized this principle, known as the "ministerial exception," in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC. In that case, the Court considered four factors before reaching its conclusion that the employee was a "minister" for purposes of an exception to generally applicable anti-discrimination laws. However, the Court expressly declined "to adopt a rigid formula for deciding when an employee qualifies as a minister." The factors relied upon in Hosanna-Tabor were specific to that case, and courts may consider different factors to decide whether another employee is a "minister" in another context. The key inquiry is what the employee does. Educating young people in their faith, which was the responsibility of the plaintiffs in these two cases, is at the very core of a private religious school's mission, and as such, Morrissey-Berru and Biel qualify for the exception recognized in Hosanna-Tabor.

Justice Clarence Thomas authored a concurring opinion, in which Justice Neil Gorsuch joined, arguing that courts should "defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'"

Justice Sonia Sotomayor authored a dissenting opinion, in which Justice Ruth Bader Ginsburg joined, arguing that the Court incorrectly classified the teachers as "ministers," given that the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic. Moreover, Justice Sotomayor argued, the majority's approach "has no basis in law and strips thousands of schoolteachers of their legal protections."

Salazar v. Lubbock County Hospital District, No. 20-10322 (5th Cir. December 7, 2020)

Plaintiff filed suit against her former employer, UMC, alleging age discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA). At the time of her termination, Plaintiff has been employed by UMC for twenty-seven years and was 57 years old. Plaintiff claimed that she and several other elderly employees were fired and replaced by younger respiratory therapists, whom UMC paid at a lower rate. Both parties agreed that plaintiff demonstrated a prima facie case of age discrimination and that UMC articulated a legitimate, non-discriminatory basis for her termination.

The Fifth Circuit affirmed the district court's judgment in favor of UMC, holding that plaintiff failed to adduce sufficient evidence to create a genuine dispute over the veracity of UMC's proffered reasons for plaintiff's discharge. In this case, UMC's articulated reasons for plaintiff's termination were her poor performance, which began to decline in 2016, and her demonstrated lack of effort to change her behavior. While UMC alleged that it made several attempts to convey to Plaintiff "the importance [of] chang[ing] her current practices," Plaintiff claims that she was never counseled or warned in any way that she was performing poorly. Instead, she asserts that she was the recipient of several merit raises, which were indicative of her satisfactory performance. The court concluded that plaintiff failed to present sufficient evidence to create doubt as to whether her poor performance was a mere pretext for discrimination.

VII. QUALIFIED IMMUNITY

Converse v. City of Kemah, No. 17-41234 (5th Cir. June 12, 2020)

On April 11, 2014, around 12:20 a.m., 26-year-old Chad Silvis threatened to commit suicide by jumping off a bridge in Kemah, Texas. A passerby alerted an officer after which various officers arrived at the scene. After some conversation with Silvis, the officers were able to forcefully pull Silvis off the bridge railing. The officers arrested Silvis and he was driven to the Kemah jail. The arresting officer were present when Silvis was booked in the jail. One of the arresting officers prepared the cell and gave Silvis a blanket, but Silvis' shoes were taken away from him. All the arresting officers observed Silvis in his cell with the blanket. While in his cell, Silvis was yelling, banging his hands against the cell door, and stating that he "should have jumped." At around 1:44 a.m., Silvis used the blanket to hang himself from the top bunk of the bed in his cell. The officers did not discover his body until forty-five minutes later.

Plaintiffs, family members of Chad Ernest Lee Silvis, filed suit against the police officers alleging that the officers were deliberately indifferent to Silva's serious medical needs in violation of the Fourteenth Amendment. After limited discovery, the district court dismissed Plaintiffs' claims based on qualified immunity.

The Fifth Circuit reversed the district court's dismissal of plaintiffs' claims based on qualified immunity, holding that the complaint contains sufficient factual allegations to state a claim for relief. In this case, plaintiffs have pleaded sufficient facts that allow the court to draw the reasonable inference that the officers are not entitled to qualified immunity because they were subjectively aware that Silvis was at a significant risk of suicide and responded unreasonably to that risk by failing to remove the blanket from Silvis's cell, in violation of the Fourteenth Amendment.

Dyer v. City of Mesquite, No. 19-10280 (5th Cir. July 6, 2020)

Kathy and Robert Dyer appealed the dismissal on qualified immunity grounds their deliberate indifference claims against paramedics and police officers employed by the City of Mesquite. Their 18-year-old son, Graham, died after being arrested on LSD and bashing his head over 40 times against the interior of a patrol car while being transported to jail. The cause of death was craniocerebral trauma due to extensive blunt force injuries to Graham's head.

The Fifth Circuit affirmed the dismissal as to the paramedics as they examined Graham prior to him being placed in the back of the patrol car. The Court noted that the Dyer's allegations at most constituted negligence and that negligence does not meet the deliberate indifference standard.

With respect to the officers involved, the Fifth Circuit found that a reasonable jury could find that (1) Graham violently bashed his head against the interior of Officer Heidelburg's car over 40 times while en route to the jail; (2) Officers Heidelburg, Gafford and Scott were fully aware of Graham's actions and of their

serious danger; (3) the Officers sought no medical attention for Graham; and (4) upon arriving at jail, the Officers failed to inform jail officials what Graham had done to himself, telling them only that Graham had been "medically cleared" at the scene. From this evidence, the Fifth Circuit concluded that a reasonable jury could conclude that the Officers were either aware or should have been aware of the unjustifiably high risk to Graham's health and did nothing to seek medical attention. Accordingly, the Fifth Circuit reversed summary judgment as to the Officers and remanded.

Wigginton v. Jones, No. 19-60268 (5th Cir. July 1, 2020)

Dr. Wigginton was denied tenure during his sixth year as an assistant professor at the University of Mississippi. He sued several university officials in their individual capacities, alleging that they violated his substantive due process rights when they evaluated his eligibility for tenure in an arbitrary and capricious manner. After the District Court denied qualified immunity, the case went to trial and the jury awarded Wigginton $200,000 for lost wages and past and future pain and suffering.

The Fifth Circuit reversed and rendered judgment in favor of defendants, holding that the District Court had erred when it denied their motions for qualified immunity. In reviewing a substantive due process claim, the existence of a protected property right is a threshold issue. Because Wigginton failed to identify any state or federal law that placed defendants on notice that his alleged contractual right to a fair tenure review process was a constitutionally protected interest, Wigginton failed to demonstrate a clearly-established property right. That is, a discretionary tenure policy does not give rise to a protected property interest because, by definition, discretionary tenure policies give universities flexibility to grant or deny tenure based on subjective criteria.

Sanchez v. Oliver, No. 20-50282 (5th Cir. April 26, 2021)

Gauna took his own life while being held in the Bell County jail as a pretrial detainee. His mother, Kathy Sanchez, sued, among others, licensed clinical social worker , Natalee Oliver. Oliver was the mental health professional who evaluated Gauna and took him off suicide watch. After the District Court granted summary judgment to Oliver based on qualified immunity, Sanchez appealed.

On appeal, the Fifth Circuit considered whether Oliver, an employee of the private company, Correctional Healthcare Companies, could assert qualified immunity. The question was whether her employer, CHC, was systematically organized to perform the major administrative task of providing mental health care at state facilities. Finding that CHC's own marketing made this claim and that CHC derived well over a billion dollars annually from its contracts in jails and prisons, the Fifth Circuit agreed with the Sixth and Seventh Circuits that employees of CHC are not entitled to qualified immunity.

Aguirre v. City of San Antonio, No. 17-51031 (5th Cir. April 22, 2021)

SAPD responded to a call of a mentally disturbed man walking along the median of a busy highway. When officers arrived, several drew their weapons and ordered Aguirre to come to them or they would shoot. Aguirre eventually turned and placed his hands on the concrete median at which time the officers rushed in and handcuffed him. Video did not show any resistance on the part of Aguirre.

After the officers pulled Aguirre over the median, where he landed on his head, they placed him on the ground and in a hog-tie position known as a "maximal-restraint" position. Aguirre was left in this position for over 5 minutes at which point officers noticed that Aguirre wasn't breathing. Aguirre was not able to be resuscitated.

Aguirre's family filed suit against the City of San Antonio, alleging that the officers violated Aguirre's constitutional rights by causing his death through the use of excessive force – specifically, the use of the maximal-restraint position. The District Court granted summary judgment as to the officers, concluding they were entitled to qualified immunity, as well as to the City, finding that Plaintiffs had failed to establish a City policy, custom or practice was the moving force behind the officers' actions.

The Fifth Circuit affirmed as to the City but reversed and remanded as to the excessive force claims against the officers. In doing so, the Court reviewed the excessive force claim and the Graham factors – the severity of the crime, whether the suspect posed an immediate threat to the safety of the officers or others, and whether the suspect was actively resisting arrest or attempting to evade arrest. While the officers argued that Aguirre was attempting to break free and run into traffic, the video evidence raised questions as to whether it was objectively reasonable to believe that Aguirre was actively resisting or even physically capable of posing an immediate safety threat.

Estate of Rosa Bonilla v. Orange County, No. 19-41039 (5th Cir. December 3, 2020)

The Fifth Circuit affirmed the district court's grant of summary judgment to defendants in an action brought by the estate of Rosa Bonilla, a woman who committed suicide while in custody at the Orange County, Texas, jail 10 hours after arriving.

By way of background, as Bonilla was being booked into the jail for possessing a baggie containing Xanax capsules, a guard who had suicide detection and prevention training used the jail's intake screening questionnaire to interview her. Initially "agitated," she became more "calm" and "positive," disclosing that she suffered from bipolar disorder and ADHD and was taking Wellbutrin, Trazodone, and Xanax. She admitted having a history of abusing Xanax and having "taken Xanax and smoked a little bit of weed" that morning. She said she was "depressed" by a friend's death and had PTSD from childhood sexual abuse but denied having ever attempted suicide or having current suicidal thoughts.

The screening form's guidance recommended against placing her on suicide watch, but the guard decided to discuss Bonilla's answers with a supervisor. They decided to keep her in a holding cell and observed her sleeping during subsequent cell checks. There were no other prisoners in the holding cell.

A jail nurse reviewed Bonilla's intake screening form and emailed a pharmacy to verify her prescriptions but received no reply before her shift ended. The nurse found a possible match for prior treatment at a state mental health facility. Therefore, the nurse emailed an "Inmate Mental Health Condition Report" to a magistrate and to mental health services requesting further evaluation.

Bonilla did not request medication or show any signs of distress until a guard found her hanging from a bed sheet tied around a phone conduit about two hours after delivering her supper. She was declared brain dead two days later.

An investigation by the Texas Commission on Jail Standards found "numerous flags" in the intake form but determined that jail staff had acted appropriately by notifying the magistrate and mental health services. Bonilla's estate and children filed a civil rights lawsuit against the sheriff and numerous jail employees.

In regard to the episodic acts or omissions claims, the court was reluctant to hold that generalized evidence of an inmate's mental illness invariably indicates a substantial risk of self-harm. In this case, the circumstances of Bonilla's arrest, booking, and detention did not raise questions concerning her mental stability or capacity for self-harm; she had no suicidal tendencies; and evidence indicates that Bonilla did not request medical help, and her behavior in detention was unremarkable prior to her suicide. Therefore, the evidence did not give rise to reasonable inferences that the individual

defendants were aware of Bonilla's suicidal tendency, much less that they disregarded the risk. Furthermore, plaintiffs' episodic acts or omission claim would fail because Defendants Dickerson and Shafer are entitled to qualified immunity.

In regard to claims against Orange County, the court concluded that the record does not support plaintiffs' theory that Orange County has a pervasive policy or custom of allowing detainees to self-classify their risk of self-harm. The court also concluded that there was no policy or custom of unreasonably delaying prescriptions. The court held plaintiffs had not shown a prisoner had a clearly established right to adequate suicide screening or screening by medical professionals or to receive prescription narcotics within hours of intake and before the prescriptions are verified. In this case, a jury would have to resort to impermissible speculation to conclude that there was a "direct causal link" between the alleged constitutional violation—defendants' failure to distribute Xanax to Bonilla during her 10-hour stay—and her death.

***Ramirez, et al v. Guadarrama, et al,* No. 20-10055 (5th Cir. February 8, 2021; rehearing denied June 25, 2021)**

This case arises out of the tragic death of Gabriel Eduardo Olivas. While responding to a 911 call reporting that Olivas was threatening to kill himself and burn down his family's house, Officers Guadarrama and Jefferson discharged their tasers at Olivas, striking him in the chest. Olivas had doused himself in gasoline, which ignited when the prongs of Guadarrama's taser came into contact with it. Olivas was engulfed in flames. The house burned down. Olivas died of his injuries several days later. Olivas's widow and two children subsequently brought suit, alleging that Officers Guadarrama and Jefferson had violated Olivas's Fourth Amendment rights when they tased him. Guadarrama and Jefferson asserted the defense of qualified immunity and moved for dismissal. The district court denied their motion, stating that more factual development was needed. Guadarrama and Jefferson then filed this interlocutory appeal. The Fifth Circuit reversed the denial of qualified immunity and remand to the district court with instructions to dismiss the claims against Guadarrama and Jefferson. With this background setting, we now proceed to explain more fully.

The Court acknowledged that the facts in the light most favorable to Plaintiffs are as follows: Guadarrama, Jefferson, and Elliott arrived at the house in response to a 911 call, having been told that Olivas was threatening to kill himself and burn down the house. They found Olivas in a bedroom that smelled of gasoline. Olivas was holding a gas can. Officer Elliott shouted, "If we tase him, he is going to light on fire." Elliott then discharged OC spray at Olivas, temporarily blinding him. Olivas began to shout nonsense and yell that he was going to burn the place to the ground. He poured gasoline over himself. At some point before either taser was discharged, Officers Guadarrama and Elliott noticed an object in Olivas's hand that appeared to them to be a lighter. Guadarrama fired his taser, striking Olivas in the chest. Olivas burst into flames. Jefferson then fired his taser, which also struck Olivas in the chest.

In determining the reasonableness of the force that was employed, the court noted the considerable severity of the threatened crime and whether the suspect poses an immediate threat to the safety of the officers or others (Olivas posed a substantial risk of death or serious bodily injury to himself and everyone in the house). The Court acknowledged the final factor – whether Olivas was attempting to flee or evade arrest – but stated it was of minimal relevance in the subject matter.

The Court held that although the employment of tasers led to a tragic outcome, it could not suggest exactly what alternative course the defendant officers should have followed that would have led to an outcome free of potential tragedy. Accepting the pleaded facts as true and construing them in the light most favorable to Plaintiffs, the Court held that neither officer's conduct was unreasonable, nor was the force they employed clearly excessive.

In a 13-4 decision, rehearing en banc was denied. There were both concurring and dissenting opinions on the denial of rehearing.

Dissenting opinions were authored by Circuit Judge Jerry Smith and Circuit Judge Don Willett, which was joined by Circuit Judges Graves and Higginson. Justice Smith based his dissent on the recent Supreme Court qualified immunity orders. Justice Willett too based his dissenting opinion on the recent Supreme Court qualified immunity holdings and believed rehearing was necessary so as to not provide the Supreme Court with yet another message sending opportunity by giving the officers a "premature pass to egregious behavior." Justice Willett dissented for the following three reasons:

- The panel applied a too-stringent standard at the 12(b)(6) stage.
- The panel held that setting Olivas on fire was perfectly lawful under the Fourth Amendment.
- The panel opinion is at odds with recent Supreme Court decisions reinvigorating the "obviousness" principle in cases involving clear constitutional abuses.

In a concurring opinion authored by Circuit Judge Grady Holly, he pointed out that while factually horrifying, this was a clear cut legal case of qualified immunity. Judge Holly admonished the dissent as being quite unfair to the record, to the law, and to the officers. He reiterated that these officers had no fair and clear warning of what the Constitution required in the split second, life-or-death encounter presented them in this matter.

Another concurring opinion authored by Circuit Judge James Ho and joined by Circuit Judges Jolly and Jones restated that there was no reasonable alternative course of action that the officers could have taken instead to protect innocent lives (including family members in the home). Judge Ho points out that despite the dissent's admission that the officers had no apparent options, it declared that the officers committed an "obvious," "egregious," and "conscience shocking" "constitutional violation." In making such a contrary admission and declaration, the dissent believed that additional discovery might uncover some reasonable alternative action that the officers could have taken (despite not explaining how such additional discovery would impact the analysis). Judge Ho pointed out that if such discovery was necessary to prove the existence or absence of reasonable alternatives, how could the officers have had such information to form a split second decision in the field.

Judge Andrew Oldham authored another concurring opinion that was joined by Judge Jolly , Jones, Ho, and Engelhardt. Judge Oldham concluded that the plaintiffs failed to plead a violation of the Fourth Amendment for three reasons:

- The officers' split second decision cannot be "unreasonable," much less plainly unreasonable, when no one can specify what reasonable alternatives the officers had.
- The dissent says that none of this matters because the plaintiffs should be allowed to take discovery and only then (maybe) tell us what a reasonable officer would've done in a split-second confrontation with a suicidal man doused in gasoline and holding a lighter in a room with innocent family members. However, he pointed to past precedent, *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." (quotation omitted)).

- Lastly, Judge Oldham recognizes the Supreme Court's recent qualified immunity orders, but pointed out that those decisions advise the lower court to look for "particularly egregious facts" where there is "no evidence" of "necessity or exigency." However he points out the overwhelming evidence in this matter of dire, life-threatening exigencies and the fact that there is no "obvious" answer in a split second confrontation with a suicidal man doused in gasoline and holding a lighter in a room with innocent family members.

Judge Oldham concluded by stating that arguing that we "transmogrify [the Fourth Amendment] beyond recognition when we say officers act 'unreasonably' without any effort to say what a reasonable officer would've done."

VIII. ADA

Laufer v. Mann Hospitality, LLC, No. 20-50858 (5th Cir. April 28, 2021)

Laufer, a Florida resident, filed suit against Mann Hospitality, the owner of the Sunset Inn in Caldwell, Texas, under the ADA. Laufer alleged that that Inn's information, posted on a third-party booking site, failed to identify rooms accessible to disabled persons like her. Laufer, however, had never stayed at the Inn nor traveled to Caldwell, Texas. Instead, Laufer had filed hundreds of identical lawsuits in federal district courts around the country.

After the District Court dismissed the suit finding no standing for lack of injury in fact, the Fifth Circuit affirmed. However, the Fifth Circuit vacated the award of attorney's fees to Mann under 28 U.S.C. § 1919. This code provision authorizes "just costs" but not attorney's fees.

Weber v. BNSF Railway Co., No. 20-10295 (5th Cir. February 24, 2021)

Weber, a train dispatcher, was terminated for violating company attendance guidelines. Weber, an epileptic, sued, alleging that BNSF failed to provide reasonable accommodations for his disability. The District Court granted summary judgment in BNSF's favor.

On appeal, the sole issue was Weber's failure to accommodate claim which required Weber to establish he was a "qualified individual with a disability." The parties did not dispute that Weber had a disability. However, to be a "qualified individual" Weber had to show that he was one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." While reassignment can be a reasonable accommodation, Weber offered no evidence that he had the requisite qualifications for another position or that another position that he sought was vacant. Likewise, Weber failed to show that he could perform the essential functions of his train dispatcher position, with or without a reasonable accommodation. Accordingly, the Fifth Circuit affirmed the dismissal of Weber's claims.

T. B. v. Northwest Independent School District, No. 19-11115 (5th Cir. November 23, 2020)

T.B. is a student at Northwest Independent School District ("the District") diagnosed with Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder. As a result of these conditions, T.B. sometimes exhibited significant behavioral issues that required him to be removed from class or otherwise restrained. This case arises out of an incident on April 4, 2017 that began with then-10-year-old T.B. calling his mother to come pick him up from school. At some point, T.B.'s teacher got on the call and told T.B.'s mother that she was "losing patience" with T.B. Soon thereafter, T.B. climbed on a table in an effort to avoid his teacher who then allegedly "knocked

him to the ground, dragged him through two classrooms, and climbed on top of him" before kicking him in the chest when he began to run around the room. Over a year after learning of this incident, T.B.'s mother filed a request for a special education due process hearing that was dismissed because it was not made within the applicable statute of limitations. T.B. appealed that decision and filed a complaint asserting claims against the District, his teacher, and a school paraprofessional on the exact same day. In his complaint, T.B. asserted that the District "failed to provide T.B. a safe and non-hostile educational environment." As a result of the District's conduct, T.B. claimed to have suffered the "[l]oss of equal educational opportunities as those afforded non-disabled students."

The District moved to dismiss under Rule 12(b)(1). Specifically, the District argued that T.B.'s complaint failed to properly exhaust his administrative remedies under the Individuals with Disabilities Education Act ("IDEA") and, thus, the court lacked subject matter jurisdiction. In response, T.B. filed an amended complaint that was essentially the same as the original except that it dropped the claims against the paraprofessional. The District again moved to dismiss on the same grounds as before. T.B.'s response did not address the District's exhaustion arguments on their merits. Instead, T.B. argued that a 12(b)(1) motion to dismiss may only be adjudicated on the face of the pleadings and that T.B.'s amended complaint lacks any language that specifically mentions the IDEA or his status as a student receiving special education services. The district court granted the District's motion, agreeing that the court lacked subject matter jurisdiction over T.B.'s claims because of T.B.'s failure to first exhaust his administrative remedies. T.B. filed a "motion for reconsideration" under Rule 59(e) and a motion for leave to file a second amended complaint. The district court denied both. T.B. appealed.

The Fifth Circuit affirmed the district court's dismissal without prejudice of T.B.'s discrimination claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The court held, on the record before it, that T.B. seeks redress for denial of a free appropriate public education (FAPE) and thus, under the Individuals with Disabilities Education Act (IDEA), he was required to exhaust his administrative remedies before bringing this claim to the district court. Because he has failed to do so, his complaint was properly dismissed. The court also held that the district court did not abuse its discretion in denying T.B.'s motion to reconsider or request to amend.

IX. MISCELLANEOUS

Espinoza v. Montana Department of Revenue, 590 US _ (2020)

Petitioners Kendra Espinoza and others are low-income mothers who applied for scholarships to keep their children enrolled in Stillwater Christian School, in Kalispell, Montana. The Montana legislature enacted a tax-credit scholarship program in 2015 to provide a modest tax credit to individuals and businesses who donate to private, nonprofit scholarship organizations. Shortly after the program was enacted, the Montana Department of Revenue promulgated an administrative rule ("Rule 1") prohibiting scholarship recipients from using their scholarships at religious schools, citing a provision of the state constitution that prohibits "direct or indirect" public funding of religiously affiliated educational programs.

Espinoza and the other mothers filed a lawsuit in state court challenging Rule 1. The court determined that the scholarship program was constitutional without Rule 1 and granted the plaintiffs' motion for summary judgment. On appeal, the Department of Revenue argued that the program is unconstitutional without Rule 1. The Montana Supreme Court agreed with the Department and reversed the lower court.

The Supreme Court was tasked with determining whether a state law that allows for funding for education generally while prohibiting funding for religious schools violate the Religion Clauses or the Equal Protection

Clause of the federal Constitution. It held that the application of the Montana Constitution's "no-aid" provision to a state program providing tuition assistance to parents who send their children to private schools discriminated against religious schools and the families whose children attend or hope to attend them in violation of the Free Exercise Clause. Chief Justice John Roberts authored the opinion on behalf of the 5-4 majority.

The Court first noted that the Free Exercise Clause "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." In this case, Montana's no-aid provision excluded religious schools from public benefits solely because of religious status. As such, the law must be subject to strict scrutiny review; that is, the government must show that its action advances "'interests of the highest order" and that the action is "narrowly tailored in pursuit of those interests." Montana's interest in this case—which the Court described as creating greater separation of church and state than the federal Constitution requires—does not satisfy strict scrutiny given its infringement of free exercise. Because the Free Exercise Clause barred the application of Montana's no-aid provision, the Montana Supreme Court lacked the authority to invalidate the program on the basis of that provision.

Justice Clarence Thomas authored a concurring opinion in which Justice Neil Gorsuch joined, opining that the Court's Court's interpretation of the Establishment Clause (not at issue in this case) hampers free exercise rights.

Justice Samuel Alito and Justice Gorsuch each filed their own separate concurrences. Justice Alito argued, as he did in dissenting from the Court's decision earlier this term in Ramos v. Louisiana, that original motivation should have no bearing on the present constitutionality of a provision of law, yet even without that consideration, the majority reached the correct conclusion in this case. Justice Gorsuch argued that the Court's characterization of the Montana Constitution as discriminating based on "religious status" and not "religious use," is dubious at best.

Justice Ruth Bader Ginsburg filed a dissenting opinion in which Justice Elena Kagan joined, arguing that the Montana Supreme Court's decision does not place a burden on petitioners' religious exercise and thus does not violate the Free Exercise Clause. The Court's precedents establish that neutral government action is not unconstitutional solely because it fails to benefit religious exercise.

Justice Stephen Breyer filed a dissenting opinion, in which Justice Elena Kagan joined in part. Justice Breyer argued that the majority's approach and conclusion risk the kind of entanglement and conflict that the Religion Clauses are intended to prevent. Instead, Justice Breyer opined that the Court's decision in Locke—upholding the application of a no-aid provision in Washington State based on the conclusion that the Free Exercise Clause permitted Washington to forbid state-scholarship funds for students pursuing devotional theology degrees—controlled the outcome in this case, in which the no-aid provision was "materially similar."

Justice Sonia Sotomayor filed a separate dissenting opinion, arguing that the Court in this case resolved a constitutional question not presented, thereby violating "Article III principles older than the Religion Clause" itself. Moreover, Justice Sotomayor continued, the Court answered incorrectly that question it should not have addressed in the first place.

Doe v. Edgewood Independent School District, No. 19-50737 (5th Cir. July 6, 2020)

Doe, a high school student, endured two years of repeated employee-on-student misconduct/sexual harassment by two school employees – a school peace officer and a teacher. Both employees were later criminally prosecuted for their actions. Doe filed suit against the District asserting Title IX and constitutional violations.

Affirming the District Court's granting of the District's summary judgment, the Fifth Circuit pointed to the Supreme Court's decision in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). Under *Gebse*r, a school district is not liable under Title IX for teacher-on-student harassment unless the district, among other things, had "actual notice" of the misconduct and was "deliberately indifferent" to it. Actual notice does not mean the misconduct is reported to any employee, however. The reported-to employee must "at a minimum ha[ve] authority to institute corrective measures on the district's behalf."

In this case, Doe argued that the school peace officer had knowledge of the teacher's harassment of Doe and that the school peace officer constituted the "appropriate person" under *Gebser*. The Fifth Circuit disagreed with Doe's interpretation and stated that an "appropriate person" under Title IX is an official that has the authority to repudiate the conduct and eliminate the hostile environment. A school peace officer, while having the power to arrest an offender, has no power to implement policy or hire and/or fire school employees.

Ross v. Judson I.S.D., No. 20-50250 (5th Cir. April 1, 2021)

Ross, an African American woman, was a middle school principal from 2010-2016. When the JISD conducted an annual review of the school's expenditures, the review found several checks that were not countersigned as well as other violations of district policies. The Board of Trustees decided to not renew Ross' contract, which led to Ross filing suit in state court, alleging sex, race and age discrimination under the Texas Commission on Human Rights Act. After she added two Section 1983 claims for retaliation and violation of her due process rights, JISD removed the suit and successfully moved for summary judgment.

The Fifth Circuit affirmed. Regarding the state law claims, the Court concluded that Ross failed to establish a prima facie case of race and sex discrimination when she failed to show either that she was replaced by someone outside her protected class or treated less favorably than similarly situated individuals who were outside her protected class. Likewise, Ross' age discrimination failed because JISD rebutted the presumption of discrimination by offering a legitimate, nondiscriminatory reason for her nonrenewal and Ross failed to present evidence to show that this reason was pretextual. Finally, Ross' due process claim failed because she did not establish a protected liberty interest.