RECENT FEDERAL CASES
OF INTEREST TO GOVERNMENTAL ENTITIES

TEXAS CITY ATTORNEYS ASSOCIATION
FALL CONFERENCE
SAN ANTONIO, TEXAS
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I. FIRST AMENDMENT

***Solis v. Serrett,* No. 21-20256 (5th Cir. April 21, 2022)**

Solis was riding in the car with her boyfriend when he was pulled over by Officer Serrett for failing to properly signal and driving outside of the lane. When the officer began to ask the boyfriend questions, Solis began to interject. The officer ordered the boyfriend out of the car and began to question him. During this exchange, Solis left the vehicle and began to record everything on her phone.

When Solis' boyfriend refused to do a field sobriety test, he was arrested and placed in the back of the patrol vehicle. At this time, another officer had arrived on the scene and was standing with Solis. Solis continued to film and narrate the events, twice asking the officers for their badge numbers. Officer Serrett asked for Solis' phone, telling her he didn't want her to drop it when he arrested her. Solis yanked her arm back, Officer Serrett reached for her other arm, and Solis fell to the ground. (It is unclear as to whether she fell from her own momentum or due to the police forcing her.) Solis was handcuffed and informed she was under arrest for public intoxication and taken to jail.

Solis filed a Section 1983 action against both officers, alleging excessive force, unreasonable seizure due to arrest without probable cause, malicious prosecution, and violation of her First and Fourteenth Amendment rights for arresting her in retaliation for filming. The officers moved for summary judgment based on qualified immunity and was granted it on all claims except the excessive force claim, which the officers then appealed.

Upon review, the Fifth Circuit first examined Solis' alleged injury to determine whether it was more than de minimis. The Fifth Circuit recently characterized the injury requirement as a "sliding scale" and treats the degree of injury – even if minor – as interrelated to the reasonableness and excessiveness of the officer's force. Thus, any force found to be objectively unreasonable necessarily exceeds the de minimis threshold, and objectively reasonable force will result in de minimis injuries only. Solis' injuries were characterized as minor. Thus, the Fifth Circuit turned to the amount of force used and the reasonableness of resorting to such force, applying 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 actively resisted arrest.

In this case, the severity of the crime (traffic violation) and whether Solis posed a threat to the officers weighed against the officers. However, whether Solis was resisting arrest cut in favor of the officers – she was hostile from the beginning, argued with the officers, repeatedly interrupted the questioning of her boyfriend, and pulled away when they tried to take her phone. "A suspect who backs away from the arresting officers is actively resisting arrest – albeit mildly." Further, the Court found that Solis' adverse conduct leading up to the arrest may have indicated to the officers that she would not submit to the arrest. Thus, based on this, the Fifth Circuit found that the officers' actions were not so objectively unreasonable as to violate Solis' constitutional rights, and the District Court erred in denying the officers' motion for summary judgment.

***Buehler v. Dear*, No. 20-50822 (5th Cir. March 3, 2022)**

Buehler, a police-accountability activist, was arrested on Sixth Street in Austin for "cop watching." Buehler and Austin officers had repeated verbal confrontations about how close to them Buehler was permitted to stand while filming them. The bickering escalated and Buehler was arrested for misdemeanor interference with performance of official duties. Buehler was taken to the ground and handcuffed, resulting in minor bruises and lesions. Buehler filed suit alleging false arrest and excessive force in violation of the Fourth Amendment and retaliation for the exercise of his First Amendment right to film the police. The district court dismissed Buehler's First

Amendment claim and granted summary judgement to the officers on Buehler's false arrest claim. But the district court denied the officers' summary judgment as to the excessive force claim.

Upon review, the Fifth Circuit found that the officers did not use excessive force. "The right to make an arrest….necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." While the officers argued that Buehler's injuries were too minor to constitute excessive force, the Fifth Circuit found that Buehler's abrasions to his face and bruises to his triceps and head, while minor, were not so minor that Buehler's claim for excessive force necessarily failed as a matter of law. However, the injuries were considered de minimis. The limited extent of Buehler's injuries tended to support the officers' argument that they acted reasonably. Further, because Buehler relentlessly followed the officers around and disobeyed their repeated commands that he step back at least arm's length so as not to block the officers' field of vision, the officers' reactions were "measured and ascending." And the use of a takedown to gain control of a suspect who had disregarded lawful police orders or mildly resisted arrest, even when the arrestee was suspected of minor offenses, has been upheld repeatedly by courts. Thus, the Fifth Circuit found that the district court erred in denying the officers' motion for summary judgment on the excessive force claim.

***Villarreal v. City of Laredo,* No. 20-40359 (5th Cir. November 1, 2021)**

Villarreal is a journalist in Laredo, using her camera to record and post videos reporting on local crime, missing persons, community events, etc on her Facebook page. She also criticizes law enforcement. In 2017 she published a story about a man who committed suicide, identifying the man as an agent with the US Border Patrol. She contacted an LPD Officer who confirmed the man's identity. The following month, she published the last name of a family involved in a fatal car crash. Again, she contacted an LPD Officer to verify her information. Six months later, two arrest warrants were issued for Villarreal for violating Texas Penal Code § 39.06(c) – soliciting information from a public servant with the intent to obtain a benefit. Villarreal learned of the warrants and turned herself in where LPD took pictures of her in handcuffs with their cell phones and mocked her.

Villarreal filed suit against various LPD officers, Webb County and the City, alleging a pattern of harassment and retaliation in violation of her First Amendment rights among other things. The district court dismissed all of her claims. On appeal, the Fifth Circuit joined its sister circuits in holding that qualified immunity does not permit government officials to invoke patently unconstitutional statutes like Sect. 39.06(c) to avoid liability for their actions. The Court reversed the dismissal of the First Amendment claim, concluding that it should be patently obvious to any reasonable police officer that locking up a journalist for asking questions of public officials violated the First Amendment. However, regarding her separate First Amendment retaliation claim, the Fifth Circuit found that Villarreal failed to sufficiently plead such a claim. "A retaliation claim requires some showing that the plaintiff's exercise of free speech has been curtailed." Villarreal alleged that she lost sleep, suffered reputational damage, became physically ill and feared future interference from officials – but she did not allege that her speech was curtailed. The Fifth Circuit affirmed the dismissal of this claim.

***Egbert v. Boule,* (citation pending, Docket No. 21-147) (2022)**

Erik Egbert, a Customs and Border Patrol Agent, went to the Smugglers Inn, which sits at the U.S.-Canada border, and approached a car carrying a guest from Turkey. The inn's owner, Robert Boule, asked Egbert to leave, and when Egbert refused to do so, Egbert pushed Boule to the ground. After Boule complained to Egbert's supervisors, Egbert suggested to the IRS that it investigate Boule.

Based upon the foregoing, Boule filed a Bivens lawsuit against Egbert arguing that the agent had violated his First and Fourth

Amendment rights. The district court ruled against Boule, finding his claims were beyond the scope of those permitted under Bivens. The U.S. Court of Appeals for the Ninth Circuit reversed, and the full (en banc) Ninth Circuit denied Egbert's petition for rehearing.

The question presented to the Supreme Court was whether a plaintiff has a right to sue federal officers for First Amendment retaliation claims or for allegedly violating his/her Fourth Amendment rights while the officer is engaging in immigration-related functions.

The Supreme Court ruled against Egbert. In a 6-3 majority authored by Justice Clarence Thomas, the Court concluded that it is generally the job of Congress to allow Americans to sue federal police for excessive force violations under the Fourth Amendment, not the courts. "Congress is better positioned to create remedies in the border-security context, and the government already has provided alternative remedies that protect plaintiffs," Thomas wrote, a reference to an internal U.S. Customs grievance procedure.

Associate Justice Sonia Sotomayor dissented from the court's ruling on the Fourth Amendment claim, asserting that it "contravenes precedent and will strip many more individuals who suffer injuries at the hands of other federal officers...of an important remedy." Sotomayor agreed with the court's ruling against the inn owner's separate First Amendment claim.

***Fulton v. City of Philadelphia,* (593 US ___) (2021)**

In March 2018, the City of Philadelphia barred Catholic Social Services (CSS) from placing children in foster homes because of its policy of not licensing same-sex couples to be foster parents. CSS sued the City of Philadelphia, asking the court to order the city to renew their contract. CSS argued that its right to free exercise of religion and free speech entitled it to reject qualified same-sex couples because they were same-sex couples, rather than for any reason related to their qualifications to care for children.

The district court denied CSS's motion for a preliminary injunction, and the Third Circuit affirmed, finding that the City's non-discrimination policy was a neutral, generally applicable law and that CSS had not demonstrated that the City targeted CSS for its religious beliefs or was motivated by ill will against its religion.

The questions presented to the Court were:

- To succeed on their free exercise claim, must plaintiffs prove that the government would allow the same conduct by someone who held different religious views, or only provide sufficient evidence that a law is not neutral and generally applicable?
- Should the Court revisit its decision in Employment Division v. Smith?
- Does the government violate the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs?

In a unanimous decision, the Court ruled for Fulton. In his majority opinion, Justice Roberts opined that the refusal of Philadelphia to contract with CSS for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violated the Free Exercise Clause of the First Amendment. Philadelphia's actions burdened CSS's religious exercise by forcing it either to curtail its mission or to certify same-sex couples as foster parents, in violation of its stated religious beliefs. Although the Court held in Employment Division v. Smith that neutral, generally applicable laws may incidentally burden religion, the Philadelphia law was not neutral and generally applicable because it allowed for

exceptions to the anti-discrimination requirement at the sole discretion of the Commissioner. Additionally, CSS's actions do not fall within public accommodations laws because certification as a foster parent is not "made available to the public" in the usual sense of the phrase. Thus, the non-discrimination requirement is subject to strict scrutiny, which requires that the government show the law is necessary to achieve a compelling government interest. The Court pointed out that the question is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS. The Court concluded that it did not.

Justice Amy Coney Barrett wrote a separate concurring opinion in which Justice Brett Kavanaugh joined and in which Justice Stephen Breyer joined as to all but the first paragraph. Justice Barrett acknowledged strong arguments for overruling Smith but agreed with the majority that the facts of the case did not trigger Smith.

Justice Samuel Alito authored an opinion concurring in the judgment, in which Justices Clarence Thomas and Neil Gorsuch joined. Justice Alito would overrule Smith, replacing it with a rule that any law that burdens religious exercise must be subject to strict scrutiny.

Justice Gorsuch authored an opinion concurring in the judgment, in which Justices Thomas and Alito joined, criticizing the majority's circumvention of Smith.

II. FOURTH AMENDMENT

***Smith v. Heap,* No. 21-20329 (5th Cir. April 14, 2022)**

Heap is an elected constable in Harris County. Smith is his counterpart in adjoining Waller County. After a 911 caller reported that Smith had aimed a gun at him on a local tollway in Harris County, Heap's deputies stopped and questioned Smith, but then released him minutes later. The next day, Smith, who is black, held a press conference at which he accused the deputies, Heap and the 911 caller of racial discrimination.

Smith sued Heap, the deputies, and Harris County in federal court, asserting excessive force, illegal search and seizure, and supervisory liability. Heap moved for dismissal based on qualified immunity. The stop was lawful, and Heap wasn't there. Despite this, the district court denied Heap's motion to dismiss.

On appeal, the Fifth Circuit did not mince words:

> *We choose to address the merits, and there are none. Smith has not pleaded a constitutional violation – not even close.*

It is reasonable to detain a suspect at gunpoint, handcuff him, and place him in a police car during an investigatory stop. And the deputies detained Smith for mere minutes, releasing him after he denied aiming his gun at the driver. Because reasonable suspicion supported the investigatory stop, Smith did not adequately plead an unreasonable seizure.

Likewise, Smith's claim of excessive force fails – he argued to the Fifth Circuit that he suffered "psychological injuries." However, his complaint didn't allege that. Further, placing Smith in cuffs for two minutes while they secured the scene was reasonable and routine police procedure.

Because Smith failed to allege a constitutional violation, Smith's supervisory claim against Heap likewise failed. "Absent a constitutional violation, Heap can't be liable for supervising one, ratifying one, or for failing to train his deputies to avoid one."

***United States v. Martinez,* No. 21-30068 (5th Cir. February 2, 2022)**

Martinez appealed the district court's denial of his motion to suppress drugs found in two packages that were seized by USPS. He argued that reasonable suspicion did not exist to detain the packages for further investigation. And even if there was reasonable suspicion, the 17-day delay between the detention and their search was unreasonable in violation of the Fourth Amendment. Martinez further argued that the search warrants were invalid and insufficient to establish probable cause because they contained incorrect information.

Upon review, the Fifth Circuit noted that the protections of the Fourth Amendment extend to packages sent via the USPS. However, if the Government has reasonable suspicion that a package contains contraband or evidence of criminal activity, a package may be detained without a warrant. If the Government subsequently obtains a search warrant, the package may be searched. In this case, the postal employee observed several drug package profile characteristics that caused reasonable suspicion to detain the package. And the 17-day delay was not unreasonable as the postal worker was diligent in his investigation after receiving them. Finally, Martinez, as the party attacking the warrant, failed to establish by the preponderance of the evidence that the affiant's misrepresentations were intentional or made with reckless disregard for the truth. Based on the foregoing, the Fifth Circuit affirmed the conviction and sentence.

***Parker v. Blackwell,* No. 20-40398 (5th Cir. January 14, 2022)**

Parker, a detainee at the Shelby County Jail, filed a Section 1983 action alleging that a jailer sexually assaulted him and other detainees and that Sheriff Blackwell violated Parker's Fourth Amendment right to procedural and substantive due process by rehiring the jailer after he had been terminated for abusing detainees and failing to properly supervise and train the jailer. Sheriff Blackwell appealed from the district court's denial of his motion to dismiss based on qualified immunity.

On review, the Fifth Circuit noted that, when considering a denial of a Rule 12(b)(6) motion, the pertinent inquiry is whether the plaintiff has alleged facts that raise a facially plausible claim. Regarding the rehiring claim, the Court stated that "one's rights can be infringed when an official is deliberately indifferent to a specific risk of harm posed by a hiring decision, such as a risk of sexual assault." The alleged connection between the jailer's prior termination for abusing detainees and the alleged abuse of Parker was sufficient to state a claim for deliberate indifference in rehiring the jailer. Accordingly, the Court affirmed the district court's ruling as to this claim.

With respect to Parker's failure to train claim, the Fifth Circuit found that Parker's allegations were generic at best and did not allege facts regarding the lack of a training program or frequent abusive conduct that would put the Sheriff on notice that training or supervision was needed. Accordingly, the Court reversed and remanded for dismissal of this claim.

***Templeton v. Jarmillo,* No. 21-50299 (5th Cir. March 12, 2021)**

Austin PD was called to perform a welfare check on Templeton based on a recommendation of a licensed clinical social worker at the Austin Travis County Mental Health and Mental Retardation Center. When the officers arrived, Templeton was not at home. Upon arrival, the officers allegedly emerged from hiding, pointed their guns at Templeton, instructed him to get on his knees, and cuffed him. This appeal deals only with Templeton's allegation of excessive force related to his handcuffing, to which the district court granted qualified immunity to the officers.

The district court found that Templeton had failed to cite any caselaw that would the show the officers violated his clearly established rights. However, in his motion to alter judgment, he cited a 5th Circuit opinion in which the Court held that a claim that handcuffs were applied too tightly, and the arrestee's plea to loosen them were ignored, could be a plausible claim of

excessive force. The district court held it was too late to inject new caselaw, and even if it were not, the new precedent was insufficient to show clearly established law.

On appeal, the Fifth Circuit found that Templeton presented and pressed the argument that the use of handcuffs constituted excessive force. And that the citing of new precedent in his motion to alter judgment was not a new argument – it was new support for an existing argument. And the reviewing court is not restricted in analyzing issues based solely on the cases cited by the parties.

Despite this, the Fifth Circuit found that clearly established law in the Fifth Circuit is contrary to Templeton's claims. Tight handcuffing alone, even where a detainee sustains minor injuries, does not present an excessive force claim. While Templeton alleged he experienced pain in his shoulder from tight handcuffing, he was cuffed for a matter of minutes. This allegation is insufficient to raise an excessive force claim – "Facts matter in excessive force claims."

***Wilson v. City of Bastrop,* No. 21-30204 (5th Cir. February 22, 2022)**

After receiving reports of an armed confrontation and "they are drawing guns," two Bastrop police officers chased an armed suspect who ignored their repeated commands to stop and drop his gun. The pursuit occurred near passing motorists, onlookers and an apartment complex. As vehicles passed nearby, one officer drew his weapon and yelled, "drop the gun!" When the suspect failed to comply and continued to run, the officer fired at him but missed. The officer continued pursuit of the suspect across a field, ordering him to drop the gun and instructing onlookers to lie on the ground. The second officer responded from the other side of the field, and watched the suspect change direction toward a neighborhood. The officer ordered the suspect to stop and drop the gun. When he didn't, the officer shot him. The suspect stumbled, dropped his gun, picked it up and continued to flee. At that point both officers gave chase, repeatedly ordering the suspect to stop and drop the gun. When he didn't and both officers were in range, they both fired and the suspect fell and dropped his gun. The suspect died on the scene from his wounds.

The suspect's family filed suit against the officers, alleging excessive force. After limited discovery, the officers moved for summary judgment based on qualified immunity, which the district court granted. On appeal, the Fifth Circuit examined the officers' use of deadly force and whether the officers had probable cause to believe that the suspect posed a threat of serious physical harm, either to the officers or others. Each officer reasonably believed that the suspect posed a serious physical threat to both bystanders and the officers. When the suspect ran, armed and disobeying orders to stop and drop the gun, and in the presence of onlookers, the use of deadly force became justified. Further, it was not required for the suspect to fire his weapon in order to pose a threat – "we have never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure safety."

***Craig v. Martin,* No. 19-10013 (5th Cir. February 16, 2022)**

Officer Martin responded to a call about neighbors throwing trash into the caller's yard. A subsequent 911 call came from the neighbor (Craig), complaining that the first caller had grabbed her son by the neck because the boy had allegedly littered. Officer Martin activated his body camera at the scene and then got into a verbal altercation with Craig. Craig's teenagers and adult daughters became involved. Officer Martin used physical force to get them into his squad car.

Craig and her children sued Officer Martin for unlawful arrest and excessive force. Craig also sued on the behalf of one of her minor children, alleging injuries suffered as a bystander. The district court dismissed the minor's claim as incognizable and dismissed the remaining claims for unlawful arrest, holding that Officer Martin was entitled to qualified immunity. However, the district court denied

qualified immunity on the excessive force claims, concluding that the video submitted by Martin was "too uncertain."

On appeal, the Fifth Circuit reversed the denial of qualified immunity. Officer Martin was the only officer at the scene. One teen had stepped between Officer Martin and Craig and Officer Martin had to physically separate both individuals. Officer Martin was then pushed from behind by another teen. He drew his taser and forced Craig to the ground. The court found this objectively reasonable given the fact that he had been pushed from behind and was facing numerous people who were shouting at him while he was trying to arrest Craig. The Fifth Circuit also found it was objectively reasonable when he took one of the teens to the ground who refused his commands to get on the ground. It was also reasonable for him to use his foot to shove the teen's leg into the patrol car when she refused to put her leg in the vehicle.

The Fifth Circuit also pointed out that Craig failed to provide any controlling precedent showing that Officer Martin's conduct violated clearly established rights. While Craig does not need to point to a factually identical case, she must provide some controlling precedent that "squarely governs the specific facts at issue." Because Craig did not do so, she failed to show that the law was clearly established that Martin's conduct was unlawful and failed to overcome Officer Martin's qualified immunity defense.

***Betts v. Brennan,* No. 21-30101 (5th Cir. January 12, 2022)**

During a routine traffic stop, Betts repeatedly challenged Officer Brennan's reasons for stopping him, refused to comply with his orders, batted his hand away, called him a liar, warned him to backup, and dared him to use his taser. After going around and around with Betts for several minutes, Brennan tased Betts once and arrested him. Betts plead guilty to resisting arrest but then sued Brennan for excessive force. The district court denied Brennan's motion for summary judgment based on qualified immunity.

On review, the Fifth Circuit applied the Graham factors to determine whether the use of force was reasonable, finding that the extent of Betts' resistance was the most important. While Betts was stopped for only a minor traffic violation, Betts' persistent confrontational manner created some threat to the officer's safety. Further, Betts' resistance was not "passive." He adopted a confrontational stance at the outset, contested why he was stopped, ignored dozens of commands, and dared the officer to tase him after batting away the officer's hand. The officer's use of the taser was found to be reasonable, as it was not the officer's first resort and he used measured and ascending actions that corresponded with Betts' escalating verbal and physical resistance.

***Timpa v. Dillard,* No. 20-10876 (5th Cir. December 16, 2021)**

Timpa called 911 and asked to be picked up. He stated that he had a history of mental illness, had not taken his meds, was having a lot of anxiety, and was afraid of a man that was with him. Another 911 caller reported a man running up and down the highway and stopping traffic. 911 requested officers to respond to a Crisis Intervention Training situation and described Timpa as a white male with schizophrenia who was off his meds.

Dallas PD General Orders instructs that five officers respond to a CIT call and perform a "five-man takedown," a control technique where each officer secures one limb while the fifth officer holds the head. As soon as the person is brought under control, they are to be placed in an upright position. In this case, when the officers responded to the call, Timpa was already in cuffs (two private security guards had cuffed him) and sitting on the grass by a sidewalk. Timpa was thrashing around and rolling back and forth in the grass shouting "Help me! You're gonna kill me!" The officers attempted to calm him, forcing Timpa to his stomach and two officers placing knees into Timpa's back. One officer removed his knee after two minutes; the other officer kept his knee in Timpa's upper back for over fourteen minutes. Timpa's ankles were zip-tied. Nine

minutes into the restraint, after a medic took Timpa's vitals, Timpa's legs stopped kicking. A minute later he fell limp and nonresponsive. Instead of immediately rolling him over, the officers stood around asking each other what to do and made jesting comments. By the time the medics strapped him to a gurney, he was pronounced dead. His death would later be ruled a homicide.

Plaintiffs filed suit alleging excessive force and bystander liability, which the officers successfully moved for summary judgment on based on qualified immunity. On appeal, the Fifth Circuit affirmed as to the excessive force claim but reversed as to bystander liability as to all but one officer. As to the one officer, the Court stated that bystander liability only applies if the officer is present. One of the officers had left the scene before Timpa became unresponsive and thus was not liable under the bystander theory. However, the other officers were all present and each were trained that, once a suspect is brought under control, you are to place him in an upright position or on their side. Instead of doing this, the officers stood by and laughed as Timpa lost consciousness. Accordingly, the Court reversed the summary judgment as to these officers under the bystander liability claim.

Lange v. California, (594 US ___) (2021)

A California Highway Patrol officer observed a parked car "playing music very loudly," and then the driver, Arthur Gregory Lange, honked the horn four or five times despite there being no other vehicles nearby. Finding this behavior unusual, the officer began following Lange, intending to conduct a traffic stop. After following Lange for several blocks, the officer activated his overhead lights, and Lange "failed to yield." Lange turned into a driveway and drove into a garage. The officer followed and interrupted the closing garage door. When asked whether Lange had noticed the officer, Lange replied that he had not. Based on evidence obtained from this interaction, Lange was charged with two Vehicle Code misdemeanors and an infraction.

Lange moved to suppress the evidence obtained in the garage. At the suppression hearing, the prosecutor argued that Lange committed a misdemeanor when he failed to stop after the officer activated his overhead lights and that the officer had probable cause to arrest Lange for this misdemeanor offense. Based on this probable cause, the prosecutor argued that exigent circumstances justified the officer's warrantless entry into Lange's garage. Lange's attorney argued that a reasonable person in Lange's position would not have thought he was being detained when the officer activated his overhead lights, and the officer should not have entered Lange's garage without a warrant. The court denied Lange's motion to suppress, and the appellate division affirmed. Lange pled no contest and then appealed the denial of his suppression motion a second time. The appellate division affirmed Lange's judgment of conviction.

In the interim, Lange filed a civil suit, asking the court to overturn the suspension of his license, and the civil court granted the petition after determining Lange's arrest was unlawful. The court reasoned that the "hot pursuit" doctrine did not justify the warrantless entry because when the officer entered Lange's garage, all the officer knew was that Lange had been playing his music too loudly and had honked his horn unnecessarily, which are infractions, not felonies. Based on the inconsistent findings of the courts, Lange petitioned for transfer to the California Court of Appeal, which concluded that Lange's arrest was lawful and affirmed the judgment of conviction.

The question presented to the Supreme Court was whether the exigent circumstances exception to the Fourth Amendment's warrant requirement applies when police are pursuing a suspect whom they believe committed a misdemeanor.

In an unanimous decision authored by Justice Kagan, the Court ruled for Lange. It concluded that the pursuit of a fleeing misdemeanor suspect does not always or categorically qualify as an exigent circumstance justifying a warrantless entry into a home. It

acknowledged that while the Fourth Amendment ordinarily requires a police officer to obtain a warrant to enter a home, an officer may enter a home without a warrant under certain specific circumstances, including exigency. Additionally, the Court has recognized exigent circumstances when an officer must act to prevent imminent injury, the destruction of evidence, or a felony suspect's escape.

However, that a suspect is fleeing does not categorically create exigency. In United States v. Santana, 427 U.S. 38 (1976), the Court recognized that the "hot pursuit" of a felony suspect created exigency that justified warrantless entry into a home. However, that case did not address hot pursuit of misdemeanor suspects. Rather, the Court's Fourth Amendment precedents support a case-by-case assessment of the exigencies arising from a particular suspect's flight.

Justice Brett Kavanaugh authored a concurring opinion noting that the reasoning of the majority and that of Chief Justice John Roberts in his opinion concurring in the judgment are not so dissimilar as they might seem at first. Rather, cases involving fleeing misdemeanor suspects "will almost always" involve a recognized exigent circumstance" such that warrantless entry into a home is justified.

Justice Clarence Thomas authored an opinion concurring in part and concurring in the judgment. Justice Thomas noted that the general case-by-case rule described by the majority is subject to historical, categorical exceptions. Joined by Justice Kavanaugh, Justice Thomas also noted that the federal exclusionary rule does not apply to evidence discovered in the course of pursuing a fleeing suspect.

Chief Justice Roberts authored an opinion concurring in the judgment, which Justice Samuel Alito joined. The Chief Justice argued that it is well established that the flight, not the underlying offense, justifies the "hot pursuit" exception.

United States v. Cooley, **(593 US ___) (2021)**

Joshua James Cooley was parked in his pickup truck on the side of a road within the Crow Reservation in Montana when Officer James Saylor of the Crow Tribe approached his truck in the early hours of the morning. During their exchange, the officer assumed, based on Cooley's appearance, that Cooley did not belong to a Native American tribe, but he did not ask Cooley or otherwise verify this conclusion. During their conversation, the officer grew suspicious that Cooley was engaged in unlawful activity and detained him to conduct a search of his truck, where he found evidence of methamphetamine. Meanwhile, the officer called for assistance from county officers because Cooley "seemed to be non-Native."

Cooley was charged with weapons and drug offenses in violation of federal law. He moved to suppress the evidence on the grounds that Saylor was acting outside the scope of his jurisdiction as a Crow Tribe law enforcement officer when he seized Cooley, in violation of the Indian Civil Rights Act of 1968 ("ICRA"). The district court granted Cooley's motion, and the U.S. Court of Appeals for the Ninth Circuit affirmed, finding that Saylor, a tribal officer, lacked jurisdiction to detain Cooley, a non-Native person, without first making any attempt to determine whether he was Native.

The Court was presented with the question of whether a police officer for a Native American tribe can detain and search a non-tribe member within a reservation on suspicion of violating a state or federal law. In a unanimous decision, the Court held a tribal police officer has authority to detain temporarily and to search a non-Indian traveling on a public right-of-way running through a reservation for potential violations of state or federal law. Justice Stephen Breyer authored the majority opinion of the Court which held that Native American tribes are "distinct, independent political communities" exercising a "unique and limited" sovereign authority within the United States. Among the limitations is the general lack of inherent sovereign power to exercise criminal jurisdiction over non-tribal members. However, the Court recognized two exceptions to this rule in Montana v. United States, 450 U.S. 544

(1981). First, a tribe may regulate the activities of non-tribal members "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Second, a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." The authority at issue in this case aligns with the second exception "almost like a glove." None of the policing provisions Congress has enacted fit the circumstances of this case as well as the Court's understanding in Montana, and particularly the second exception. Rather, legislation and executive action appear to assume that tribes retain the detention authority presented in this case.

Justice Samuel Alito authored a concurring opinion noting that his agreement is limited to a narrow reading of the Court's holding.

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

After a deputy sheriff tased, shot, and killed Joshua Cloud during a traffic stop, his parents filed suit against the deputy sheriff, alleging excessive force. The district court granted summary judgment to the deputy sheriff after finding no constitutional violation.

The Fifth Circuit affirmed, concluding that the deputy sheriff had reasonable grounds to tase Cloud after Cloud continued to resist arrest. In this case, while the deputy sheriff tried to handcuff Cloud, Cloud partially turned around, took a confrontational stance, and deprived the deputy sheriff of the use of his handcuffs, thwarting efforts to complete the arrest. Furthermore, the deputy sheriff's continued force to complete the arrest, like the initial tase, was reasonable. The court also concluded that the deputy sheriff justifiably used deadly force when Cloud lunged for a revolver that had already discharged and struck the deputy sheriff in the chest. The court explained that at a minimum, the deputy sheriff knew that a loaded revolver lay on the ground behind and to his left; more than that, though, he knew that the gun had just discharged twice—once into his chest—and that he had had to wrestle it from Cloud's hands and toss it away; and he saw Cloud make a sudden move in the gun's direction. Even drawing all inferences in plaintiff's favor, the record shows that Cloud was shot while moving toward the revolver and potentially seconds from reclaiming it. Because the court found no constitutional violation, it need not consider whether the deputy sheriff violated any clearly established law.

III. SECTION 1983

***Gomez v. Galman,* No. 20-30508 (5th Cir. November 19, 2021)**

Gomez, a veteran wearing fatigues, was sitting alone in a bar in New Orleans having a drink when two off-duty officers, not in uniform, came in and began harassing him. After they stole Gomez's beret off his head, Gomez followed the pair outside, where one officer ordered Gomez to stop and not leave the patio. The officers then beat Gomez until several bystanders intervened. After getting pummeled, Gomez managed to get to his truck and tried to drive home. But the officers ordered him to stop and exit his vehicle. Gomez claimed that, because they acted like police officers, he didn't think he was free to leave. Gomez followed their orders to get out of the vehicle where he was again attacked and beaten unconscious.

Gomez filed suit against the officers and the City of New Orleans alleging a Section 1983 claim as well as various state tort claims. Gomez also alleged a Section 1983 claim against the city for failure to train, hire, supervise or discipline the officers. The district court dismissed Gomez's federal claims because it found that the officers were not acting "under color of law." However, the Fifth Circuit found that Gomez had alleged sufficient facts to support his claim that the officers acted under color of law – the officers had given Gomez a direct order to stop and not leave the patio, which Gomez obeyed; when Gomez tried to drive away, the officers ordered him to stop and

get out, which Gomez obeyed; and because they acted like police officers, Gomez believed he was not free to leave. However, the Court concluded that Gomez did not allege sufficient facts to support a Monell claim against the City based on the officers' actions.

***Carver v. Atwood,* No. 21-40113 (5th Cir. November 18, 2021)**

Tiffany Carver was a corrections officer at the Stiles Unit of the Texas Department of Criminal Justice. She sued three former co-workers, alleging the three men had sexually assaulted her at the Stiles Unit. She sued the individuals in their official capacities, under both Section 1983 and Texas common law. She also brought Section 1983 claims against TDCD and the Stiles Unit. The district court dismissed the TDJC on sovereign immunity grounds and also dismissed Carver's claims against the Stiles Unit.

After none of the individual defendants had responded to their summonses, the clerk entered a default. Two weeks later, the district court ordered the individual defendants to show cause why a default judgment should not be granted. The court scheduled a show cause hearing but later canceled it. Then, without notice to Carver or an opportunity to respond, the district court dismissed her claims with prejudice against the individuals because Carver had sued them in their official capacities and the suit was prima facie barred by sovereign immunity.

On appeal, the Fifth Circuit first considered whether a district court has a general power to dismiss cases sua sponte. Finding that it does, the next question was whether a district court has the power to dismiss a case sua sponte with prejudice and without giving a plaintiff notice or an opportunity to respond. The Fifth Circuit found that the district court erred in doing so – Carver could have amended her complaint to sue the individual defendants in their personal capacities.

***Gray v. White,* No. 20-30218 (5th Cir. November 17, 2021)**

Gray claims that officers came to his cell, attacked him without provocation, and then took him to a shower and sprayed him with a chemical agent until he passed out. Upon waking, Gray claims he was placed in restraints and dragged to a transportation van where officers continued to beat him. Gray alleges he sustained a broken nose and a bruised kidney. Gray's allegations were contradicted by the disciplinary reports prepared by the jail officers indicating that the officers went to Gray's cell on a targeted search and found him intoxicated with vomit on the floor. The officers moved Gray to a showed area where he resisted by kicking and spitting, necessitating the use of a chemical agent to gain compliance. Gray was brought before the prison disciplinary board and found guilty of intoxication, defiance, aggravated disobedience, property destruction, and having synthetic marijuana in his cell. Gray sued under Section 1983 but the district court granted summary judgment for the defendants, finding that Gray's claims were barred by Heck as they could not be accepted without contradicting the findings of the prison disciplinary board. The district court further found that the alleged beating suffered during transport to the showers was not raised in Gray's administrative complaint and thus barred under the PLRA.

The Fifth Circuit reversed on the dismissal under Heck, finding that Heck precludes Section 1983 litigation in the prison-disciplinary proceeding contract where it would negate the prisoner's disciplinary conviction if negating the conviction would affect the duration of his sentence by restoring his good time credits. But Heck is not implicated if the prisoner's challenge threatens no consequence for his conviction or the duration of his sentence. Because the record was insufficient to determine whether, or which of, Gray's claims were barred by Heck, and because not all of Gray's disciplinary violations resulted in the loss of good time credit, the Court found that the defendants did not meet their burden for summary judgment.

The Fifth Circuit affirmed the dismissal regarding the PLRA, however. The PLRA

precludes prisoners from asserting Section 1983 claims regarding prison conditions until such available administrative remedies are exhausted. In this case, Gray's administrative complaint did not describe any incident regarding being beaten by the showers.

***Santos v. White, No.* 20-30048 (5th Cir. November 17, 2021)**

Santos alleged that he witnessed six prison officers beating another inmate. Santos intervened but was knocked to the ground, hit, kicked, choked, handcuffed, and dragged so that his head hit poles. He was then placed in a shower where an officer (Wells) sprayed him in the face, genitals and anus with a chemical agent. The same officer allegedly cut Santos with a knife and threatened to kill him. Santos was ultimately transferred to a medical center where, he alleges, he was denied adequate attention.

Shockingly, the prison officers claimed it was Santos that attacked them. Despite being initially restrained, Santos hit Wells so hard that he broke Wells' dentures. His actions necessitated the use of a chemical agent to gain compliance. A prison disciplinary board concluded that Santos was guilty of defiance, aggravated disobedience, and property destruction. Santos sued under Section 1983. The district court granted the defendants summary judgment, determining that Santos' claims were by Heck because prison disciplinary reports contradicted Santo's allegations.

The Fifth Circuit, upon review, upheld the decision to admit the disciplinary reports, rejecting a hearsay argument, but remanded with regard to the application of Heck. The reports were offered to demonstrate that the disciplinary board found Santos guilty, not to prove the truth of the assertions. Whether the board's findings related to the assault on Wells barred the corresponding claims by Santos must be determined by a fact-specific analysis.

***Abraugh v. Altimus,* No. 21-30205 (5th Cir. February 14, 2022)**

When authorities booked Randall as a pretrial detainee, he was medicated and intoxicated and had a history of mental health treatment. Though Randall was supposed to "be followed for alcohol withdrawal symptoms and possible delirium tremens, he was allegedly placed in a cell without an operable source of water, not monitored, and was not provided any medication or liquids. The next day, officials found him hanging from his bedsheets.

Randall's mother, Abraugh, filed a Section 1983 complaint, alleging that Randall was survived by his wife and biological parents. She then amended her complaint to "substitute Plaintiff with individual heirs," adding the wife and Randall's minor child. The district court dismissed, holding that Abraugh lacked standing and adding the wife and minor child could not cure the initial jurisdictional defect.

On appeal, the Fifth Circuit found that the district court had erred on standing. That is, while Abraugh lacked prudential standing because Louisiana law did not authorize her to bring this particular cause of action, she had Article III standing – Abraugh had a constitutionally cognizable interest in the life of her son. And that determination does not turn on whether Louisiana law allows her to sue. Because Abraugh had Article III standing, the district court had subject matter jurisdiction. Thus, the district court erred when it held that it lacked subject matter jurisdiction to consider Abraugh's amended complaint.

***Mahoney Area School District v. B.L.,* (594 US ___) (2021)**

B.L., a student at Mahanoy Area High School (MAHS), tried out for and failed to make her high school's varsity cheerleading team, making instead only the junior varsity team. Over a weekend and away from school, she posted a picture of herself on Snapchat with the caption "Fuck school fuck softball fuck cheer fuck everything." The photo was visible to about 250 people, many of whom were MAHS students and some of whom were cheerleaders. Several students who saw the captioned photo approached the coach and expressed concern

that the snap was inappropriate. The coaches decided B.L.'s snap violated team and school rules, which B.L. had acknowledged before joining the team, and she was suspended from the junior varsity team for a year.

B.L. sued the school under 42 U.S.C. § 1983 alleging (1) that her suspension from the team violated the First Amendment; (2) that the school and team rules were overbroad and viewpoint discriminatory; and (3) that those rules were unconstitutionally vague. The district court granted summary judgment in B.L.'s favor, ruling that the school had violated her First Amendment rights. The U.S. Court of Appeals for the Third Circuit affirmed.

The question presented to the Court was whether the First Amendment prohibited public school officials from regulating off-campus student speech. In an 8-1 majority decision authored by Justice Breyer, the Court concluded that the First Amendment limits but does not entirely prohibit regulation of off-campus student speech by public school officials. However, in this case, the school district's decision to suspend B.L. violated the First Amendment.

The opinion explained that although public schools may regulate student speech and conduct on campus, the Court's precedents make clear that students do not "shed their constitutional rights to freedom of speech or expression" when they enter campus. The Court has also recognized that schools may regulate student speech in three circumstances: (1) indecent, lewd, or vulgar speech on school grounds, (2) speech promoting illicit drug use during a class trip, and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper. Moreover, in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court held that schools may also regulate speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." The school's interests in regulating these types of student speech do not disappear when the speaker is off campus. Three features of off-campus speech diminish the need for First Amendment leeway: (1) off-campus speech normally falls within the zone of parental responsibility, rather than school responsibility, (2) off-campus speech regulations coupled with on-campus speech regulations would mean a student cannot engage in the regulated type of speech at all, and (3) the school itself has an interest in protecting a student's unpopular off-campus expression because the free marketplace of ideas is a cornerstone of our representative democracy.

In this case, B.L. spoke in circumstances where her parents, not the school, had responsibility, and her speech did not cause "substantial disruption" or threaten harm to the rights of others. Thus, her off-campus speech was protected by the First Amendment, and the school's decision to suspend her violated her First Amendment rights.

Justice Samuel Alito authored a concurring opinion, joined by Justice Neil Gorsuch, explaining his understanding of the Court's decision. Justice Alito argued that a key takeaway of the Court's decision is that "the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory."

Justice Clarence Thomas authored a dissenting opinion, arguing that schools have historically had the authority to regulate speech when it occurs off campus, so long as it has a proximate tendency to harm the school, its faculty or students, or its programs. Justice Thomas viewed the facts of this case as falling squarely within that rule and thus would have held that the school could properly suspend B.L. for her speech.

***United States v. Beard,* No. 20-20116 (5th Cir., October 22, 2021)**

The Fifth Circuit affirmed the district court's denial of defendant's motion to suppress drugs found in a package he mailed via the United States Postal Service from Houston, Texas, to Hammond, Louisiana. Defendant did

not dispute that reasonable suspicion existed to detain the package when it arrived in Hammond, Louisiana. Defendant argued, though, that his Fourth Amendment rights were violated, and an unlawful seizure occurred, when the package was rerouted back to Houston, which took five days, before law enforcement took further investigative steps to confirm their suspicion. However, the court agreed with the district court that the U.S. Marshal's choice to reroute the package back to Houston was reasonable and prudent under the facts of this case. The court also agreed that the five days the package was in transit from Hammond back to Houston, as well as the two days it took to obtain the warrant after the package returned to Houston, were not unreasonably long under the circumstances (the five days included a weekend and did not involve any lack of diligence on behalf of law enforcement). Further, the package had extensive connections to Houston and the U.S. Marshal requested that the package be rerouted to Houston because he believed that there was no difference in the time it would take to obtain a warrant in Houston versus Hammond.

Davis v. Hodgkiss, **No. 20-50917 (5th Cir., August 25, 2021)**

In this consolidated civil rights action, Plaintiffs filed suit alleging that defendant violated their Fourth Amendment rights by using false statements to secure a search warrant. The case arises out of a criminal investigation into Plaintiffs by detectives of the Williamson County Sheriff's Office.

The Fifth Circuit reversed the district court's denial of defendant's motion for qualified immunity and concluded that defendant is entitled to summary judgment on plaintiffs' Franks claims as there was no constitutional violation. Even after setting aside the allegedly false statements at issue, the court concluded that there are similar facts set forth in the affidavit that establish probable cause to search the residence. Therefore, the court found that, with the allegedly false statements excised, the affidavit's remaining content was enough to establish probable cause.

Wearry v. Foster, **No. 20-30406 (5th Cir., May 3, 2022)**

In 2016, the Supreme Court threw out the murder conviction of Michael Wearry, who was found guilty of a 1998 murder and sentenced to death in 2002. After that conviction was vacated, Wearry filed a civil suit against Scott Perriloux, a prosecutor, and Marlon Foster, a police officer, alleging that Perrilloux and Foster conspired to intimidate and coach a 10-year-old child into providing false testimony implicating Wearry in the murder.

Defendants each moved to dismiss for failure to state a claim under Rule 12(c) based on assertions of absolute prosecutorial immunity. The district court denied the motions, holding that neither defendant was entitled to absolute immunity for fabricating evidence by intimidating and coercing a juvenile to adopt a false narrative the defendants had concocted out of whole cloth.

The Fifth Circuit affirmed the district court’s rulings, holding that a police officer is not entitled to absolute immunity reserved for a prosecutor. The court held that neither the Detective nor the District Attorney is owed absolute immunity under the facts alleged in Plaintiff’s complaint. The court reasoned that the Supreme Court has made clear that police officers, even when working in concert with prosecutors, are not entitled to absolute immunity. Nor are prosecutors when they step outside of their role as advocates and act only in an investigatory role (allegedly fabricating evidence in this matter). The facts and actions alleged by the complaint are fundamentally investigatory in nature, and therefore absolute immunity is not warranted.

Harmon v. City of Arlington, **No. 20-10830 (5th Cir., October 26, 2021)**

After an officer fatally shot O'Shea Terry, who was trying to drive his SUV away while the officer stood on the vehicle's running board, Terry's estate and Terrance Harmon, a passenger in the car, sued the officer under 42 U.S.C. 1983 for using excessive force. The

officer's defense hinged on whether he reasonably perceived an imminent threat of personal physical harm in the short interval between Terry's starting the engine and when the officer began shooting.

The Fifth Circuit affirmed the district court's grant of summary judgment to the officer, relying heavily on a detailed analysis of Officer Tran's body camera footage. The court noted that "the video of this ten-second event [was] critical" in confirming that Officer Tran reasonably believed he was at risk of serious injury when the SUV started moving with him on the running board.

The court concluded that Plaintiffs did not plausibly allege an unconstitutional use of excessive force by the officer to rebut his qualified immunity. In this case, even if Plaintiffs could allege sufficient facts showing a constitutional violation, they did not show that the officer violated any clearly established law that would place beyond doubt the constitutional question in this case, whether it is unreasonable for an officer to use deadly force when he has become an unwilling passenger on the side of a fleeing vehicle. Furthermore, Harmon's excessive force claim fails not only because the officer is entitled to qualified immunity, but also because, as a passenger, the officer failed to state a valid Fourth Amendment claim in his own right. Finally, because Plaintiffs failed to allege a predicate constitutional violation by the officer, Plaintiffs' municipal claims also failed.

Kokesh v. Curlee, **No. 20-30356 (5th Cir., September 21, 2021)**

This is another case involving a law enforcement officer's defense of qualified immunity. But unlike most cases involving qualified immunity, this one raises no issue with regard to excessive force, or an unconstitutional search of a premises. Instead, this story begins not even with a traffic stop, but simply a state trooper attempting to render roadside assistance.

Louisiana Trooper Curlee observed a handicap-plated truck after nightfall stopped on the road's shoulder, high atop the Pontchartrain Expressway. The vehicle has its emergency hazard blinking, its hood open, and two people standing outside the truck. Curlee stopped to investigate (at which time he turned one his bodycam, which remained on for several hours). Curlee saw men spray painting the overpass wall (the men were spraying the word "freedon" onto the overpass wall), and based upon their odd statements, sought their identification. Evans, the driver, and Gizzarelli complied. Kokesh refused to comply and videotaped the encounter. Curlee arrested Kokesh because of his failure to provide identification, determined that the two other men were acting on Kokesh's instructions, decided Gizzarelli should be released, photographed the overpass, and wrote Evans a ticket for illegally stopping on the interstate shoulder.

Kokesh subsequently sued. The district court dismissed all claims for injunctive and declaratory relief, all official-capacity claims, and all state law claims, leaving only 42 U.S.C. 1983 claims against Curlee in his individual capacity for unreasonable seizure and excessive force and First Amendment retaliation. The district court granted Curlee qualified immunity as to the excessive force claim but denied it as to the unreasonable seizure claim and the First Amendment claim. The Fifth Circuit reversed, in favor of Curlee, describing the incident as "a regular investigation of an extraordinary and hazardous situation created voluntarily by the plaintiff." Curlee's conduct was in accord with reasonable expectations. "The Fourth Amendment and 42 U.S.C. 1983 should not be employed as a daily quiz tendered by videotaping hopefuls seeking to metamorphosize law enforcement officers from investigators and protectors, into mere spectators, and then further converting them into federal defendants."

Poole v. City of Shreveport, **No. 21-30015 (5th Cir., September 9, 2021)**

The Fifth Circuit affirmed the district court's denial of summary judgment in an excessive force case where the district court held that a jury could conclude that an officer shot a citizen four times without warning while the citizen was turning away and empty-handed.

The court explained that, because genuine disputes exist on three material facts—whether the officer warned before shooting, whether the citizen had turned away from the officer, and whether the officer could see that the citizen was unarmed—the district court properly denied a summary judgment motion invoking qualified immunity. The court agreed with the district court that there was a violation of clearly established law if the jury resolves the factual disputes in favor of Plaintiff.

***Hewitt v. Helix Energy Solutions Group, Inc.*, No. 19-20023 (5th Cir., September 9, 2021)**

The Fair Labor Standards Act (FLSA) establishes a standard 40-hour workweek by requiring employers to pay "time and a half" for any additional time worked. Congress has repeatedly rejected efforts to categorically exempt all highly paid employees from overtime requirements. Under 29 C.F.R. 541.601, a highly compensated employee must be paid on a "salary basis" in order to avoid overtime. Under section 541.604(b), an employee whose pay is "computed on a daily basis" must meet certain conditions in order to satisfy the salary-basis test. A daily-rate worker can be exempt from overtime—but only "if" two conditions are met: the minimum weekly guarantee condition and the reasonable relationship condition.

In this case, Helix claims that Plaintiff is exempt from overtime as a highly compensated executive employee under section 541.601. The parties agree that Hewitt meets both the duties requirements and income thresholds of both exemptions. However, Hewitt admits that Plaintiff's pay is computed on a daily basis, rather than on a weekly, monthly, or annual basis.

The court concluded that Helix does not comply with either prong of section 541.604(b) where it pays Plaintiff a daily rate without offering a minimum weekly required amount paid and Helix does not comply with the reasonable-relationship test. The court also concluded that there is no principled basis for applying or ignoring section 541.604(b) based on how much the employee is paid; the salary-basis test does not conflict with precedent; and the court rejected Helix's contention that extending overtime to highly-paid employees like Plaintiff defies the purpose of the Fair Labor Standards Act.

The U.S. Supreme Court has granted certiorari and, presumably during next Fall's term, will determine whether the analysis of Fifth, Sixth, and Eighth Circuits regarding the FLSA's salary-basis requirement was sound.

***Spikes v. McVea*, No. 19-30019 (5th Cir., August 11, 2021)**

Plaintiff, a former inmate, filed suit against his nurses and his physician (Dr. McVea) under 42 U.S.C. 1983, alleging they were deliberately indifferent to his medical needs in violation of the Eighth Amendment. The district court denied defendants' motion for summary judgment, finding that, at that juncture, they were not entitled to qualified immunity.

The Fifth Circuit affirmed the district court's denial of summary judgment and remanded for further proceedings. The court concluded that Plaintiff had introduced evidence showing that officials knowingly furnished treatment unresponsive to his need. In this case, they ignored his inability to walk and refused to treat his lost mobility, permitting the inference that they intentionally treated him incorrectly. The court saw no meaningful distinction between an official's decision to offer plainly unresponsive treatment to a prisoner and his decision to refuse to treat him, ignore his complaints, or intentionally treat him incorrectly. Therefore, at minimum, the court concluded that Plaintiff introduced evidence that officials engaged in similar conduct that would clearly evince a wanton disregard for his serious medical need. Defendants' admission of malpractice did not preclude a finding of deliberate indifference, and the court determined that these actions rose to the level of deliberate indifference. The court also concluded that defendants had fair warning that their delay in treating Plaintiff's fractured hip beyond the most

cursory care violated his Eighth Amendment rights.

A petition for rehearing was granted on September 14, 2021. The physician involved in the lawsuit, Dr. McVea, passed away. The court granted the petition reasoning that the "recent death of the doctor makes it all the more important that the inquiry of qualified immunity not rest on the collective action of the medical staff, but on the role of each participant." The judgement was vacated and remanded for further proceedings.

Prim v. Deputy Stein, **No. 20-20387 (5th Cir., July 27, 2021)**

The Prims attended a concert at the Pavilion after consuming wine and consumed more wine during the concert in The Woodlands, Texas. After the concert, Janet, who suffers from MS, was "stumbling" and unstable. A Pavilion employee called for a wheelchair, escorted the Prims to the security office, and smelled alcohol on Eric's breath. Deputy Stein, who was working traffic, noticed that Eric had difficulty standing and had slurred speech. Eric admitted that he had been drinking. Eric twice failed a horizontal gaze nystagmus test. A medic evaluated Janet and called Lieutenant Webb. The Prims insisted on walking home, but they would have had to cross two busy intersections in the dark. The officers tried, unsuccessfully, to find the Prims a ride home. Stein arrested them for public intoxication. The charges were ultimately dismissed. The Prims asserted 1983 claims against the County and officers for alleged violations of the Fourth Amendment. They alleged that the County and the Pavilion Defendants violated their rights under the Americans with Disabilities Act ("ADA") and Rehabilitation Act ("Rehab Act"). They also asserted false imprisonment, assault, negligence, gross negligence, and intentional infliction of emotional distress claims against the Pavilion Defendants. Janet claimed that she was assaulted when she was forced into a wheelchair by an unknown individual. Eric says that a Pavilion employee assaulted him by grabbing his arm while they walked to the Pavilion's security office.

The district court granted the defendants summary judgment. The Fifth Circuit reversed with respect to Eric's assault claim but affirmed as to Janet's assault claim and both false imprisonment claims. It further determined that the officers were entitled to qualified immunity on the section 1983 claims. Given their apparent intoxication and their route home, the officers reasonably concluded that the Prims posed a danger to themselves or others. With respect to the ADA and Rehabilitation Act, the court affirmed, noting the Pavilion is a private entity and does not receive federal financial assistance. Finally, the court held that Janet was not discriminated against based on her disability.

Tucker v. City of Shreveport, **No. 19-30247 (5th Cir., May 18, 2021)**

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 precluded 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.

IV. QUALIFIED IMMUNITY

***Edwards v. Oliver,* No. 21-10366 (5th Cir. April 19, 2022)**

Jordan Edwards, a 15-year-old boy, was shot and killed while leaving a house party by then-Officer Roy Oliver, who had responded to a 911 call about possible underage drinking. While Oliver was convicted of murder in the criminal action, he moved for summary judgment based on qualified immunity in the civil action. When his motion was denied, he filed an interlocutory appeal.

This case revolves around whether the denial of Oliver's summary judgment was immediately appealable. If the district court's finding is that a genuine factual dispute exists, this is a factual determination that the appellate court cannot review. However, the appellate court can review whether the factual disputes that the district court identified are material to the application of qualified immunity. "An officer challenges materiality when he contends that, taking all the plaintiff's factual allegations as true, no violation of a clearly established right was shown."

On appeal, Oliver argued that the facts at the moment of the threat were undisputed and urged the Court to exercise jurisdiction over the case on the issue of materiality. However, Oliver did not take the facts in a light most favorable to the plaintiffs. In fact, significant portions of his argument assumed facts different from those assumed by the magistrate judge. As such, Oliver's appeal did not challenge the materiality of the disputed facts, but rather an attack on the magistrate's factual determination, which the Fifth Circuit did not have jurisdiction to consider. The appellate court cannot assume facts different from those assumed by the magistrate. Thus, the Fifth Circuit dismissed Oliver's interlocutory appeal and remanded the case for further proceedings.

***Jackson v. Gautreaux,* No. 20-30442 (5th Cir., June 30, 2021)**

The Fifth Circuit affirmed the district court's grant of summary judgment based on qualified immunity to police officers who shot and killed Travis Stevenson after he repeatedly slammed his vehicle into a police cruiser and a concrete pillar in front of an apartment building while yelling, "Kill me!" After making repeated but unsuccessful efforts to deescalate the situation and to disable Stevenson's vehicle, officers shot and killed Stevenson.

The court concluded that the district court correctly held, in accordance with precedent, that Plaintiffs' excessive-force claim fails as a matter of law. In this case, Stevenson was using his car as a weapon; Stevenson, like the drivers in the court's precedent, exhibited volatile behaviors that contributed to the officers' justification in firing to prevent death or great bodily harm; and Plaintiffs have not produced any evidence that suggests the officers might have had a reasonable alternative course of action. The court agreed with the district court that Plaintiffs forfeited their failure-to-train claim against the sheriff by failing to plead it in their complaint and raising it only in response to the officers' motion for summary judgment.

***Kelson v. Clark,* No. 20-10764 (5th Cir., June 17, 2021)**

This interlocutory appeal arises out of the district court's denial of defendant paramedics Kyle Clark and Brad Cox's motion to dismiss on the basis of qualified immunity for claims of failure to treat and the wrongful death of Hirschell Wayne Fletcher, Jr., who died from previously sustained head trauma while in custody. The Fifth Circuit affirmed the district court's denial of Defendant Clark and Cox's motion to dismiss on the basis of qualified immunity.

The court agreed with Plaintiffs that between when paramedics Clark and Cox arrived and allegedly failed to treat Fletcher, but before he was formally transported, a reasonable person in Fletcher's position – surrounded and

confronted by five officers – may not have thought he was free to leave, and was therefore detained. In this case, Plaintiffs alleged that Clark, Cox, and the surrounding officers harassed and laughed at Fletcher until he was transported to the detention facility, all without any medical treatment. As alleged, the court concluded that such conduct supports that the paramedics may have been both subjectively aware of, and disregarded, Fletcher's serious risk of injury. Furthermore, it is undisputed that, at the time Clark and Cox allegedly failed to treat Fletcher, the law was clearly established that pretrial detainees have a Fourteenth Amendment right to medical care.

V. ADA

***Gosby v. Apache Industrial*, No. 21-40406 (5th Cir. April 8, 2022)**

Gosby, a temporary employee hired to work as a scaffolding helper on a construction job, suffered a diabetic attack at work on April 26, 2018. She was taken to the medical tent for treatment and was then sent home to stabilize her blood sugar. Gosby soon received clearance to return to work and informed Apach. That day, though, Apache sent home the scaffolding team, allegedly due to lack of work. Two days later, Apache announced 12 layoffs that included Gosby. Gosby claimed that two Apache employees told her she was included in the layoffs because of her visit to the medical tent.

Gosby filed a charge with the EEOC, alleging discrimination on account of her disability. After exhausting her administrative remedies, Gosby sued Apache, bringing claims for damages under the ADA. At the conclusion of discovery, the district court granted Apache's summary judgment, finding that Gosby had failed to establish a prima facie case of discrimination because she produced no evidence for a causal link between her disability and termination beyond the temporal proximity of her diabetic attack to her termination.

The Fifth Circuit disagreed. While the district court rejected that there was any significance between her diabetic attack and being laid off six days later because she was a temporary employee, the temporal proximity between protected activity and adverse employment action is sometimes enough to establish causation at the prima facie stage. And how long Gosby expected her employment to last doesn't have any bearing on whether Gosby carried her light burden of showing a prima facie case. Additionally, Gosby presented evidence that Apache's nondiscriminatory rationale for her inclusion in the reduction in force was pretextual. Thus, the Fifth Circuit reversed the summary judgment and remanded the case.

***Thompson v. Microsoft Corp.*, No. 20-50218 (5th Cir., June 22, 2021)**

The Fifth Circuit affirmed the district court's grant of summary judgment in favor of Microsoft on Plaintiff's claims under the Americans with Disabilities Act (ADA) for failure to accommodate, discrimination, and creation of a hostile work environment. Plaintiff's claims stemmed from his efforts to obtain accommodations for his Autism Spectrum Disorder while employed as an account technology strategist and an Enterprise Architect (EA) at Microsoft.

Plaintiff first requested accommodations from Microsoft's human resources group in 2015 when he was an account technology strategist. During negotiations about his requests, Plaintiff expressed interest in transferring to an EA role, which was "a senior-level executive position" serving as a liaison between Microsoft and its clients. Microsoft informed Plaintiff that some of his requested accommodations were incompatible with the EA role because the role required "strong leadership and people skills" and "[e]xecutive-level interpersonal, verbal, written and presentation skills." Plaintiff withdrew his request for accommodations and asked that his new manager not be informed about his ASD diagnosis. He then applied for an EA position, was recommended as a good fit for the role, and was ultimately hired for the role. Plaintiff's performance as an EA did not go smoothly, ultimately resulting in him again requesting accommodations.

In regard to Plaintiff's claim for failure to accommodate, the court concluded that Plaintiff's requests for individuals to assist him with translating verbal information into written materials, recording meeting notes, and performing administrative tasks were unreasonable because they would exempt him from performing essential functions. Consequently, Plaintiff is not a qualified person under the ADA. Furthermore, there was no genuine dispute of material fact that Plaintiff's performance as an EA at that point was deficient and thus there was no genuine dispute of material fact that he could have performed EA essential functions without all of his requested accommodations. The court also concluded that, even if Plaintiff were a qualified person under the ADA, he also failed to create a genuine issue of material fact as to whether Microsoft failed to negotiate in a good-faith manner. The court explained that, because Microsoft had the "ultimate discretion to choose between effective accommodations," it was justified in placing Plaintiff on job reassignment over his objections. In this case, the record demonstrated that Plaintiff, not Microsoft, was responsible for the breakdown of the interactive process seeking reasonable accommodation in refusing to indicate interest in any vacant position.

In regard to Plaintiff's discrimination claim, the court concluded that Plaintiff could not establish a prima facie discrimination claim for the same reason his failure-to-accommodate claim failed –he was not a qualified individual under the ADA. Even if he were qualified, Plaintiff was not subject to an adverse employment decision. Finally, in regard to Plaintiff's hostile-work-environment claim, the court concluded that none of the evidence Plaintiff relied on indicated that he was subject to harassment pervasive or severe enough to alter the conditions of his employment. Furthermore, Plaintiff's placement on job reassignment was not evidence of a hostile work environment.

***Crawford v. Hinds County Board of Supervisors,* No. 20-60372 (5th Cir., June 16, 2021)**

Scott Crawford needs a wheelchair to move about. After being unable to serve on a jury in part because of the architecture of the Hinds County Courthouse, he sued for injunctive relief under the Americans with Disabilities Act ("ADA"). The district court dismissed for lack of standing, holding it was too speculative that Plaintiff would, among other things, again be excluded from jury service.

The Fifth Circuit reversed and remanded, concluding that Plaintiff has standing to seek injunctive relief where he has a substantial risk of being called for jury duty again. The court explained that Plaintiff was called twice between 2012 and 2017, and that Hinds County is not extremely populous, and only a subset of its population is eligible for jury service, so it is fairly likely that Plaintiff will again, at some point, be called for jury duty. The court also concluded that the architectural barriers Plaintiff claims prevented his serving on a jury duty amount to a systemic exclusion.

VI. TITLE VII

Saketkoo v. Admin Tulane Educ., No. 21-30055 (5th Cir. April 21, 2022)

Dr. Lesley Saketkoo was hired as an associate professor at Tulane's School of Medicine in 2014. Her one-year contract was renewed annually until 2019. In 2017, she was transferred from one division to another, where Dr. Saketkoo began alleging discriminatory treatment by her supervisor when he failed to support her research. In 2019, Dr. Saketkoo was told her contract was not being renewed because she was not earning enough to pay her salary. Dr. Saketkoo stated that her supervisor discriminated against her based on gender, which the school stated it would investigate but that it did not change anything related to Saketkoo's contract.

Dr. Saketkoo filed suit against the Administrators, the School, the Dean, and her supervisor, asserting claims under Title VII, the Equal Pay Act, and state law. After all defendants were dismissed by stipulation except the Administrators, the district court granted

summary judgment in favor of the Administrators because Dr. Saketkoo did not make a successful prima facie case of gender discrimination, retaliation, and hostile work environment.

Upon review, the Fifth Circuit affirmed the decision. Regarding employment discrimination, Dr. Saketkoo had failed to offer evidence that she was treated differently than similarly situated employees – that is, she did not present evidence that any male physicians shared her research responsibilities, section assignments, historical performances, or other attributes that would render them similarly situated. Regarding her retaliation claim, Dr. Saketkoo offered no evidence that she reported her discrimination claim before the School's decision to not renew her contract. Finally, on her claim of hostile work environment, the Fifth Circuit found that Dr. Saketkoo's examples of "hostile" conduct on the part of her supervisor did not insufficiently severe or pervasive to sustain her claim. The sporadic and abrasive conduct was not severe or pervasive enough to support her claim.

Woods v. Cantrell, No. 21-30150 (5th Cir. March 24, 2021)

Woods, pro se, filed a complaint against his former employer, French Market Corporation, alleging a violation of Title VII for discriminating against him based on race and religion and subjecting him to a hostile work environment. He also alleged a host of other civil rights allegations – all of which were dismissed under rule 12(b)(6).

Upon review, the Fifth Circuit found that most of Woods' claims were conclusory and could not support a cognizable claim – with the exception of his hostile work environment claim. In that regard, Wood's complaint specifically alleged that, in the presence of other employees, Woods' supervisor directly called him a "Lazy Monkey A____ N_____." This allegation is specific and non-conclusory. And while the district court dismissed it because "a single utterance of a racial epithet cannot support a hostile work environment claim," the Fifth Circuit disagreed. "Under the totality of the circumstances test, a single incident of harassment, if sufficiently severe, can give rise to a viable Title VII claim."

Other circuits have recognized that the use of the N-word by a supervisor in the presence of subordinates can alter the conditions of employment and create an abusive working environment. The use of "Lazy Monkey A____ N_____" in front of Woods' fellow employees is sufficient to create an actionable claim of hostile work environment.

***Jennings v. Towers Watson,* No. 19-11028 (5th Cir. August 25, 2021)**

In May 2016, Willis Towers Watson (WTW) hired Christian Jennings to work as a seasonal benefits adviser, a position she had held for the three previous seasons. On May 24, during a second day of mandatory training, she fell and was injured in WTW's parking lot. A doctor diagnosed Jennings with left ankle pain and right shin pain. The doctor cleared her to return to work the following day with certain restrictions, which were expected to last until June 1, 2016. The restrictions included walking no more than two hours per day and refraining from climbing stairs. Jennings didn't return to the training, which was held on the second floor of a building, because she didn't think WTW had an accessible elevator. She also claimed she asked the employer to have a trainer meet her on the first floor to continue the training and that the request was denied. Instead, WTW let Jennings know she could restart the training on June 6. She alleged the employer told her if she didn't report for training on that date, she would be unemployed. As offered, she restarted and completed the training.

Jennings later filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) asserting that after she was injured on the job and saw a doctor, WTW denied her request for a reasonable accommodation. After being terminated for insubordination (specifically, violations of attendance policies and procedures), Plaintiff filed suit against her former employer, WTW,

alleging civil conspiracy under Texas law, a hostile work environment under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 (ADA), disability discrimination under the ADA, racial discrimination, and wrongful termination. After both parties moved for summary judgment, the district court granted WTW's motion and denied Jennings's.

The Fifth Circuit affirmed the district court's grant of WTW's motion for summary judgment. The court concluded that, while Plaintiff did exhaust her disability discrimination and failure-to-accommodate claims, she failed to exhaust her claims of race discrimination and a hostile work environment. The court also concluded that Plaintiff had not raised a genuine issue of material fact as to her failure-to-accommodate and disability discrimination claims, and WTW is entitled to judgment as a matter of law. The court further concluded that the district court did not abuse its discretion in denying Plaintiff's motion to alter or amend the judgment and Plaintiff has not shown that the district court abused its discretion in taxing costs against her.

***Ernst v. Methodist Hospital,* No. 20-20321 (5th Cir., June 8, 2021)**

Methodist Hospital System fired James Ernst (who describes himself as a gay, white man) after a job candidate alleged that Ernst had sexually harassed him. Ernst sued Houston Methodist, alleging sex discrimination, retaliation, and race discrimination under Title VII. While in his EEOC questionnaire Plaintiff alleged sex discrimination because of his sexual orientation, age discrimination, and retaliation, in his formal EEOC charge he only checked the box for race.

The Fifth Circuit affirmed the district court's dismissal of the sex discrimination and retaliation claims because Plaintiff failed to exhaust his administrative remedies. In this case, Plaintiff failed to establish that he satisfied the EEOC verification requirements for a charge. The court also affirmed the district court's grant of summary judgment on the race discrimination claim where Plaintiff failed to show that he was replaced or that a comparator received more favorable treatment.

***Harris v. City of Schertz,* No. 20-50795 (5th Cir. March 11, 2022)**

Harris worked for the City for 28 years. At the time of his termination, he supervised the City's Animal Services department – a department that was experiencing substantial issues at that time. Harris filed suit alleging age and sex discrimination. The district court granted summary judgment in favor of the City on both claims, finding that Harris had failed to provide evidence that a similarly situated employee outside his protected class was treated more favorably and failed to prove that his age was the "but for" cause of his termination. On appeal, Harris only challenged the age-based discrimination claim.

The Fifth Circuit found that Harris had not been fired because of his age. While the Executive Director of Operations had stated in his deposition that Harris was largely unqualified for the burgeoning responsibilities of his position, this was not enough to infer that Harris was "old and slow" as Harris suggested. "When comments by a decision-maker have been found sufficiently suggestive of age basis, they have been much more age-specific than the reference to responsibilities as being too great."

Olivarez v. T-Mobile USA, Inc.,* No. 20-20463 (5th Cir., May 12, 2021*)

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 initially

concluded that Plaintiff did 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.

However, just two days later, on May 14, 2021, the Fifth Circuit withdrew its prior opinion and concluded that at the Rule 12(b)(6) stage, its analysis of the Title VII claim is governed by Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) – and not the evidentiary standard set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under Swierkiewicz, there are two ultimate elements a Plaintiff must plead to support a disparate treatment claim under Title VII: (1) an adverse employment action, (2) taken against a Plaintiff because of her protected status. The court explained that when a complaint purports to allege a case of circumstantial evidence of discrimination, it may be helpful to refer to McDonnell Douglas to understand whether a Plaintiff has sufficiently pleaded an adverse employment action taken "because of" his protected status as required under Swierkiewicz.

Applying these principles here, the court concluded that there was no dispute that Plaintiff suffered an adverse employment action. However, the court concluded that Plaintiff had failed to plead any facts indicating less favorable treatment than others "similarly situated" outside of the asserted protected class. In this case, Plaintiff's live pleading did not contain any facts about any comparators at all, and there was no allegation that any non-transgender employee with a similar job and supervisor and who engaged in the same conduct as Plaintiff received more favorable treatment. Therefore, the complaint did not plead any facts that would permit a reasonable inference that T-Mobile terminated Plaintiff because of gender identity. Furthermore, Plaintiff's Americans with Disabilities Act discrimination claim failed for similar reasons, and Plaintiff's retaliation claim under Title VII is untimely.

The court rejected Plaintiff's contention that Bostock v. Clayton County, 140 S. Ct. 1731 (2020), changed the law and created a lower standard for those alleging discrimination based on gender identity. Rather, the court concluded that Bostock did not constitute an intervening change of law that warranted reconsideration under Rule 59(e). The court explained that Bostock defined sex discrimination to encompass sexual orientation and gender identity discrimination, but did not alter the meaning of discrimination itself. Therefore, 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 was an ordinary business practice rather than discrimination. Finally, the district court did not abuse its discretion in denying further leave to amend.

VII. FMLA

***Houston v. Texas Dep't of Agriculture*, No. 20-20591 (5th Cir. November 5, 2021)**

Houston, a former state employee at the Texas Department of Agriculture, alleged she was fired in retaliation for exercising her rights under the FMLA and discriminated against under the Texas Rehabilitation Act. Houston suffered from lupus, anemia, and other illnesses which caused her to miss work and sometimes take leave under the FMLA. Her job required her to perform on-site inspections; in 2016, when she returned from a lengthy absence, she requested an accommodation for telework, which was denied. After a series of warnings in 2016 and 2017, she was placed on a 90-day probation period. At the end of the probation, she was terminated for failure to correct her performance deficiencies, excessive absenteeism and tardiness unrelated to protected FMLA leave and insubordination.

The Fifth Circuit affirmed summary judgment in favor of defendant, finding that defendant established legitimate, nondiscriminatory reasons for Houston's termination. Houston had failed to raise a disputed material fact showing that these reasons were pretextual. Her principal argument that the denial of telework led to her termination was speculation and not supported by specific evidence.

Hester v. Bell-Textron, Inc., No. 20-11140 (5th Cir., August 23, 2021)

Hester, employed by Bell-Textron since 1997, suffers from epilepsy and glaucoma. Hester also assists his wife, who has stage-four cancer. In 2017, Hester began reporting to Cribb, who was aware of Hester's medical history. In 2018, Cribb issued Hester's first poor performance review. Months later, Cribb issued Hester a final warning related to a part that broke during testing. Hester protested and was escorted off-premises. Cribb told him to apply for an employee assistance program. Hester was granted short-term disability coverage and leave under the Family and Medical Leave Act (FMLA) based on his epilepsy and glaucoma. A human resources employee fired Hester by telephone weeks later, citing Hester's "poor mid-year performance review." Hester was informed that he still had several weeks of FMLA leave remaining. Hester then filed suit, alleging discriminatory termination during the pendency of his FMLA leave and interference with his right of reinstatement at the end of his FMLA leave.

The Fifth Circuit reversed the dismissal of his complaint. The alleged timeline of events indicates that Bell-Textron's termination decision was not "completely unrelated" to the exercise of his FMLA rights. The allegation that Bell-Textron directed Hester to an employee assistance program and guided him through the FMLA application process—rather than simply firing him outright on the basis of poor workplace performance—indicates that Hester's right to restored employment was still intact when he secured FMLA leave.

***Campos v. Steves & Sons, Inc.*, No. 19-51100 (5th Cir., August 19, 2021)**

Plaintiff appealed the district court's grant of summary judgment in favor of the employer on his state-law disability-discrimination and retaliation claims, as well as his claims for retaliation and interference under the Family Medical Leave Act (FMLA). Plaintiff's claim stemmed from his termination after taking time off of work for open-heart surgery.

The court concluded that the district court properly granted summary judgment on Plaintiff's disability discrimination claim under Chapter 21 of the Texas Labor Code because there was simply no medical evidence in the record except for Plaintiff's own statements that he was qualified to return to work at any point, let alone before his FMLA leave expired; Plaintiff failed to establish that he was qualified for either of two positions at work; and there was no other request for accommodations outside of the ability to attend dialysis treatments nor any reasonable explanation to account for the contradictory statements about Plaintiff's physical capabilities made in the application for social security benefits. The court also concluded that Plaintiff failed to support that he engaged in any protected activity under state law that led to retaliation by his employer.

In regard to Plaintiff's FMLA claims, the court concluded that the district court correctly determined that Plaintiff did not show the prejudice necessary to prevail on an FMLA interference claim. However, in regard to Plaintiff's FMLA retaliation claim, the adverse employment action occurred approximately one month after Plaintiff's FMLA leave expired. The court concluded that a month is close enough in time to create a causal connection. Therefore, the burden shifts to the employer to offer legitimate, nonretaliatory reasons for the adverse reaction. Although the employer offered three reasons, the court concluded that they were adequately rebutted for purposes of summary judgment. Accordingly, the court affirmed on all claims except for the FMLA retaliation claim,

which it reversed and remanded for further proceedings.

***Lindsey v. Bio-Medical Applications of Louisiana, LLC,* No. 20-30289 (5th Cir., August 16, 2021)**

Lindsey, a registered nurse, alleged that, after 17 years of service, her employer, BMA, terminated her because she was compelled to take Family and Medical Leave Act (FMLA), 29 U.S.C. 2615(a)(1) leave in response to a series of personal tragedies that included a fire in her home and the hospitalization of her son. BMA claimed she was fired for poor attendance and missed deadlines.

The district court granted BMA summary judgment on her FMLA discriminatory retaliation claim. The Fifth Circuit reversed. Lindsey's employment records suggest BMA offered attendance issues as a post hoc rationalization to justify her firing. BMA was not able to list specific dates or times of her purported absences; summary judgment evidence suggested that the deadlines were hortatory rather than mandatory; and that Lindsey was never informed that her failure to meet these deadlines could result in discipline of any kind, let alone termination. Further, BMA did not follow its own progressive discipline policy, which instructed that "corrective action be escalating."

VIII. 14TH AMENDMENT

***Freedom From Religion Foundation, Inc. v. Mack,* No. 21-20279 (5th Cir., June 9, 2021)**

In 2014, Judge Mack, a justice of the peace in Montgomery County, Texas, created a chaplaincy program to assist him in the duties as county coroner. As a corollary to the program, Judge Mack regularly invited the volunteer chaplains to participate in "opening ceremonies" in his courtroom before the first case was called. In these ceremonies, chaplains offered prayers or "encouraging words." Those with business before the court were not required to stay in the room and were told that their involvement would not be considered by the court in its decisions. An attorney and FFRF filed suit against Judge Mack in both his individual and official capacities alleging that the opening ceremonies violated the Establishment Clause of the U.S. Constitution. The District Court granted Plaintiff's summary judgment motion finding that the opening ceremonies violated the Establishment Clause.

The Fifth Circuit granted Judge Mack's motion for a stay pending appeal and concluded that Judge Mack made a strong showing that the district court erred and is likely to succeed on the merits of his claims, because the district court's adjudication of FFRF's official-capacity claim was manifestly erroneous and also because FFRF's individual-capacity claim is likely to fail. The court explained that, even assuming Judge Mack could be considered a state official, rather than a county official, FFRF's official-capacity claim must be dismissed because the Supreme Court's Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989), decision squarely prohibits official-capacity claims against state officers under 42 U.S.C. 1983. In regard to the individual-capacity claim, the court explained that the Supreme Court has held that our Nation's history and tradition allow legislatures to use tax dollars to pay for chaplains who perform sectarian prayers before sessions. See Marsh v. Chambers, 463 U.S. 783 (1983). The court noted that Judge Mack's chaplaincy program raises fewer questions under the Establishment Clause because it uses zero tax dollars and operates on a volunteer basis. The court rejected FFRF's arguments that the evidence of courtroom prayers at the Founding was spotty; that the Supreme Court's invocation does not solicit the participation of the attending public, but that Judge Mack's opening ceremony is "coercive;" that Justice Kagan's hypothetical prayer in the dissent of Town of Greece v. Galloway, 572 U.S. 565 (2014), supported FFRF's position; and that Judge Mack's practices runs afoul of the Lemon test. The court also concluded that Judge Mack will be irreparably harmed in the absence of a stay pending appeal; any injury to FFRF is outweighed by Judge Mack's strong likelihood of success on the merits; and the public interest warrants a stay.

IX. § 1981

***Scott v. U.S. Bank National Ass'n*, No. 21-10031 (5th Cir. November 2, 2021)**

Scott, an African American male, was hired by the Bank in its underwriting department in 2016. He received positive reviews and a merit-based raise between 2016 and 2018. In January of 2018, Scott overheard a manager in his department tell Scott's direct supervisor that he intended to terminate 4 African American employees. Scott then warned those employees, one of which went to HR and complained. Scott was requested to provide a written statement, which he did after expressing concern that he would be retaliated against. Scott alleged that the Bank then began it retaliate against him, failing his loans, giving him warnings for poor performance, and requiring him to take a refresher course. He was terminated in May 2018.

Scott sued the Bank, alleging retaliation under Section 1981. The Bank moved to dismiss, which the district court granted with prejudice, finding that Scott could not state a claim for retaliation because he failed to allege that he participated in a protected activity under Section 1981. The district court further denied Scott leave to amend his complaint.

On appeal, the Fifth Circuit concluded that the district court did not err in denying Scott leave to amend when he failed to offer any grounds as to why his leave should be granted or how deficiencies in his complaint could be corrected. However, the Court concluded that it was error to find that Scott had failed to state a claim under Section 1981 for failing to allege he engaged in a protected activity. A supervisor's consideration of the race of an employee when deciding to terminate that employee is an unlawful employment practice, which Scott opposed. After Scott gave his statement to HR, he alleged that the Bank began to retaliate against him. The Court concluded that Scott had successfully pleaded facts that could support a reasonable belief that he was fired in retaliation.

***Johnson v. PRIDE Industries, Inc.*, No. 19-50173 (5th Cir., August 6, 2021)**

In 2015, PRIDE, a non-profit that employs individuals with disabilities, hired Johnson, an African-American. Johnson endured repeated race-based harassment by his fellow PRIDE employee Palomares. Johnson's colleague corroborated that Palomares used racially offensive language and generally treated non-Hispanic employees worse than their Hispanic counterparts. Beyond his mistreatment by Palomares, several other workplace incidents occurred that Johnson viewed as harassing. Johnson made multiple complaints regarding Palomares's harassing behavior and was told, "you've just got to be tough and keep going." Ultimately, Johnson angrily confronted Palomares at PRIDE's worksite. Johnson was written up and told to "follow instructions and remain respectful." Johnson interviewed for a supervisory carpentry position. PRIDE selected a Hispanic individual for the position, who, unlike Johnson, had supervisory experience. Johnson filed a charge of discrimination with the Equal Employment Opportunity Commission. PRIDE's Human Resources Director, acknowledged that Johnson reported that Palomares had been harassing him but PRIDE ultimately "did not find that any harassment." Later that month, PRIDE called Johnson to discuss problems with his attendance. Johnson said coming into work was "too stressful," declared that he was resigning, and walked out. He signed a resignation letter—purportedly drafted by PRIDE—that stated he felt "there were several incidents that occurred during his time with PRIDE . . . that affected his mental health," including "confrontations and/or conflicts with his supervisor and or other coworkers . . . that have caused him stress and anxiety." Per the letter, Johnson resigned "so he can focus on receiving the treatment he needs."

In December 2017, following his resignation, Johnson filed this suit in Texas state court, alleging that PRIDE violated federal and state employment discrimination laws by maintaining a hostile work environment and taking adverse employment actions against him for discriminatory and retaliatory reasons,

including by failing to promote him and constructively discharging him. PRIDE removed the matter to federal court, and the district court subsequently granted PRIDE's motion for summary judgment. The court held that (1) Johnson's hostile work environment claim failed because he did not show that the harassment was severe or pervasive; (2) Johnson's failure to promote claim was unavailing because he did not carry his burden to show that PRIDE promoted other candidates with equal or fewer qualifications in his place; (3) Johnson could pursue his constructive discharge claim even though he had not exhausted his administrative remedies; but (4) Johnson's inability to establish a hostile work environment necessarily precluded him from meeting the higher bar of showing constructive discharge; and (5) Johnson's retaliation claim failed because he could not establish a nexus between protected activity and any adverse employment action, including his alleged constructive discharge.

The Fifth Circuit affirmed in part. Summary judgment for the employer was proper as to most of Johnson's claims, but the court erred in its ruling on Johnson's hostile work environment claim.

***Cope v. Cogdill,* No. 19-10798 (5th Cir., July 2, 2021)**

The Fifth Circuit reversed the district court's denial of qualified immunity to three officers employed by the Coleman County Jail in an action alleging claims regarding Derrek Monroe's death by suicide that occurred at the jail.

The court concluded that Defendant Jailer's decision to wait for backup before entering the cell after he saw Monroe strangling himself with a phone cord did not violate any clearly established constitutional right. The court explained that it was not sufficiently clear at the time that every reasonable official would have understood that waiting for a backup officer to arrive in accordance with prison policy violates a pretrial detainee's right. Therefore, Defendant Jailer was entitled to qualified immunity on the deliberate indifference claim. Furthermore, it was not clearly established at the time that Defendant jailer should have immediately called 911, where he did call another jailer who called 911. The court also concluded that Defendant Jail Administrator and Defendant Sheriff were not deliberately indifferent where holding Monroe in a cell containing a phone cord did not violate a clearly established constitutional right. Finally, Defendant Jail Administrator and Defendant Sheriff decision to staff only one weekend jailer did not violate any clearly established constitutional right. The court rendered judgment in defendants' favor.

X. MISCELLANEOUS CASES

Dynamic CRM v. UMA Education,* No. 21-20351 (5th Cir. April 19, 2022*)

This case involves forum selection clauses in commercial contracts. Dynamic CRM Recruiting Solutions sued UMA Education in Harris County district court for alleged misappropriation of Dynamic's software. UMA removed the action to federal court, which in turn remanded it to state court based on the forum selection clause. UMA appealed the remand to the Fifth Circuit.

The clause in dispute reads:

> Any dispute arising out of or under this Agreement shall be brought before the district courts of Harris County Texas….unless mutually agreed otherwise. Notwithstanding this, this choice of forum provision shall not prevent either party from seeking injunctive relief with respect to a violation of intellectual property rights or confidentiality obligations in any appropriate jurisdiction.

UMA argued that the choice of Harris County district courts was not exclusive of other forum, and even if it were, the "district courts of Harris County" included the federal district courts located there.

On review, the Fifth Circuit stated that while the enforceability of a forum selection clause in a diversity case such as this one is governed by federal law, the clause's interpretation is governed by the law of the forum state. Contractual choice-of-law clauses are generally valid under Texas law and neither party argued that the clause is invalid. Under Texas law then, the Court's "prime directive" is to determine the parties' intent as expressed in the contract. And the surest manifestation of what the parties intended is what the agreement says.

Here, the natural reading of the clause is that the choice of Harris County district courts is exclusive of other forum. The use of the word "shall" is indicative of "mandatory." Further, the second sentence that sets forth the only exception did not help UMA as it was Dynamic that sought injunctive relief and therefore it was Dynamic, not UMA, who could bring the dispute before the jurisdiction of its choosing.

***Seigler v. Wal-Mart Stores TX,* No. 20-11080 (5th Cir. April 5, 2022)**

Seigler was in the deli section of a Walmart store when she slipped and fell on a greasy substance (chicken grease). After she filed a premises liability claim, Walmart removed the case based on diversity jurisdiction and filed summary judgment, claiming Seigler had no evidence that Walmart had actual or constructive knowledge of the grease spill. Seigler included an affidavit with her response, which Walmart then moved to strike as a sham affidavit. Three days later, without any response from Seigler, the district court granted Walmart's motion and dismissed Seigler's case.

The "sham affidavit doctrine" does not allow a party to defeat a summary judgment using an affidavit that impeaches, without explanation, sworn testimony. The bar for applying the doctrine is a high one, typically requiring affidavit testimony that is "inherently inconsistent" with prior testimony. An affidavit that supplements rather than contradicts prior deposition testimony falls outside of the doctrine.

The district court identified four discrepancies between Seigler's deposition testimony and her affidavit regarding her description of the chicken grease. Seigler argued that none of her affidavit testimony was inherently inconsistent but rather was supplementary to her deposition testimony. Walmart argued that Seigler's affidavit failed to include an explanation for the additional testimony. However, an explanation is not required unless the affidavit contradicts, rather than supplements, the deposition testimony – which is what the Fifth Circuit found. Seigler's affidavit testimony regarding her description of the "chicken grease" was not necessarily contradictory to her deposition testimony and was something a jury should evaluate in their role of resolving questions of credibility. Thus, the Fifth Circuit concluded that the district court abused its discretion in applying the sham affidavit rule.

***Abbt v. City of Houston,* No. 21-20085 (5th Cir. March 11, 2022)**

Melinda Abbt was a firefighter with the City of Houston. At some point in time, she made an intimate, nude video of herself to share with her husband and saved it on her personal laptop. She brought the laptop to the station and somehow the video landed in a Junior Captain's email box. The video was shared with the District Chief – both of whom proceeded to watch the video off and on over the next several years.

When Abbt eventually found out, she was distraught and called in sick the next day and for the weeks that followed. She was diagnosed with PTSD 3 weeks later and received 6 months of FMLA unpaid leave. She filed a worker's comp claim 6 months later, which the City opposed. The ALJ found that Abbt had suffered a compensable mental trauma injury.

Abbt was medically separated from the City and her employment ended.

The district court granted summary judgment in favor of the City and dismissed Abbt's claims for sexual harassment and retaliation. On appeal, the Fifth Circuit agreed that there was no genuine dispute of material fact as to the retaliation claim. However, with respect to her harassment claim, it was undisputed that Abbt was a member of a protected class and that she experienced unwelcome harassment. The harassment was based on sex and it was severe enough to create an abusive or hostile work environment. Further, the conduct was objectively offensive to Abbt and affected a term or condition of her employment.

***Moon v. Olivarez,* No. 21-50193 (5th Cir. February 11, 2021)**

Moon spent 17 years in prison for a rape he did not commit. When he was exonerated and released from prison in 2004, he filed suit against numerous individuals and entities. After 15 years of litigation, the only remaining claim is for false imprisonment under Texas state law against two retired El Paso detectives, Olivarez and Dove. The district court granted summary judgment in favor of the detectives, concluding that they did not willfully detain Moon, an essential element for the false imprisonment claim.

In finding no error and affirming the decision, the Fifth Circuit explained that willful detention may be shown even when the defendant does not actively detain the plaintiff IF the defendant instigated the false imprisonment. That is, the defendant engages in conduct that is intended to cause one to be detained and in fact causes the detention. In this case, there was no evidence to support Moon's contention that Olivarez and Dove instigated his arrest. Without this evidence, Plaintiff was unable to sustain his claim for false imprisonment.

***Wantou v. Wal-Mart Stores Texas, LLC,* No. 20-40284 (5th Cir. January 11, 2022)**

Wantou, a pharmacist from Cameroon, filed suit against his former employer, contending that Walmart intentionally subjected and/or allowed him to be subjected to discrimination based on race, color and national original, illegal harassment, and a hostile work environment. Wantou also alleged retaliation for complaining about discrimination.

The Fifth Circuit concluded that the district court did not reversibly err in granting summary judgment in favor of Walmart on the hostile work environment claim where it was not evident that a triable dispute existed relative to whether Walmart remained aware that Wantou suffered continued harassment and failed to take prompt remedial action. The Court further concluded that the district court did not abuse its discretion in instructing the jury and in refusing to provide the specific Cat's Paw instructions that Wantou requested.

Veasey v. Abbott,* No. 20-40428 (5th Cir., September 3, 2021*)

After the en banc court held unlawful a Texas statute requiring voters to present photo ID in order to vote, the only issue in this appeal is whether Plaintiffs are prevailing parties and thereby entitled to recover attorneys' fees under 42 U.S.C. 1988(b) and 52 U.S.C. 10310(e).

The Fifth Circuit affirmed the district court's finding that Plaintiffs are prevailing parties under Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 604 (2001), and the district court's award of attorneys' fees. In this case, Plaintiffs successfully challenged the Texas photo ID requirement before the en banc court, and used that victory to secure a court order permanently preventing its enforcement during the elections in 2016 and 2017. Furthermore, the court order substituted the photo ID requirement with a mere option—which of course defeats the whole purpose of a mandate, and the state cannot go

back in time and re-run the 2016 and 2017 elections under a photo ID requirement. The State even readily admits that any suggestion that Plaintiffs did not prevail in these proceedings would be "counterintuitive," to say the least.

***Rollins v. Home Depot USA, Inc.*, No. 20-50736 (5th Cir., August 9, 2021)**

The Fifth Circuit affirmed the district court's denial of relief under Federal Rule of Civil Procedure 59(e) to Plaintiff in a personal injury case where his counsel failed to see the electronic notification of a summary judgment motion filed by defendants. In this case, counsel's computer's email system placed the notification in a folder that he does not regularly monitor, and counsel did not check the docket after the deadline for dispositive motions had elapsed. Consequently, counsel did not file an opposition to the summary judgment motion. So, the district court subsequently entered judgment against Plaintiff.

The court concluded that its precedent makes clear that no such relief is available under circumstances such as this. The court explained that counsel provided the email address to defendants, counsel was plainly in the best position to ensure that his own email was working properly, and counsel could have checked the docket after the agreed deadline for dispositive motions had already passed. Therefore, the district court did not abuse its discretion in denying the Rule 59(e) motion. The court also concluded that Plaintiff forfeited his claim that a fact dispute precluded summary judgment by failing to raise it first before the district court.