# RECENT FEDERAL CASES
# OF INTEREST TO GOVERNMENTAL ENTITIES

**TML ANNUAL MEETING**
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**D. RANDALL MONTGOMERY**
**ASHLEY SMITH**
**ALYSSA BARRENECHE**
D. Randall Montgomery & Associates, P.L.L.C.
12400 Coit Road, Suite 560
Dallas, Texas 75251
(214) 292-2600
*Rmontgomery@drmlawyers.com*
*asmith@drmlawyers.com*
*abarreneche@drmlawyers.com*

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## I. FIRST AMENDMENT

***Anderson v. Harris County*, 98 F.4th 641 (5th Cir. April 15, 2024*)***

A current and a former employee of Harris County filed suit against Harris County, alleging that Constable Christopher Diaz violated their First Amendment rights. Both alleged that Diza instituted reforms to ensure his re-election, which included requiring employees to work on his campaign and retaliating against those who impeded campaign functions. Plaintiffs asserted that Diaz had final authority of employment decisions and that his actions resulted in various adverse employment actions. The County moved for summary judgment, which the district court granted, finding that Diaz was not a policymaker for the County.

On appeal, the Fifth Circuit affirmed. Diaz, as a constable for a single precinct, was not a final policymaker for Harris County. The Court also concluded that Plaintiffs failed to show that the First Amendment violations were the result of an official county policy.

***Bailey v. Iles*, 87 F.4th 275 (5th Cir. November 21, 2023)**

Waylon Bailey lives in Rapides Parish in central Louisiana. On March 20, 2020—during the first month of the COVID-19 pandemic—he posted the following on Facebook:

SHARE SHARE SHARE ! ! ! ! JUST IN: RAPIDES PARISH SHERIFF'S OFFICE HAVE ISSUED THE ORDER, IF DEPUTIES COME INTO CONTACT WITH " THE INFECTED" SHOOT ON SIGHT….Lord have mercy on us all. #Covid9teen #weneedyoubradpitt

Bailey's post was in response to another friend—Matthew Mertens— posting a joke about COVID, and Mertens understood Bailey's post to be a joke. Bailey intended the post as a joke and did not intend to scare anyone.

Despite there being no complaints about the post, Detective Iles of the Rapides Parish Sheriff's Office was assigned to investigate the post, which he determined to be "terrorizing" in violation of Louisiana Revised Statute § 14:40.1. Without seeking an arrest warrant, Iles and numerous other officers went to Bailey's house and arrested him. Bailey deleted his Facebook post after Iles told him that he could either delete it himself or the RPSO would contact Facebook to remove it. In the affidavit of probable cause for arrest without warrant and later during his deposition testimony, Iles agreed that he relied solely on the Facebook post itself. Bailey's arrest was posted on the sheriff's office Facebook page, and Bailey was identified in news reports as having been arrested for terrorism. The district attorney subsequently dropped the charges and did not prosecute Bailey.

Bailey filed suit under Section 1983 against Detective Isles and the Sheriff, alleging violations of his First and Fourth Amendment rights. The district court granted summary judgment based on qualified immunity. Additionally, while neither party briefed the issue, the district court also concluded *sua sponte* that Bailey's Facebook post was not constitutionally protected speech because it created a "clear and present danger."

The Fifth Circuit reversed and remanded, first holding that the Facebook post was constitutionally protected, and that the district court erred in applying the "clear and present danger" test. Instead, the crucial element is whether the post was directed to inciting or producing imminent lawless action, which Bailey's post did not. The Court also found that defendants were not entitled to qualified immunity as the Facebook post was constitutionally protected.

***Lindke v. Freed,* 601 US _ (2024)**

James Freed created a private Facebook profile that was originally intended to connect with family and friends. Eventually, he grew too popular for Facebook's 5,000-friend limit on profiles. So Freed converted his profile to a "page," which has unlimited "followers" instead of friends and is public so that anyone may "follow" it. Freed designated the page category as "public figure."

In 2014, Freed was appointed city manager for Port Huron, Michigan, so he updated his Facebook page to reflect that new title. On his page, he shared both personal updates about himself and his family and professional updates, including directives and policies he initiated in his official capacity.

Kevin Lindke came across Freed's page and did not approve of how Freed was handling the pandemic. He posted criticism of Freed in response to Freed's Facebook page, and Freed deleted the comments and ultimately "blocked" Lindke.

Lindke sued Freed under 42 U.S.C. § 1983 for violating his First Amendment rights by deleting his comments and blocking him. The district court granted summary judgment to Freed, and the U.S. Court of Appeals for the Sixth Circuit affirmed.

The question presented to the Supreme Court was when does a public official's social media activity constitute state action subject to the First Amendment. In a unanimous decision, the Court held that a public official who prevents someone from commenting on the official's social-media page engages in state action under 42 U.S.C. § 1983 only if the official both (1) possessed actual authority to speak on the State's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts.

The Court held that state officials retain their own First Amendment rights to speak about their jobs as private citizens. To determine whether an official was acting in an official capacity or as a private citizen on social media, courts must look at factors like whether the account was designated as personal or official, whether individual posts expressly invoked the official's state authority, and the immediate legal effect of the posts. Additional contextual factors like the official's use of government staff to make posts may also be relevant in unclear cases. Because the U.S. Court of Appeals for the Sixth Circuit applied a different test, the Court vacated its judgment and remanded the case.

***Johnson v. Harris County*, 83 F.4th 941 (5th Cir. October 12, 2023)**

Johnson was arrested and charged with interfering with the duties of a public servant when she filmed officers arresting her brother. She filed suit 856 days later under Section 1983 against Harris County and a number of officers, asserting a series of alleged constitutional violations. The district court found the applicable statute of limitations barred all claims and granted Defendants' respective motions to dismiss.

On appeal, Plaintiff challenged the dismissal of her claims for false arrest, false imprisonment, and failure to train, supervise and discipline. She also argued that the district court erred in denying her leave to amend and requested reassignment to a different district judge. The Fifth Circuit affirmed. A false arrest claim accrues when charges are filed. Similarly, a Section 1983 claim for false imprisonment accrues when legal process is initiated. Limitations had long lapsed by the time Plaintiff sued.

***National Press v. McCraw,* No. 22-50337 (5th Cir. January 10, 2024)**

Chapter 423 of the Texas Government Code governs the operation of drones in Texas airspace. In this case, Plaintiffs claimed a sweeping First Amendment right to use unmanned drones to film private individuals and property without their consent. They also asserted a constitutional right to fly drones at low altitudes over critical infrastructure facilities

like prisons and sports venues. Plaintiffs filed a pre-enforcement facial constitutional challenge to Chapter 423, seeking to enjoin Defendants from enforcing the Surveillance and No-Fly provisions. Plaintiffs argued that Chapter 423 unlawfully infringed on their right to film and gather news, that the statutory prohibitions were so vague that they violated Due Process, and that Texas has no authority to promulgate drone regulations because the Federal Government has expressly preempted all state and local drone regulations.

The Fifth Circuit reversed and remanded with instructions to enter judgment in Defendants' favor on the constitutional claims. Plaintiffs did not have a sweeping First Amendment right to use drones to film private individuals and property without their consent. The Court did affirm the district court's dismissal of the federal preemption claim, explaining that federal law expressly contemplates concurrent non-federal regulation of drones, especially where privacy and critical infrastructure are concerned.

***Perez v. City of San Antonio,* 98 F.4th 586 (5th Cir. April 11, 2024)**

Two members of the Lipan-Apache Native American Church sued the City of San Antonion for preventing them from performing religious ceremonies in Brackenridge Park. Plaintiffs claim that the City's development plan for the park, which included tree removal and bird deterrence measures, violated their rights under the First Amendment, the Texas Religious Freedom Restoration Act and the Texas Constitution. Plaintiffs sought a temporary injunction, which the court declined although it granted Plaintiffs access to the area for religious ceremonies.

Both parties appealed. The Fifth Circuit affirmed, finding that the City's development plan did not substantially burden Plaintiffs' religious exercise. The Court also found that the City's plan served two compelling interests: public health and safety and compliance with federal law. The Court concluded that that the City's tree removal and bird deterrence plans were the least restrictive means to advance these interests.

## II. SECOND AMENDMENT

***McRorey v. Garland,* No. 23-10837 (5th Cir. April 26, 2024)**

This case involves a challenge to the provisions of the Bipartisan Safer Communities Act of 2022, which expanded background checks for firearm purchases by individuals aged 18 to 20. McRorey attempted to purchase a shotgun from a federally licensed dealer in Texas. He was informed that his purchase was delayed due to protocols under the National Instant Criminal Background Check System. Instead of waiting, McRorey, along with another individual and the Gun Owners of America, Inc. sued that same day, requesting a preliminary injunction. The district court (Northern District) denied the plaintiffs' request for a preliminary injunction, reasoning that while adults aged 18 to 20 are protected by the Second Amendment, laws barring the mentally ill and felons from possessing firearms are constitutional, and restrictions to further those ends are presumptively lawful. Thus, the plaintiffs lacked a substantial likelihood of success on the merits.

On appeal, the Fifth Circuit affirmed, finding that the background checks preceding firearm sales are presumptively constitutional, and that plaintiffs failed to rebut that presumption. The Court also found that the plaintiffs had not shown that the challenged regulations had been put towards abusive ends or had otherwise rebutted the presumption of lawfulness.

## III. FOURTH AMENDMENT

***Baker v. Coburn,* 68 F.4th 240 (5th Cir. May 17, 2023)**

Darion Baker and his friend Gregory Dees ran out of money while on vacation in Los Angeles. To return home to Memphis, Tennessee, the men decided to steal an unoccupied Infiniti sedan. Shortly after doing so, the pair headed home. Officers in Stratford,

Texas, noticed the sedan, which suddenly slowed down, causing them to follow the vehicle and ultimately run its license plate. Dispatch verified that the sedan was stolen, so the officers decided to investigate further, ultimately resulting in one of the officers discharging his firearm into the windshield of the vehicle, which remained stationary (but whose brake lights had come on). There was a disagreement between the parties about what led up to the shooting and whether the officer (Coburn) initiated firing his weapon before or after the sedan started moving. The sedan eventually moved past the officer, who continued to fire. The other officer, McHugh, discharged his firearm moments later. According to McHugh, he delayed firing for two reasons: (1) to avoid shooting the suspect in the passenger seat, and (2) to avoid shooting through the front passenger side window. The driver of the suspect vehicle was hit from behind by two gunshots and died at the scene. The passenger was not injured. The Texas Ranger's investigation was unable to reveal which officer's gun fired the fatal bullet.

The Decedent's family sued the officers under 42 U.S.C. § 1983, alleging the shooting constituted excessive force in violation of the Fourth and Fourteenth Amendments. Invoking qualified immunity, the officers moved for summary judgment. The motion was referred to a Magistrate Judge, who recommended that the District Court deny the officers' summary judgment motion. In response, the officers filed objections. The District Court sustained their objections and granted the officers' motion on two grounds. First, the District Court concluded that the plaintiffs failed to establish that Coborn's actions violated clearly established law with respect to the first round of shots before the sedan had moved. Second, it found that the gunshots after the sedan had moved were objectively reasonable and therefore did not violate the Fourth Amendment. Having so ruled, the District Court did not reach the clearly established law analysis as to the second round of shots. The plaintiffs appealed.

The Fifth Circuit affirmed in part, reversed in part, and remanded to the district court. With relation to the Coburn's initial shots, the court explained that Plaintiffs had not pointed to sufficient authority clearly establishing that the officer's conduct violated the law under the specific circumstances he was facing, and thus he is entitled to qualified immunity. However, the court held that it is not convinced that the degree of force used in the second round of shots was objectively reasonable. It held that a jury could reasonably find that Defendants violated the man's Fourth Amendment right to be free from excessive force.

***Jimerson v. Lewis*, No. 22-10441 (5th Cir. February 1, 2024)**

On March 27, 2019, at approximately 7:17 pm, Lt. Lewis with the City of Waxahachie Police Department and Team Commander for the SWAT Team was contacted by the Dallas DEA office about execution of a search warrant. The DEA office provided basic information as well as information requested by Lt. Lewis. Lt. Lewis also obtained information from the county appraisal district regarding the house, including the square footage, the year built and information regarding the backyard. The SWAT Team was then briefed by Lt. Lewis of the situation and then traveled to neighboring Lancaster Police Department where the DEA agents provided real-time intelligence and briefing.

After the search warrant was issued at 9:40 pm, the SWAT Team was deployed, being led by a Lancaster Officer since the house was located in Lancaster, Texas. The Lancaster Officer stopped his vehicle and motioned to the Waxahachie SWAT Team as to which was the target house. The SWAT Team then stacked up on the porch of that house; however, before they entered, Lt. Lewis noticed that house did not look like the house in the DEA intel photos. He noticed the house to the left looked like the photos and motioned for the Team to go there. This house was also not correct and belonged to the Jimerson family. Three members of the SWAT Team breached the front door and were in the house no more than 30 seconds before someone called out, "Wrong house!" The

officers then immediately left and went to the correct target house.

The Jimersons, including their minor children, filed suit for violation of their Fourth Amendment rights against the officers only. All moved for and were granted summary judgment based on qualified immunity except as to Lt. Lewis. As to Lewis, the district court found that there was ample evidence for a reasonable jury to conclude that Lewis acted objectively unreasonable prior to the execution of the search warrant. On appeal, Lewis pointed out that the Jimersons never raised any arguments challenging the reasonableness of Lt. Lewis' efforts to ascertain the correct house. Instead, they focused on the actions of the officers once they were inside the house. Lewis also presented evidence as to his efforts to identify the correct house; the Jimersons presented no evidence regarding the sufficiency of Lewis' efforts. And finally, Lewis argued that, unlike the Fifth Circuit opinion in *Rogers v. Hooper*, Lt. Lewis did not lead the SWAT Team to the incorrect house. Instead, Lt. Lewis was in a vehicle behind the SWAT Team while the SWAT Team was being led by a Lancaster Police Officer. Further, this was a situation involving "quickly-unfolding facts or circumstances" and not one where Lewis had the luxury of time to do his own personal drive-by and surveillance. The Fifth Circuit agreed, stating that the Jimersons had failed to cite to any authority that Lewis' conduct violated clearly established law. While errors were made by Lewis, he did make significant effort to identify the correct house in the short time he was allotted.

***Smith v. Lee,* No. 22-30241 (5th Cir. July 14, 2023)**

On October 4, 2018, the Shreveport Police Department received a tip that a murder suspect, Christian Combs, was hiding at either 1906 State Street or 1913 State Street in Shreveport, Louisiana. The arrest warrant identified Combs as a thirty-three-year-old Black man. Multiple Shreveport Police Department officers met to develop a plan to search the two houses. The officers first searched the 1906 State Street home, but they did not find Combs there. The officers then proceeded to 1913 State Street, the home of Juanita Smith. The officers claim they went to Smith's front door. One of them knocked, and Smith answered. They explained they were looking for Combs when Smith answered the door. Smith told them she did not know Combs. At this point, stories diverged. When the officers asked Smith if anyone else was inside the home, Smith responded no because she thought they were only asking if Combs was inside. Smith denied that any officer asked her for permission to enter her home. Barker claimed he asked Smith to step outside of her home and that she agreed, but Smith claimed Barker stepped inside her house to prevent her from going back in. No video or audio existed to confirm or refute what was said or done during this encounter at the front door. Smith ultimately walked out of her house and into her driveway. The officers entered the home and, according to them, provided three loud warnings telling anyone inside that a police canine was present and they should come out and identify themselves. During the third warning, the officer warned the dog would enter and bite. Smith said she did not hear any warnings before Lee entered the house. The canine ended up attacking Floyed Stewart, a 78-year-old black man who had awoken when he heard noise outside. He was leaving the bedroom when the dog bit him. The officer claims that when he became aware that the dog was biting a person other than Combs, he immediately got the dog to release the bite. According to Stewart, the dog bit him multiple times and the officer did not immediately command the dog to stop the attack but waited approximately one minute. The officer had a body camera, which he thought was activated per department policy. However, it was not switched on until after the dog bit Stewart.

Defendants Cpl. John Lee and Cpl. Derek Barker appealed the district court's denial of their motion for summary judgment seeking qualified immunity from Plaintiffs' unlawful entry and excessive force claims. The Fifth Circuit unanimously concluded that Smith sufficiently alleged that Barker and Lee had violated her Fourth Amendment rights and were not entitled to qualified immunity from

Plaintiffs' unlawful entry claims. However, the court held that Lee was entitled to qualified immunity for any force employed from the moment he entered Plaintiffs' house. The court explained that, including the significant fact that the dog was deployed as a wholly duplicative means of detention, no precedent establishes under analogous circumstances how long a bite is too long. Thus, a jury could not find that every reasonable officer would have known that a K9-trained dog had to be released more quickly. Even if Officer Lee mistakenly permitted Dice to bite Plaintiff for a minute, qualified immunity shields him from suit as well as liability.

***USA v. Gaulden*, No. 22-30435 (5th Cir. July 14, 2023)**

Kentrell Gaulden's company, Big38Enterprise LLC, hired Marvin Ramsey to follow Gaulden, a rapper professionally called YoungBoy Never Broke Again, around to film his everyday life. Gaulden often requested that Ramsey share portions of this "B-Roll" footage with Gaulden's record label, Atlantic Records, for use in music videos. More often, Gaulden edited and uploaded portions of the footage directly to social media. Either way, the footage was used according to Gaulden's preferences for promotional purposes. Most of the footage remained unshared. On September 28, 2020, an anonymous 9-1-1 caller reported several men with "Uzis" and other guns walking down a residential street in Baton Rouge, Louisiana. This was the second such report in two days. Police arrived at the scene and detained Gaulden, Ramsey, and others. The officers recovered a camera containing a memory card from Ramsey's person and several firearms from the surrounding underbrush. After obtaining a warrant, officers viewed video footage stored on Ramsey's memory card. The footage showed Gaulden holding a Glock pistol and gesturing with a Masterpiece Arms pistol equipped with a vertical foregrip. Gaulden is a felon. Based in part on that footage, a Federal grand jury indicted Gaulden for possessing firearms following a felony conviction, 28 U.S.C. § 922(g)(1), and for possessing a firearm that was not registered to him under the National Firearms Act, 26 U.S.C. § 5861(d).

Gaulden moved to suppress the video footage. The Government argued that Gaulden could not suppress the video footage because he lacked a Fourth Amendment interest in it. Three witnesses testified in support of Gaulden. A bank manager attested to a payment from Big38Enterprise LLC to Ramsey, and two witnesses from Atlantic Records discussed Ramsey's employment as an around-the-clock videographer who recorded "lifestyle" footage for social media and music videos. Atlantic's Chairman noted that Gaulden "shoots a lot of stuff, and then he determines what he wants to go up," but the unused footage is not reviewed by Atlantic. Ramsey did not testify. The District Court reasoned that Gaulden had a protectible Fourth Amendment interest in the videos on the memory card although he lacked a Fourth Amendment interest in the memory card itself. It also found the warrant fatally defective. Accordingly, the District Court suppressed the footage of Gaulden in possession of the firearms. The District Court denied the Government's motion for reconsideration. The Government appealed, raising only the antecedent question of Gaulden's Fourth Amendment interest in the footage.

The Fifth Circuit reversed holding that Defendant's right to Fourth Amendment protection turns on whether he had a constitutionally protected property interest or a judicially conferred reasonable expectation of privacy in the place or thing searched or seized. To the extent Defendant can have a distinct property interest in the video footage, he never proved that he acquired such a right. Defendant himself did not testify and there was no written contract giving Defendant ownership of the video footage. And Defendant's company, not Defendant himself, hired the videographer. Thus, Defendant did not have an established property interest in the footage. The court further held that Defendant lacked a reasonable expectation of privacy in the footage.

## IV. FIFTH AMENDMENT

***Baker v. City of McKinney,* No. 22-40644 (5th Cir. February 14, 2024)**

Simply stated, Baker's home was severely damaged when City of McKinney police breached it to find an armed fugitive with a 15-year-old girl hostage. Officers used armored vehicles, explosives and toxic-gas grenades to resolve the situation, all of which both sides agree was necessary. However, the City refused to provide compensation to Plaintiff for the damage to her home and the destruction of her personal property. Plaintiff filed suit in federal court alleging a violation of the Takings Clause of the Fifth Amendment. The district court found for Baker, holding that, as a matter of law, the City violated the Takings Clause when it refused to compensate Baker.

On appeal, the Fifth Circuit reversed and remanded. As a matter of history and precedent, the Takings Clause does not require compensation for damaged or destroyed property when it was objectively necessary for officers to damage or destroy that property in an active emergency to prevent imminent harm to persons. Baker has always maintained that the officers' actions were precisely that: necessary, in light of an active emergency, to prevent imminent harm to the hostage child, the officers on the scene and others in the residential community.

***Devillier v. Texas,* 601 US _ (2024)**

Petitioners Devillier and others own property in Texas along Interstate Highway 10 (IH-10). The State of Texas, through the Texas Department of Transportation (TxDOT), elevated IH-10 and installed a solid concrete median barrier, which acted as a "weir" to obstruct natural water flow and led to the flooding of the petitioners' properties. Despite being aware of the potential for flooding, the State proceeded with the construction and even extended the barrier, causing extensive damage to the petitioners' properties.

The petitioners sued the state, directly invoking the Taking Clause of the U.S. Constitution, which they argued applied to the states through the Fourteenth Amendment. The district court denied Texas's motion to dismiss, and the U.S. Court of Appeals for the Fifth Circuit vacated, finding the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claims against the state.

The issue before the Supreme Court was whether a party can sue a state directly under the Takings Clause of the Fifth Amendment. However, the Court did not resolve the question presented, holding that the case's underlying premise was incorrect because Texas state law provides an inverse-condemnation cause of action that property owners can use to bring takings claims under both the Texas Constitution and the U.S. Constitution's Takings Clause. Since the property owners have an available avenue to seek just compensation, the Court remanded the case to allow them to pursue their Takings Clause claims through the Texas inverse-condemnation cause of action.

## V. EIGHTH AMENDMENT

***Garrett v. Lumpkin*, 98 F.4th 896 (5th Cir. March 22, 2024)**

Garrett, a 30-year resident of the Texas Department of Criminal Justice system, filed multiple grievances to prison officials concerning sleep deprivation. All were rejected. Garrett then filed suit against the Department, alleging an Eighth Amendment violation because the prison's schedule only allowed him 3.5 hours of sleep per night and was cruel and unusual punishment. The District Court dismissed Garrett's claim, reasoning that he failed to demonstrate a causal relationship between his health issues and his sleep deprivation. The court also held that the prison official's actions did not constitute deliberate indifference as the schedule was based on legitimate penological purposes.

On appeal, the Fifth Circuit found that the lower court applied the incorrect legal standards. In order to establish a violation of the Eighth Amendment, a prisoner need only show a substantial risk of serious harm, not actual harm. Further, a prison's penological purpose has no bearing on whether an inmate has shown "deliberate indifference" for purposes of an Eighth Amendment claim. The case was vacated and remanded to the district court to apply the correct legal standards.

## VI. FOURTEENTH AMENDMENT

***Culberson v. Clay County,* 98 F.4th 281 (5th Cir. April 8, 2024)**

O'Neal was arrested and transported to the Clay County Detention Center. He was strangled to death in his cell one ***week*** later. O'Neal's heirs filed suit against several officers and the county under Section 1983, alleging that the defendants failed to protect O'Neal and thus violated his 14th Amendment rights. The crux of the case centered around the intake officer's actions and whether he knew that O'Neal's murderer had been flagged for violent behavior and whether the booking system would have revealed a previously determined threat.

After plaintiffs late-designated an expert to establish the county's liability thru custom, policy or practice, the report was excluded and the district court granted summary judgment as to all defendants, concluding that plaintiffs could not create a fact question as to whether the individual defendants acted with deliberate indifference. The court also found that the intake officer had qualified immunity.

The Fifth Circuit affirmed, finding no abuse of discretion in excluding the late designated expert. The Court also affirmed the grant of summary judgment as to qualified immunity, noting that that plaintiffs had failed to point to any case law supporting the proposition that the alleged constitutional violation was clearly established.

## VII. SECTION 1983

***A & R Engineering v. Scott,* No. 22-20047 (5th Cir. July 10, 2023)**

Under Texas law, parties to municipal contracts must certify that they do not and will not boycott Israel for the duration of their contracts. The City of Houston offered A&R Engineering and Testing, Inc. a contract with an anti-boycott clause. A&R refused to sign and brought a Section 1983 suit against the City and the Texas Attorney General. The district court entered a preliminary injunction against the City and the Attorney General. The Attorney General appealed, arguing that A&R lacks standing.

The Fifth Circuit reversed and remanded with instructions to vacate the injunction and dismiss the suit against the Attorney General. The court explained that A&R has not shown that the Attorney General could interfere with the City's contracts. Chapter Section 2271 merely provides a list of definitions and then a list of requirements. It doesn't expressly provide a way for the Attorney General to enforce those requirements. The statute's "textually unenforceable language" poses a traceability problem. Second, the Attorney General hadn't taken any action to suggest he might enforce the provision even if he has such power. Plaintiffs must assert "an injury that is the result of a statute's actual or threatened enforcement." Finally, the City's conduct severs any link between A&R's economic injury and the Attorney General.

Therefore, the Court concluded that the District Court lacked jurisdiction to enter its injunction against the Attorney General. It denied the motion to dismiss the appeal for lack of jurisdiction and reversed the District Court. Finally, the Court remanded with instructions to the District Court to vacate the injunction and dismiss the suit against the Attorney General.

***Bagley v. Guillen,* 90 F.4th 799 (5th Cir. January 10, 2024)**

Bagley sued Officer Guillen for excessive force, unlawful arrest and illegal

detention after Officer Guillen pulled Bagley over for a minor traffic violation and subsequently tased him. The district court granted summary judgment as to qualified immunity as to the unlawful arrest and illegal detention claims but denied it as to excessive force. The Fifth Circuit affirmed. At the time of the conduct in question, it as clearly established law that an officer may not use force on a suspect who is complying with his commands. The Court found that Bagley had presented sufficient evidence of excessive force to defeat qualified immunity and dismissed the appeal for lack of jurisdiction.

***Barnes v. Felix*, No. 22-20519 (5th Cir. January 23, 2024)**

Barnes was shot in the head by Officer Felix during a traffic stop. Evidence showed that Barnes had been sitting in his car, complying with Officer Felix's orders, but for some reason, Officer Felix shoved his gun into the side of Barnes' head. The car started moving forward, and Officer Felix fired with "no visibility," shooting Barnes in the head and killing him. Barnes' family filed suit against Felix and Harris County, alleging that the use of force was unreasonable because even if Barnes was attempting to flee, he did not pose a threat justifying deadly force. The district court granted the defendants' motion for summary judgment, stating that Officer Felix did not violate Barnes' constitutional rights and was entitled to qualified immunity.

On appeal, the Fifth Circuit affirmed, stating that it was bound by precedent. The Court may only ask whether Officer Felix was in danger "at the moment of the threat" that caused him to use deadly force. This "moment of threat" test means that "the focus of the inquiry should be on the act that led the officer to discharge his weapon." "Any of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry." In this case, Officer Felix was "clinging" to a moving vehicle when he fired, and this moment of threat test shows that Officer Felix did not violate Barnes' constitutional rights.

***Boyd v. McNamara*, 74 F.4th 662 (5th Cir. July 24, 2023)**

Boyd was repeatedly tased while he was a pretrial detainee at the McLennan County jail in Waco, Texas. Boyd insists that he did nothing to warrant the use of force—that he was neither threatening nor resisting the officer who tased him, but the officer provided a different account. The video evidence was consistent with both parties' accounts, but clearly showed that Boyd had his back to Johnson when Johnson fired his taser, and while Boyd appeared to be twisting his body to speak to Johnson over his left shoulder, there was nothing overtly threatening about Boyd's stance. Boyd's hands remained behind his back, suggesting that he had submitted himself to be handcuffed before the taser was deployed.

After exhausting his administrative remedies, Boyd filed a pro se complaint against Johnson and other jail officials in the Western District of Texas, bringing claims under 42 U.S.C. § 1983. As relevant here, the operative complaint alleged that (1) Johnson's use of the taser constituted excessive force; (2) Defendants were deliberately indifferent to Boyd's medical needs; (3) Defendants, in their official capacities as policy makers for McLennan County, have a policy, custom, or practice of using excessive force against black and Hispanic inmates; and (4) Defendants, in their individual capacities, instituted that unconstitutional policy. Following limited discovery, the District Court granted summary judgment for Defendants. With respect to Boyd's excessive-force claim, the District Court held that "there was no violation of Plaintiff's constitutional rights" because Boyd was "actively resisting" Johnson's attempt to handcuff him when he was tased and because "Johnson's determination that he was threatened was not objectively unreasonable." Turning to Boyd's deliberate indifference claim, the District Court held that there was "no summary judgment evidence whatsoever that any Defendant had subjective knowledge of a substantial risk of serious harm to Plaintiff but responded with deliberate indifference to that risk." And as to Boyd's policy and practice claims, the District Court held that Boyd failed

to meet his burden to present "adequate summary judgment evidence of any official or unofficial policy" depriving him of his Federal rights. Boyd appealed with the principal question on appeal being whether Plaintiff had presented sufficient evidence to defeat summary judgment on his ensuing civil rights claims.

The Fifth Circuit reversed summary judgment on Plaintiff's excessive force claim against Defendant and remanded that claim to the district court for trial. The court reversed and remanded the district court's grant of summary judgment on Plaintiff's policy and practice claims to afford Plaintiff the opportunity to discover evidence relevant to those claims. But the court affirmed the dismissal of Plaintiff's deliberate indifference claim. The court held that a rational jury could find that Defendant's decision to tase Plaintiff was not justified by any exigency, in which case Defendant's qualified immunity defense would not shield him from liability because the court's precedents clearly establish that resort to force in such circumstances is unconstitutional. Further, the court wrote that it was inappropriate for the court to then dismiss Plaintiff's policy and practice claims on the ground that Plaintiff failed to present "adequate summary judgment evidence of any official or unofficial policy," depriving him of his rights. If a jury finds, as it could, that Defendant tased a non-threatening, compliant inmate, then he is not entitled to qualified immunity.

***Creech Poole v. City of Shreveport,* No. 22-30329 (5th Cir. August 17, 2023)**

During the early morning hours of March 31, 2017, Brian Poole was driving around Shreveport, Louisiana. He did not want to return to his sober living home because he had relapsed and would be drug-tested upon his return. Officer Briceno responded to a call about a truck that had made several passes down a residential street. He located Poole's truck, which was stopped at a stop sign for an unusually long time. Briceno activated his lights and sirens in an attempt to conduct an investigatory stop of Poole's vehicle. Poole refused to stop. Instead, he led Briceno on a slow-speed chase through the residential neighborhood. Poole evaded police for fifteen minutes during the slow-speed pursuit. Then, Poole jumped out of his truck and reached into the bed of his vehicle. Briceno also stopped his vehicle, moved to the left side of the vehicle door, and drew his weapon. Briceno testified that he shouted at Poole to show his hands, and while the audio is unintelligible, the dashcam video corroborates that Briceno yelled something at Poole. The video records that Poole then placed his right hand on the truck bed, moved his left hand towards the truck driver's side door, and turned his head towards Briceno, who was behind him. Briceno then fired his weapon six times and wounded Poole in his back and thigh. From the time Poole stopped his truck, the whole altercation spanned eight seconds. The dashcam video showed that Poole retrieved nothing from the bed of his truck, and he was unarmed at the time he was shot.

Plaintiff filed a 42 U.S.C. Section 1983 suit against Defendant. While the case was pending, Poole died. Defendants' motion for summary judgment based upon qualified immunity was denied, but after a bench trial, the district court ruled that Defendant was protected by qualified immunity. Plaintiff's estate filed a motion for reconsideration or, in the alternative, a new trial. The district court denied the motion without explanation. Plaintiff's estate timely appealed. Plaintiff's estate contests the district court's factual finding that Defendant could not see Plaintiff's left hand when he opened fire because "Defendant has no credibility." The Fifth Circuit affirmed. The court explained that when considering qualified immunity at the summary judgment stage, the prior panel of the Fifth Circuit court affirmed that the video potentially supported a finding that Defendant could see that Plaintiff was unarmed, but that panel agreed that the video did not require such a finding. The court explained that given its deferential standard of review, it declined to disturb the district court's factual determination on that point. The court wrote that based on the district court's finding that Defendant reasonably believed that Plaintiff was reaching for a weapon, the district court properly held that Defendant was entitled to qualified immunity.

***Cruz v. Cervantez,* 96 F.4th 806 (5th Cir. March 20, 2024)**

This appeal concerns an evidentiary ruling during trial and its effects on the jury's verdict for Officer Cervantez as to the deliberate indifference claims brought by Cruz under Section 1983. Cruz, a pretrial detainee at the time, alleged that he endured attacks by his cellmate and that Cervantez violated his constitutional rights by showing deliberate indifference to his safety. At trial, Cervantez filed a motion in limine to keep out any comments or testimony regarding his disciplinary record. The district court reserved ruling and later denied entry of such material into evidence. The jury returned a verdict finding that, while Cervantez was deliberately indifferent in protecting Cruz, he was entitled to qualified immunity because a reasonable officer could have believed that Cruz was not in unreasonable danger.

On appeal, the Fifth Circuit affirmed. Even if the lower court erred in excluding the disciplinary history, Cruz failed to demonstrate that this error affected his substantial rights. Furthermore, it affirmed the jury's finding that a reasonable officer could have believed that Cruz was not in unreasonable danger.

***Doe AW v. Burleson County,* No. 22-50918 (5th Cir. November 9, 2023)**

Jane Doe AW, a former criminal clerk in the Burleson County Attorney's Office, alleged that Burleson County Judge Mike Sutherland used his power and authority as a county judge to sexually assault her on several occasions. She alleged that the Judge sexually assaulted her once in his restaurant, and twice in his office. When she complained to him about the abuse, he terminated her. The Judge later resigned from his position pursuant to a voluntary agreement before the State Commission on Judicial Conduct.

Doe filed suit against Burleson County under Section 1983, which the district court dismissed. On appeal, she raised the issue as to whether Sutherland, as the Burleson County Judge, was a policymaker with final decision-making authority for the County with respect to Doe's claim. The Fifth Circuit affirmed. Despite his position as County Judge, Sutherland lacked the requisite policymaking authority to hold Burleson County liable for his alleged sexual misconduct. Even if the Texas constitution gave Sutherland, as the County Judge, broad ability to oversee operations in the county, this authority is immaterial as Doe failed to establish that Sutherland possessed the requisite authority as it relates specifically to her alleged sexual abuse.

***Edwards v. Balch Springs, Texas,* 70 F.4th 302 (5th Cir. June 9, 2023)**

Jordan Edwards attended a house party in Balch Springs, Texas on the evening of April 29, 2017. Jordan's two brothers and two friends also attended, as did several other teenagers. Officers Roy Oliver and Tyler Gross of the Balch Springs Police Department responded to the house after a 9-1-1 call reported underage drinking. At that point the party ended, and the five boys returned to their car. While Officers Oliver and Gross were in the house, gunfire erupted across the street. The officers heard the shots and ran outside toward the sound. The boys, too, heard the shots from their car. Vidal Allen, one of Jordan's brothers, was behind the wheel. He tried to drive away from the shots, but a vehicle was blocking the road. So he reversed the car—moving temporarily toward the shots, but ultimately aiming for and moving toward an intersection that offered an alternate route to escape the area. Gross yelled for the car to stop, but Vidal continued in reverse, reached the intersection, put the car in drive, and then drove forward and away from the shots.

Oliver recounted that the car then accelerated "at/by" the officers and that Gross was "extremely close" to the boys' car. Gross struck and shattered the car's rear passenger window, and less than half a second later, Oliver fired his first of five shots. One of those bullets struck Jordan in the head, killing him. Edwards contended that there was no immediate risk of harm to anyone when Oliver opened fire. He also asserted that Oliver shot at the car's rear—both while the car was driving away from the

officers and after it had passed them. Three days later, the City fired Oliver. A Texas jury found Oliver guilty of murder, and the Texas Court of Appeals affirmed that conviction. The Court of Criminal Appeals of Texas granted Oliver's petition for discretionary review but later dismissed it as improvidently granted. Oliver was sentenced to fifteen years in prison.

Plaintiff (the boy's father) sued both Oliver and the City under 42 U.S.C. § 1983. Oliver moved for summary judgment based on qualified immunity, but the District Court denied that motion, and the Fifth Circuit affirmed. At the close of discovery, the City sought summary judgment, urging that Edwards had failed to present evidence sufficient to establish the necessary elements of a § 1983 claim for municipal liability. The district court granted the City's motion for summary judgment, reasoning that the department's use-of-force policy was constitutional and also that Plaintiff's training, supervisory, and disciplinary theories of liability lacked factual support. The Fifth Circuit affirmed the district court's ultimate judgment. Plaintiff argued that the City's policy was facially unconstitutional because it contained "no immediacy requirement necessary to justify an officer's use of deadly force" and because it called "for an officer to use the officer's own subjective beliefs in determining whether deadly force was justified." The court explained that a local government's official, written policy is itself unconstitutional only if it affirmatively allows or compels unconstitutional conduct. The City's policy passed muster under that standard. It did not affirmatively allow officers to use deadly force absent an immediate threat, and it did not affirmatively allow officers to rely on subjective factors when evaluating whether to use deadly force. Likewise, the prior constitutional violations that Plaintiff relied on were too dissimilar and generalized to establish a pattern. For that reason, Plaintiff could not show that the City's training, supervisory, and disciplinary failures (if any) arose from deliberate indifference. In turn, he could not satisfy *Monell's* third element.

***Edmiston v. Borrego,* 75 F.4th 551 (5th Cir. August 1, 2023)**

On July 6, 2019, in Van Horn, Texas, Borrego, a jailer with the jail, received a series of calls concerning a male—later identified as Schubert— needing assistance. Borrego directed Culberson County Sheriff's Deputy Melendez to respond. Deputy Melendez located Schubert who appeared nervous and said that people were trying to kill him. Schubert was arrested due to an active warrant and transported to the jail. While Schubert was interviewed, a "Screening Form for Suicide and Medical/Mental/Developmental Impairments" was not completed, which Plaintiffs claim was required by the Texas Commission on Jail Standards. Schubert was provided with clothes and transported to a cell with a mattress. He was not placed on suicide watch. A few hours later, he was found unresponsive. He was pronounced dead, with his autopsy report listing his cause of death as suicide through asphyxia due to hanging (with the sheet from the bed).

Plaintiffs asserted claims in district court under Section 1983 against various officials for failing to protect a man in custody, claiming violations of the Eighth and Fourteenth Amendments. They also have claims against individual defendants under a theory of bystander liability and a claim against the Sheriff for supervisory liability. And, against Culberson County, Plaintiffs asserted a claim under Section 1983 and *Monell v. Department of Social Services of New York City*, 436 U.S. 658 (1978), on the basis that its policies related to jail-suicide prevention caused a violation of Schubert's constitutional rights. But, this interlocutory appeal concerned only the failure-to-protect claims against Appellants. The Fifth Circuit vacated the district court's judgment and held that Plaintiffs failed to plausibly allege Appellants possessed the requisite subjective knowledge. The court explained that although Plaintiffs alleged that the man in custody was cooperative and appeared truthful in his responses, Plaintiffs also alleged: the Sheriff was still required to conduct a mental-health screening form in accordance with TCJS; and, because "the form had not been completed," the

Sheriff "had to operate on the belief that the man was suicidal" and "was required to put the man on suicide watch." The court explained that it requires that a defendant have "actual knowledge of the substantial risk of suicide." Plaintiffs failed to allege that the man did or said anything to indicate he was suicidal. Because Plaintiffs failed to allege sufficient facts to plausibly show the Sheriff was subjectively aware of the risk of suicide, their allegations do not state a failure-to-protect claim against him.

***Favela v. Collier,*** **No. 22-40415 (5th Cir. January 31, 2024)**

Favela, a Texas inmate, alleged that his lawyer wrote four letters to prison officials expressing concern that Favela had been labeled a "snitch" and that his safety was in danger. Each letter requested that Favela be moved to a different facility. Instead, Favela remained where he was and was assaulted with a small motor wrapped inside a sock. Favela sued five Texas Department of Criminal Justice employees under Section 1983, claiming that their failure to protect him violated his constitutional rights. Defendants moved for summary judgment, arguing that Favela had failed to exhaust the prison's grievance process before suing under the Prison Litigation Reform Act. Defendants filed Favela's grievances, which did not contain a grievance pertaining to the allegations in Favela's complaint. Favela responded that he had in fact filed a grievance pertaining to his claims and submitted a declaration in support. The district court concluded that Favela's declaration was insufficient because it was unsupported and conclusory and dismiss Favela's claims.

On appeal, the Fifth Circuit reversed, finding that the summary judgment was inappropriate. The Court held that the declaration was sufficient to establish a genuine issue of material fact. The credibility of Favela's statement was a matter for trial and not for summary judgment.

***Fisher v. Moore,*** **73 F.4th 367 (5th Cir. July 14, 2023)**

A disabled public school student was sexually assaulted by another student with known violent tendencies. Despite knowing of this attack, the victim's teachers let both her and her aggressor wander the school unsupervised (in violation of the recommendations in the victim's Individualized Education Program which stated that the victim must be escorted at all time in middle school), and she was again assaulted by the very same student. The victim suffers from several mental and physical disabilities. When the relevant events occurred in the fall of 2019, the victim was around thirteen years old but had the cognitive ability of a four- or five-year-old. The aggressor, another minor student, had a history of severe behavior problems, including violence against other students and teachers, which was known to the school's staff.

The victim's mother sued the school district under Title IX and various school officials under 42 U.S.C. Section 1983. In her Section 1983 claim against the school officials, she alleged liability under the so-called "state-created danger" doctrine. The district court denied that motion and stayed proceedings on the Title IX claim pending this interlocutory appeal of the Section 1983 ruling. The Fifth Circuit reversed and remanded with instructions to dismiss the Section 1983 claim. The court explained that the Circuit has never adopted a state-created danger exception to the sweeping "no duty to protect" rule. And a never-established right cannot be a clearly established one. As for whether to adopt the state-created danger theory of constitutional liability moving forward, the court was reluctant to expand the concept of substantive due process for two reasons: (1) the Supreme Court's recent forceful pronouncements signaling unease with implied rights not deeply rooted in our Nation's history and tradition; and (2) the absence of rigorous panel briefing that grapples painstakingly with how such a cause of action would work in terms of its practical contours and application, vital details on which the court's sister circuits disagree. Rather than break new ground, the

court ruled instead on a narrower ground, one that follows the court's unbroken precedent.

***Ford v. Anderson County,* No. 22-40559 (5th Cir. January 8, 2024)**

This case involves the death of pretrial detainee Rhonda Newsome while in the custody of the Anderson County Jail. Newsome had a history of several chronic conditions, including Addison's disease. During her confinement, Anderson County contracted with Dr. Corley, a private physician, who provided medical care for detainees, as well as a registered nurse who was part-time at the Jail. Newsome was in the Jail from March until her death in June. During this time, Plaintiffs allege that Newsome was never prescribed or systematically provided with steroids – the primary treatment for Addison's disease. This resulted in an Addison's crisis and Newsome's death.

The district court granted summary judgment for all Defendants and dismissed Plaintiffs' lawsuit with prejudice. On appeal, the Fifth Circuit found that Plaintiffs had established genuine disputes of material fact regarding whether several defendants violated Newsome's 14th Amendment rights by failing to treat her chronic illness. The Court reversed in part and granted in part. The district court's denial of Plaintiffs' motion for leave to file a third amended complaint was also vacated, and instructions were given to grant Plaintiffs leave to amend.

***Gibbs v. Jackson,* 92 F.4th 566 (5th Cir. February 6, 2024)**

Gibbs, a pro se plaintiff/inmate, filed a Section 1983 action against five officers, claiming that another inmate stabbed him ***nine*** times and that the two of the defendants, Jackson and Moton, had allowed Gibbs to bleed out for 45 minutes before rendering aid. Gibbs further alleged that, in retaliation for Gibbs filing a grievance, three other officers authorized or used excessive force against him on two separate instances. Gibbs claims that these beatings caused swelling and bleeding in his brain which led to a seizure and resulted in post-seizure paralysis, confining him to a wheelchair.

Gibbs attempted to proceed in forma pauperis, which would have allowed service to be made by a US marshal, but the district court denies this on the basis that he had already paid the filing fee, had sufficient funds in his inmate trust account to serve the defendants, and had not provided the addresses of the defendants. The Fifth Circuit reversed the district court, finding that the lower court had abused its discretion. It held that a person who is not a pauper at the commencement of a suit may become one during or prior to its prosecution. The Court also found that the lower court had arbitrarily determined that the funds in his inmate trust account were sufficient for him to serve the defendants, and that there's no requirement for an individual to be absolutely destitute to enjoy the benefit of in form pauperis status. A district court's determination of whether a party may proceed in forma pauperis must be based solely upon economic criteria and not on the lack of addresses for the defendants.

***Guerra v. Castillo,* 82 F.4th 278 (5th Cir. September 7, 2023)**

Plaintiff, formerly a patrol sergeant in the Alamo, Texas police department, brought a Section 1983 action against the City of Alamo (the "City"), former chief of police, and several other officers in connection with an alleged scheme to have Plaintiff fired and arrested on bogus charges. Guerra was promoted to sergeant in the patrol department of the City's police department in the first half of 2018. In July of 2018, a subordinate patrol officer arrested a suspect for driving while intoxicated and the suspect spat on the officer's face. But the suspect was a strong political supporter of the City's Mayor who called then-police chief Castillo, Guerra's direct superior, and urged that the charges be dropped. Castillo proceeded to call Guerra and urged Guerra to tell the officer to drop the charges. But Guerra, "[i]n support of his officer," refused. Following this, Castillo initiated an investigation into Guerra on unrelated, unsubstantial issues, and ultimately enlisted Internal Affairs to perform an

unfounded investigation, after which Castillo placed Guerra on administrating leave. After an interview with Internal Affairs, Guerra requested "a full and open evidentiary hearing to get to the truth of the allegations." That hearing was never provided. Guerra was later arrested on misdemeanor charges, which were ultimately dropped due to insufficient evidence.

Guerra timely filed suit under § 1983 against Castillo, the City, and several other involved officers. Guerra's complaint asserted Fourth Amendment false arrest and malicious prosecution claims, along with a First Amendment retaliation claim, against Castillo. It also alleged the City was liable under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), citing both Castillo and "the City Manager," Ozuna, as policymakers on whom the City's liability should be based. The other officers filed a motion to dismiss under 12(b)(6), which the district court granted. Guerra does not challenge their dismissal on appeal. The City also filed a motion to dismiss under 12(b)(6), which the District Court granted. The District Court found that Guerra had failed to point to any policymaker on whom the City's *Monell* liability might plausibly be based. Later, Castillo moved to dismiss under 12(b)(6) and 12(c). The District Court denied Castillo's 12(b)(6) motion because he had already filed an answer to Guerra's complaint but granted Castillo's 12(c) motion based on qualified immunity. It found that Guerra's Fourth Amendment false arrest claim failed to overcome Castillo's qualified immunity due to an absence of clearly established law; his Fourth Amendment malicious prosecution claim was not cognizable under Fifth Circuit precedent; and Guerra's First Amendment retaliation claim failed because Guerra did not identify protected speech that caused Castillo's retaliatory acts.

Guerra appealed the dismissals of the Castillo and the City. The Fifth Circuit affirmed the dismissal of the City (holding that the complaint did not identify facts sufficient to infer that Castillo or Ozuna had complete or unreviewable discretionary authority). The Fifth Circuit reversed the dismissal of Guerra's false arrest complaint against Castillo reasoning that Guerra's complaint presents Castillo as the sole moving force behind a deliberate, long-term conspiracy to create and file affidavits Defendant knew to be false, with the purpose of exploiting the criminal justice system to arrest, detain, and torment Guerra for crimes Castillo knew he did not commit. Castillo, moreover, ordered the sham investigations that served as the basis for the false affidavits and pushed the investigations forward despite knowing Guerra was innocent. The court wrote that *Terwilliger v. Reyna* controls here. As such, the court held that Castillo's alleged actions are relevant, like Reyna's, for purposes of evaluating his potential Franks liability at the Rule 12 stage. Castillo was the "driving force" behind the conspiracy, and he was "continuously updated" as to the status of the investigations he had ordered, including the fact the investigations revealed no criminality or impropriety. Therefore, the court reversed the district court's dismissal of Guerra's false arrest claim against Castillo.

Separately, the Fifth Circuit affirmed the District Court's Rule 12 dismissal of Guerra's malicious prosecution claim against Castillo because the Fifth Circuit's caselaw explicitly disclaimed the existence of a constitutional claim for malicious prosecution at the time of Castillo's alleged conduct in 2018 and 2019 and Guerra had identified no Supreme Court case law from the same period acknowledging such a claim.

With relation to the First Amendment retaliation claim against Castillo on the theory that Castillo retaliated against Guerra for protected political speech, the Fifth Circuit affirmed the District Court's decision that Guerra failed to allege sufficient facts to support this theory, which would require that Guerra engaged in First Amendment protected speech and that the protected speech motivated Castillo's retaliatory acts.

***Hodge v. Engleman*, No. 22-11210 (5th Cir. January 16, 2024)**

Driving home, Hodge stopped at a stop sign and turned left without signaling. Officer

Engleman attempted to pull Hodge over but Hodge continued to drive several minutes until he reached his house. As Hodge parked in his driveway, Officer Engleman hopped out and sprinted towards Hodge with his gun pointed at him. Hodge exited his car with a gun in his hands and pointed it at Officer Engleman. Engleman shot Hodge and dropped to the ground. In total, Engleman fired 11 times and a backup officer fired 8. Hodge was hit 16 times. Everything was captured on bodycam.

Hodge's family sued the officers and the City of Dallas. The officers moved to dismiss based on qualified immunity, which the district court granted, treating it as an implicit motion for summary judgment, even though the video was not included with the pleadings. On appeal, the Fifth Circuit affirmed, finding that the bodycam footage showed a complete account of the incident, including Hodge raising his gun and pointing it at the officers. The Court concluded that the officers' use of deadly force was reasonable given the circumstances.

***Hughes v. Garcia,* No. 22-20621 (5th Cir. May 3, 2024)**

Hughes, a former police officer turned Uber driver, was driving with two passengers when he noticed a truck driving erratically, swerving, and almost hitting objects. Hughes called 911 and reported a possible drunk driver. After the drunk driver crashed, Hughes was able to take his keys from him. However, the driver then tried running into traffic. Hughes carried handcuffs in his vehicle (the reason is not given) and used them to detain the driver until two Houston officers arrived on scene. However, instead of arresting the driver, who was obviously intoxicated, the two officers accepted the driver's version of events and arrested Hughes for impersonating a police officer (the drunk driver was allowed to leave). After Hughes spent 24 hours in general population and charged with a 3rd degree felony, he hired a defense lawyer. Almost three months later, the county judge dismissed the case finding no probable cause existed. Hughes then sued the City of Houston, Harris County, and several officials. Relevant to this appeal, Hughes alleged that the two officers violated his Fourth and Fourteenth Amendment rights to be free from unlawful arrest and malicious prosecution by filing a false report. The officers asserted qualified immunity and moved to dismiss. After the district court denied their motions, this appeal ensued.

The Fifth Circuit had no trouble affirming the judgment of the district court, stating:

*Austin Thompson Hughes is a Good Samaritan. After 2:30am, Hughes called 911 to report a pickup truck swerving violently across a four-lane highway in Houston. While Hughes was on the phone with emergency dispatchers, the drunk driver crashed. Still on the phone with 911, Hughes pulled behind the drunk driver and effectuated a citizen's arrest in accordance with Texas law. But when police officers arrived at the scene, they let the drunk driver go and then arrested the Good Samaritan Hughes. (Seriously.) Piling insanity on irrationality, the officers then charged Hughes with a felony for impersonating a police officer. Hughes spent thousands of dollars defending against the frivolous criminal charges before the City of Houston dropped them. Then Hughes brought this §1983 suit against the two officers who victimized him. The district court denied qualified immunity. We affirm. (Obviously.)*

***Johnson v. Board of Supervisors of LSU,* No. 22-30699 (5th Cir. January 8, 2024)**

Johnson, an African-American female who worked for LSU as an Administrative Coordinator, alleged the she experienced sexual and racial harassment as well as retaliation by her employer. The harassment claims were based on an incident where Dr. Schumacher slapped her on the butt. After she reported the incident to her supervisor and HR, Johnson was temporarily relocated while an investigation was conducted. Johnson claimed this relocation was retaliatory.

The Fifth Circuit affirmed the district court's summary judgment in favor of LSU. While Johnson had demonstrated that she was

the victim of uninvited sexual and racial harassment, she failed to show that LSU knew or should have known about it and failed to take prompt remedial action. LSU took action to separate Johnson and Dr. Schumacher in response to Johnson's complaint and began an investigation, which was ultimately substantiated. But there was no evidence that the decision to relocate Johnson was pretext for retaliation.

***Robinson v. Midland County, Texas,* 80 F.4th 704 (5th Cir. September 14, 2023)**

Savion Hall was arrested and taken to Midland County Jail on June 21, 2019. He indicated he had "breathing problems" for which he had recently been hospitalized and prescribed Prednisone. On July 1, he was sent to the hospital for asthma-related issues. His discharge instructions indicated he should be returned to the emergency department if his symptoms worsened. Throughout his time in jail, he was given regularly scheduled "breathing treatments" that provided medication through a nebulizer. Midland County had contracted with Soluta, Inc., a private company, for medical services. Soluta's nurses were responsible for administering the breathing treatments. Before and after each treatment, the nurses were supposed to listen to Hall's bronchial breath sounds with a stethoscope, measure his oxygen-saturation level with a pulser oximeter, and record the findings on a "flo-sheet."

Unfortunately, but Soluta employees failed to provide standard medical care to Hall and fabricated his medical reports. Eventually, Hall required urgent medical attention, but when he asked Daniel Stickel, a prison guard, for help, Stickel followed set protocol: Hall was only supposed to receive "breathing treatments" every four hours; because less than four hours had elapsed since Hall's last treatment, Stickel sent him back to his cell. Eventually, Hall was seen by a doctor, who called EMS. Hall died in the hospital.

Plaintiffs are various relatives and representatives of Hall's estate. They settled claims against Soluta and the individual nurses. They filed the underlying suit against Midland County and Stickel for deliberate indifference to medical needs under 42 U.S.C. § 1983. Defendants moved to dismiss for failure to state a claim, and the District Court granted the motion. Plaintiffs appealed.

The Fifth Circuit affirmed. The court explained that municipalities such as Midland County cannot be held liable unless plaintiffs can show "(1) an official policy (or custom), of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy or custom." The court explained that there are no allegations that anyone other than the Soluta employees was aware, or should have been aware, of the nurses' failure to provide adequate medical care. Importantly, it held that a pattern is not sufficient to establish a policy where the municipality had no knowledge of the pattern. Plaintiffs' theory hinged entirely on the idea that if enough individuals do something, it becomes the fault of the policymaker. Without a showing of knowledge and acquiescence, however, such a theory is no more than vicarious liability and cannot survive a motion to dismiss. Finally, the court held that Plaintiffs have not plausibly pleaded deliberate indifference predicated on a delay in medical treatment and, as such, Stickel was entitled to qualified immunity.

***Sligh v. City of Conroe,* 87 F.4th 290 (5th Cir. November 21, 2023)**

Sligh's partner called 911 to report that Sligh was suicidal and had left her house on foot. The Montgomery County Sheriff's Office notified the City of Conroe of the emergency medical call and requested a canine officer. When the canine officer located Sligh, Sligh alleges that the officer ordered the dog to attack her. Bodycam, however, showed that Sligh was ordered to not approach the officer because the dog would attack. Sligh began yelling profanities and slapping at the other officer's hands as he attempted to place her hands behind her back. Sligh then broke loose and tried to run at which point the dog was released.

Sligh filed suit against the City, the canine officer and the backup officer, alleging excessive force against the canine officer, a failure to intervene/bystander liability claim against the backup officer, and a *Monell* claim against the City. After the district court dismissed Sligh's claims based on qualified immunity and the failure to state a claim against the City, the Fifth Circuit affirmed. Plaintiff failed to allege specific and nonconclusory facts that would show the City was deliberately indifferent in adopting its training policy. Further, as to excessive force, this case involved an application of "unintentionally prolonged force" against an actively resisting plaintiff and did not violate Sligh's constitutional rights.

***St. Maron v. City of Houston,* 78 F.4th 754 (5th Cir. August 21, 2023)**

A group of property owners alleged that the Mayor of Houston, the City Council, and the City Attorney concocted a scheme to trespass on and damage their properties to benefit neighboring residents—all without permission, compensation, or due process. The property owners alleged that the City used their empty lots as a dumping ground for construction materials, thereby rendering their land unable to absorb water. As a result, neighboring residences were frequently flooded over subsequent decades. After numerous complaints from the neighboring residents, the Mayor and City Council directed city officials to conduct various remediation efforts on the lots, thereby damaging the properties—all without the consent of the owners.

The property owners (doing business as Re-Mart Investment), and St. Maron Properties— brought Section 1983 claims against the City under the Takings Clause, the Due Process Clause, and the Equal Protection Clause, as well as state law tort and statutory claims. The district court dismissed the state law claims as barred by sovereign immunity. It also dismissed the Section 1983 claims under Rule 12(b)(6) for failure to satisfy the requirements for municipal liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). The property owners appealed.

The Fifth Circuit affirmed the dismissal of the state law claims but reversed the dismissal of the Section 1983 claims. The court explained that under *Monell*, a Section 1983 plaintiff may not proceed against a municipality unless the injury was caused by an official policy of the municipality. But here, the property owners allege that city officials violated their rights at the specific direction of the Mayor and the City Council. That, the Court found, was enough to establish liability under *Monell*. Accordingly, the court held that the property owners were entitled to proceed against the City on their federal claims.

***Tuttle v. Sepolio,* 68 F.4th 969 (5th Cir. May 23, 2023)**

The controversy underlying this matter began with a phone call reporting suspected unlawful activity. Patricia Garcia called the police department, claiming that the residents in 7815 Harding Street were involved in selling heroin and possessed various firearms, including machine guns. Dennis Tuttle owned that home, and lived there with Rhogena Nicholas, his wife. Police officers investigated the home, observed no criminal activity, and forwarded their notes to Lieutenant Marsha Todd, a member of the department's narcotics division and responsible in part for assigning cases to other narcotics officers. Todd relayed the information concerning Harding Street to Officer Gerald Goines, an officer in narcotics division Squad 15. Goines then took a series of actions to fraudulently obtain a search warrant for the residence at issue. First, Goines executed an affidavit swearing that a confidential informant told him that the informant purchased heroin from the residence and observed firearms within the home. Based on the affidavit, Goines then applied for and received a no-knock search warrant from a municipal judge.

As it turned out, the testimony contained in Goines's affidavit was false. Goines later admitted that he had not paid any confidential informant to purchase drugs from the Harding Street home. He maintained that he purchased the heroin and witnessed the firearms himself, but Plaintiffs denied that allegation. In any

event, Goines and Officer Steven Bryant organized Squad 15 officers to execute the search warrant. These were Officers Eric Sepolio, Manuel Salazar, Felipe Gallegos, Thomas Wood, Oscar Pardo, Frank Medina, Clemente Reyna, Cedell Lovings, and Nadeem Ashraft. The events that followed were highly contested. Plaintiffs alleged that officers fired without provocation, shooting and killing a dog owned by Tuttle and Nicholas. Plaintiffs further alleged that officers, both inside the home and outside of it, began firing their weapons after the initial shot was fired. They further alleged that all the officers mentioned above were on the scene and involved in executing the warrant. None of those officers deny being present and participating. Any firing done by Tuttle, Plaintiffs contended, was done purely in defense of himself and his wife. As a result of the gunfire, Tuttle and Nicholas were killed and four officers seriously injured. Plaintiffs also contended that Lieutenant Robert Gonzales, the supervisor of Squad 15, was aware that Goines regularly violated City policy relating to confidential informants and regularly lied in order to obtain no-knock search warrants. Lastly, Plaintiffs asserted that Gonzales knew that Goines had not actually investigated the Harding Street home.

Plaintiffs brought multiple claims against various defendants pursuant to 42 U.S.C. Section 1983. As relevant here, they asserted two general categories of claims—that the officers used excessive force in executing the search warrant and that the search and seizure were unlawful. As against the individual officers, Plaintiffs asserted both direct claims and claims premised on failure to intervene. And as against Gonzales and Todd, Plaintiffs asserted that the two lieutenants were directly liable for excessive-force and search-and-seizure, and liable on a failure to supervise theory. Finally, Plaintiffs also asserted wrongful death and survival as separate "causes of actions," in their words. Several of the officers moved to dismiss, asserting qualified immunity. Those officers were Sepolio, Salazar, Gallegos, Wood, Pardo, Medina, Reyna, Lovings, and Ashraft, as well as Gonzales and Todd. As to Plaintiffs' excessive-force claims, the District Court denied the motions in full, including the claims for failure to supervise. As to Plaintiffs' search and seizure claims, the District Court dismissed the claims against the individual officers, but allowed the failure-to-supervise claims to proceed. The District Court denied the motions to dismiss as to Plaintiffs' claims for wrongful death and survival.

The Fifth Circuit affirmed in part, reversed in part, and vacated in part. The court affirmed the aspects of the judgment denying the motions to dismiss the excessive-force claims asserted against several co-Defendants and denying one Lieutenant's motion to dismiss as to Plaintiffs' excessive force and search-and-seizure claims premised on a failure-to-supervise theory. The court reversed the district court's ruling denying the Lieutenant's motion to dismiss the excessive force and search-and-seizure claims based on direct liability. The court concluded that this was error because the Lieutenant was not personally involved in obtaining the search warrant or in effectuating the search.

## VIII. TITLE VII

### *Arredondo v. Elwood Staffing Svc,* 81 F.4th 419 (5th Cir. August 25, 2023)

Frances Arredondo and Sage Coleman are two women Elwood Staffing Services, Inc. placed at a job site working for Schlumberger, Ltd. A senior coworker at their site was a lesbian who sexually assaulted Arredondo and harassed Coleman. Coleman submitted a complaint about sexual harassment, and Schlumberger terminated her. Arredondo later resigned. Together, the women filed suit in Federal Court alleging violations of Title VII. Specifically, the women's complaint alleged that the companies had (1) created a hostile work environment based on sex and race; (2) intentionally discriminated against Coleman and Arredondo because of their sex; and (3) retaliated against both women for their allegations of discrimination. Specific to Elwood, Coleman and Arredondo alleged that the staffing company knew or should have known about the harassment, discrimination, and

retaliation they experienced, yet failed to act. The women also contended that Elwood conspired with Schlumberger to harass, discriminate, and retaliate against them and that Elwood failed to protect Coleman and Arredondo from such harm.

The District Court entered a mixed summary judgmnt order, finding the women had viable claims against Schlumberger but releasing Elwood from the suit. Schlumberger subsequently settled with Arredondo and Coleman at mediation. Arredondo and Coleman's appeal challenged the District Court's order to the extent it granted summary judgment in Elwood's favor.

The Fifth Circuit affirmed. The court concluded that Elwood did not have actual or constructive knowledge of the hostile work environment experienced by Plaintiffs. The court concluded that Plaintiffs sought to hold the wrong party liable for their injuries. They could not establish why Elwood should be held responsible for the misconduct of Schlumberger's employees.

***Hamilton v. Dallas County*, 74 F.4th 494 (5th Cir. August 18, 2023)**

Plaintiffs are nine female detention service officers working at the Dallas County Jail who are employed by Dallas County Sheriff's Department. Dallas County ("the County") provides two days off per week for its detention service officers. Most officers prefer to schedule their days off on weekends. Before April 2019, Plaintiffs' schedules were based on seniority. However, in or around April 2019, a gender-based scheduling policy went into effect and only male officers were given full weekends off whereas female officers were allowed two weekdays off or one weekday and one weekend day off. Plaintiffs alleged that "[w]hen [they] asked the [s]ergeant how scheduling was determined, he stated that it was based on gender" and explained that it would be safer for the male officers to be off during the weekends as opposed to during the week. Plaintiffs reported the new scheduling policy to their sergeant, lieutenant, chief, and human resources, all of whom declined to modify the policy. The policy remained in place at the time Plaintiffs filed their underlying complaint.

Plaintiffs filed a discrimination complaint with the Equal Employment Opportunity Commission and received Notice of Right to Sue Letters. On February 10, 2020, Plaintiffs filed suit against the County for violations of Title VII and the Texas Employment Discrimination Act (the "TEDA"). Specifically, they alleged that the County "engaged in the practice of discrimination with respect to the terms and conditions of Plaintiffs' employment." The County filed a motion to dismiss under Rule 12(b)(6) arguing that Plaintiffs failed to state a plausible claim for relief because they did not suffer an adverse employment action. In response, Plaintiffs argued that the gender-based scheduling policy harmed their work conditions and made their jobs objectively worse.

The District Court granted the County's motion to dismiss. It acknowledged that the County's facially discriminatory scheduling policy demonstrated unfair treatment and that it was plausible that the denial of full weekends off made Plaintiffs jobs objectively worse. Nonetheless, the District Court reasoned that the binding precedent of the Fifth Circuit compelled it to hold that Plaintiffs failed to state a claim upon which relief could be granted because they did not plead an adverse employment action. The District Court granted Plaintiffs leave to amend their complaint, but because Plaintiffs did not amend their pleadings within thirty days, it ultimately dismissed the action with prejudice. Plaintiffs' appeal followed. On appeal, Plaintiffs argued that the District Court erred by considering whether the County's scheduling policy constituted an adverse employment action rather than applying the statutory text of Title VII and the TEDA. They further contended that the scheduling policy qualifies as an adverse employment action.

An en banc majority of the Fifth Circuit reversed and remanded. The court held that a plaintiff plausibly alleges a disparate-treatment claim under Title VII if she pleads

discrimination in hiring, firing, compensation, or the "terms, conditions, or privileges" of her employment. She need not also show an "ultimate employment decision," a phrase that appears nowhere in the statute and that thwarts legitimate claims of workplace bias. Here, giving men full weekends off while denying the same to women—a scheduling policy that the County admits is sex-based—states a plausible claim of discrimination under Title VII.

***Harrison v. Brookhaven School District,* 82 F.4th 427 (5th Cir. September 21, 2023)**

Harrison is a black, female educator and school administrator who works for the Brookhaven School District. She sought to attend a leadership academy, a training program for prospective superintendents. Per Plaintiff, the School District established a precedent for paying for every employee's fees after the employee was accepted to attend the program. Plaintiff asked the Deputy Superintendent if the District would pay for her to attend the academy and was told yes. But once she was accepted, the Superintendent reneged and refused to pay for her to attend. Plaintiff paid for herself and then filed suit under Title VII and Section 1981, alleging that the District pays white males to attend but not a minority female.

After the district court dismissed Plaintiff's claims under Rule 12(c), the Fifth Circuit reversed. The Court found that Plaintiff set forth a plausible Title VII claim under Rule 12 because plausibly alleged facts satisfied both adverse employment action prongs, and the adverse employment action element was the only element in dispute. Taking Plaintiff's allegations as true – that the School District agreed to pay for similarly situated white males' fees to attend, promised to pay her fees (which she relied upon) and reneged on that promise, Plaintiff plausibly stated a Title VII disparate treatment claim.

***Hebrew v. TDCJ,* No. 22-20517 (5th Cir. Sept. 15, 2023)**

Elimelech Shmi Hebrew is a devout follower of the Hebrew Nation religion. As part of his religion, he has taken a Nazarite vow to keep his hair and beard long—a vow he has kept for over two decades. In August 2019, Hebrew was hired by the Texas Department of Criminal Justice ("TDCJ") as a Correctional Officer. He was immediately advised he would need to cut his hair and beard, but he declined to do so. Plaintiff sought accommodations, which were denied. Ultimately, the Texas Department of Criminal Justice fired Plaintiff after he refused to cut his hair and beard in violation of his religious vow.

Plaintiff exhausted his administrative remedies. He then filed a pro se lawsuit against TDCJ and various officers, which alleged claims of religious discrimination and failure to accommodate under Title VII of the Civil Rights Act of 1964. The district court granted summary judgment in favor of Defendants. The Fifth Circuit, in accordance with the Supreme Court's recent decision in *Groff v. DeJoy*, 143 S. Ct. 2279 (2023), reversed. The court explained that Title VII forbids religious discrimination in employment. The statute defines "religion" broadly to include "all aspects of religious observance and practice, as well as belief." Further, the court explained that Title VII also requires employers to accommodate the religious observances or practices of applicants and employees. The court held that TDCJ breached both duties. TDCJ (a) failed to accommodate Hebrew's religious practice and (b) discriminated against him on the basis of his religious practice The court reasoned that the only issue is whether TDCJ has met its burden to show that granting Hebrew's requested accommodation—to keep his hair and beard—would place an undue hardship on TDCJ. The court relied upon the recent Supreme Court decision in *Groff v. Dejoy*, 143 S. Ct. 2279 (2023), in which a unanimous Supreme Court held that a showing of "undue hardship" requires an employer to prove that the burden of accommodation "is substantial in the overall context of an employer's business." With

respect to Hebrew's beard, TDCJ presented no evidence that an officer with a long beard imposes an undue hardship. Thus, the Fifth Circuit concluded that TDCJ failed to carry its burden to show that it would face an undue hardship if it accommodated Hebrew's religious faith. The Fifth Circuit held that Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

***I F G Port Hold v. Lake Charles Harbor,* 82 F.4th 402 (5th Cir. September 21, 2023)**

Both parties consented to have their commercial dispute tried before a US Magistrate Judge. After a 20-day bench trial, the judge rendered judgment for the plaintiff, awarding $124.5 million, including over $100 million in trebled damages. After the issuance of the judgment and award, the defendant learned about an undisclosed relationship between the Magistrate and the plaintiff. Apparently, the Magistrate was a longtime family friend with the lead trial attorney for plaintiff and had even officiated the wedding of the lawyer's daughter three months before the lawsuit was filed. Defendant filed a motion to vacate the referral to the Magistrate, but the motion was denied. The Fifth Circuit, however, did vacate it, finding that the facts alleged, if true, raised serious doubts about the validity of the defendant's consent to have its case tried by the Magistrate. The Court remanded the case for an evidentiary inquiry, because the facts were not sufficiently developed for the Court to decide whether the defendant's consent was validly given or whether vacatur of the referral was otherwise warranted.

***McLin v. Twenty-First Judicial Dist,* No. 22-30490 (5th Cir. August 16, 2023*)***

In this employment dispute, the District Court dismissed with prejudice a suit brought by Katelynn McLin against the Louisiana Twenty-First Judicial District and its former Chief Judge Robert Morrison. McLin is a white female previously employed by Louisiana's Twenty-First Judicial District. On November 13, 2020, McLin attended a clerical staff luncheon convened by the Twenty-First Judicial District. During the luncheon, the Judicial Administrator Sara Brumfield publicly praised McLin for her work performance. McLin sat next to T.D. at the luncheon, a black colleague whom she had never met. At the end of the lunch, McLin stated that it was "time to go back to LP and deal with the LPians." McLin alleged that "LPians" referred to citizens of Livingston Parish, and that she did not use that term "objectively or intend[ing] to be offensive, racially charged, or antagonistic in any possible sense." The parties did not suggest the use of "LPians" had any racial connotation. Accepting McLin's pleading as true, it either lacked a racial element or none was intended. Yet the comment prompted T.D. to search for McLin's social media. While searching through McLin's Facebook posts, T.D. noticed an article McLin reposted regarding a motorist on I-244 who drove his vehicle and horse trailer through a blockade of protestors rallying in the wake of George Floyd's murder. In the post, McLin, who herself keeps and trains horses and drives a truck with a horse trailer, posted "All I'm going to say is that Silver Duramax enjoys pulling that black horse trailer at 80mph [] #IWillrunYouOver." T.D. complained about the Facebook post and the use of the term "LPians" to her supervisor, Judge Blair Edwards. McLin was terminated based on the Facebook post and comment to T.D. and was told by Brumfield that sh "hate[d] having to do this" but that she "had no other choice" as her "hands are tied." McLin then confronted Chief Judge Morrison who confirmed that his decision to terminate her was based on the Facebook post and comment to T.D., observing that "[i]n today's world that we live in, I have no other choice but to terminate you. You need to watch what you say and do."

McLin filed a charge of discrimination with the Equal Employment Opportunity Commission alleging that the Twenty-First Judicial District unlawfully terminated her based on her race in violation of Title VII, and the EEOC issued a right to sue letter. The underlying suit in the Middle District of Louisiana followed, with: (1) a disparate treatment claim based on race in violation of Title VII against the Twenty-First Judicial District, (2) 42 U.S.C. §§ 1981 and 1983 claims

of disparate treatment based on race against Chief Judge Morrison, (3) a claim of unlawful termination for "political activity" in violation of Louisiana state law against the Twenty-First Judicial District, and (4) a § 1983 claim of unlawful termination in retaliation for engaging in protected speech in violation of the First Amendment to the U.S. Constitution against Chief Judge Morrison. The District Court dismissed all claims under Rules 12(b)(1) and 12(b)(6), holding that the Twenty-First Judicial District lacked the capacity to be sued, that Chief Judge Morrison was entitled to qualified immunity, and the McLin's complaint failed to state a claim. McLin appealed.

Plaintiff argued that the district court erred in dismissing her Section 1981 and Title VII claims. The Fifth Circuit affirmed. The court explained that Plaintiff sought to meet the racial causation element with the comments made by Brumfield that her "hands are tied" as well as the Chief Judge's tone and comment stating, "in today's world that we live in, I have no other choice but to terminate you. You need to watch what you say and do." The court wrote that these speculative allegations do not carry the day. Plaintiff issued the public statement "#IWillrunYouOver" in reference to driving her truck over peaceful protestors. Taking all the factual allegations as true, a more reasonable and obvious interpretation than the one put forth by Plaintiff is that her termination had to do with her public threat to run over people. While the district court erred in requiring Plaintiff to make allegations that satisfy the *McDonnell Douglas* standard, Plaintiff still failed to plead one ultimate element a plaintiff is required to plead: that the termination was taken against her because of her protected status. The court concluded that Plaintiff has not asserted plausible facts meeting the elements of this claim.

***Muldrow v. City of St. Louis, Missouri,* 601 US _ (2024)**

Sergeant Muldrow, initially assigned to the Intelligence Division where she worked on various high-profile cases and was deputized by the FBI, was transferred to the Fifth District by Interim Police Commissioner Lawrence O'Toole's appointee, Captain Deeba. This change led to a different work schedule, responsibilities, and loss of special FBI-related privileges including a potential $17,500 in annual overtime pay. After her transfer, Sergeant Muldrow was asked to return FBI-issued equipment, which she did, and her Task Force Officer status was revoked. She filed a discrimination charge with the Missouri Commission on Human Rights against the City of St. Louis and Captain Deeba, later filing an action in Missouri state court alleging Title VII violations.

The case was removed to federal court, where the district court granted summary judgment against her Title VII claims and dismissed her state law claims. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed, holding that the employment decisions she alleged did not constitute "adverse employment action" and thus did not establish a prima facie case of gender discrimination under Title VII, nor were they "materially adverse action" as required for a prima facie case of retaliation under Title VII.

The question before the Court was whether Title VII of the Civil Rights Act of 1964 prohibits discrimination in transfer decisions absent a separate court determination that the transfer decision caused a signification disadvantage. In a unanimous decision, the Court held that while an employee challenging a job transfer under Title VII must show that the transfer brought about some harm with respect to an identifiable term or condition of employment, the employee need not show that harm be significant. The Court reasoned that as long as the transfer left the employee worse off in some way with respect to their employment terms or conditions, and was made because of a protected characteristic like sex or race, it violates Title VII's prohibition on discrimination. There is no basis for reading a heightened "significant harm" standard into the statute.

***Price v. Valvoline,* No. 23-20131 (5th Cir. December 15, 2023, revised December 18, 2023)**

Price, an African-American, filed suit against his former employer, Valvoline, alleging that his employment was terminated due to his race and that he was subjected to a hostile work environment. Valvoline operated on an attendance policy, and Price had been repeatedly warned about his absenteeism. He was eventually terminated after he missed a shift due to food poisoning.

The Fifth Circuit affirmed the district court's summary judgment in favor of Valvoline, finding that Price's employment was terminated due to his repeated absenteeism, not because of race. The Court also concluded that the allegedly race-motivated comments – "lazy boy," "you people always want something for free" - were not objectively severe or pervasive enough to create a hostile work environment. Likewise, the Court found that Price could not demonstrate that the alleged harassment he experienced was frequent or that it interfered with his work performance.

## IX. TITLE X

***Deanda v. Becerra,* 96 F.4th 750 (5th Cir. March 12, 2024)**

The Federal Title X program gives clinics hundreds of millions of dollars in grants to distribute contraceptives and other family planning services. By statute, Title X grantees must serve "adolescents" while, to the extent practical, encourage family participation. Deanda, a father raising his children in accord to Christian beliefs, challenged the Secretary of Health and Human Services' administration of Title X, arguing that it nullifies his right to consent to his children's medical care, infringing on his state-created right. The district court ruled that Title X does not preempt Texas' law and that the Secretary's administration of Title X violated Deanda's constitutional right to direct his children's upbringing. The district court also vacated a regulation, 42 CFR §59.10(b), which forbids Title X grantees from notifying parents or obtaining their consent.

On appeal the Fifth Circuit found that Title X does not preempt Texas' law. The statute does not preempt Deanda's parental right to consent to his children's obtaining contraceptives, because Title X's goal (encouraging family participation in teens' receiving family planning services) is not undermined by Texas' goal (empowering parents to consent to their teen's receiving contraceptives). Instead, the two laws reinforce each other.

## X. QUALIFIED IMMUNITY

***Grisham v. Valenciano,* No. 22-50915 (5th Cir. February 26, 2024)**

Everard and Grisham, two Second Amendment protestors, were arrested by Olmos Park police after 911 received several calls about a man walking around with an AK-47 around his neck. Both men were charged with disorderly conduct and interference with the duties of a public servant, but all charges were dismissed. The pair then filed suit against the City of Olmos Park and several officers, alleging violations of their First, Fourth and Fourteenth Amendment rights.

After the district court granted summary judgment for all defendants, Plaintiffs appealed to the Fifth Circuit. The Court affirmed, finding that the officers had probable cause to believe that Everard and Grisham were engaging in criminal activity and that the officers were not objectively unreasonable in believing probable cause existed. The Court also found that the officers had qualified immunity because Everard and Grisham failed to point to any clearly established law that the force used against them was excessive under the circumstances. The Court also affirmed the claims against the City because there was no underlying constitutional violation.

## XI. ADA

***Austin v. City of Pasadena,* 74 F.4th 312 (5th Cir. July 18, 2023)**

At 2:33 a.m. on March 28, 2019, Pasadena Police Department Officer L. Arguetta arrested 32-year-old Jamal Ali Shaw for suspicion of public intoxication. At 6:07 a.m., Pasadena Police Service Officer Joanna Marroquin placed Shaw into detention Cell H without incident. Cell H is a holding cell for detainees held on Class-C misdemeanors, typically traffic warrants, awaiting a court appearance. A video recording showed that, around 6:15 a.m., Shaw fell to the floor due to an epileptic seizure. Other detainees in Cell H alerted staff that Shaw was having a seizure. At around 6:16 a.m., Marroquin observed Cell H and made a call on the police radio requesting emergency medical services ("EMS"). Additional officers then entered Cell H and removed all detainees other than Shaw. The officers placed their hands on Shaw's back and shoulder – the officers claimed this was to keep Shaw away from the wall while Shaw claimed the officers were trying to restrain him. Unable to gain control of Shaw, the officers eventually tased Shaw in the leg in "drive-stun" mode. Shaw got up and walked toward the toilet area of the cell. Shaw then began to move towards one of the officers at which time he was tased in the chest, causing him to fall forward, face-first, onto the concrete floor, where he continued to thrash on the floor while continuing to be tased while officers continued to attempt to restrain him, including one officer pressing a knee on Shaw's back. Despite EMS arriving, Shaw was not immediately provided care. He was eventually provided calming medications and was placed in the ambulance. As the ambulance began to leave the jail, Shaw suffered cardiac arrest. He died the next day due to cardiopulmonary arrest.

Plaintiffs filed suit under 42 U.S.C. § 1983 against the officers and the City of Pasadena. The district court either dismissed or granted summary judgment on all claims in favor of the Defendants. The Fifth Circuit reversed the grant of qualified immunity for the individual Defendant Officers as to the Section 1983 claims and the grant of summary judgment on the claims for bystander liability. The court affirmed the grant of summary judgment on municipal liability and on the claims under the Americans with Disabilities Act and Rehabilitation Act. The court explained that the record was insufficient to support a jury question that the use-of-force and Electronic Control Weapon policies were so vague that they amounted to no policy at all. These policies "may have been inadequate," and while a jury might conclude that the City was negligent in not requiring Plaintiffs' specified actions, "that, of course, is not enough under Section 1983." The court explained that without evidence showing that the higher level of care was obviously necessary, we cannot see how the jury could conclude that the use-of-force and Electronic Control Weapon policies were deliberately indifferent. Accordingly, there was no substantial evidence that such a policy would obviously lead to the violation of pre-trial detainees' constitutional rights. Further, the court found that Plaintiffs cited no binding caselaw in which liability under the ADA and RA has been extended to a context similar to this one.

***January v. City of Huntsville,* 74 F.4th 646 (5th Cir. July 24, 2023)**

Almost a decade ago, Huntsville, Plaintiff, a Texas firefighter, had gallbladder surgery. It did not go well, and ever since, Plaintiff has needed medication and treatment for complications. And for years, both the City and its fire department accommodated him. But in 2016, not long after his surgery, the City caught Plaintiff asking a fellow employee for his leftover prescription painkillers. Because such a request violated city policy, Huntsville placed Plaintiff on probation and warned that future violations could lead to his termination.

Unrelatedly, in January 2018, January submitted—and then rescinded—a letter of resignation. The fire department accepted him back, but passed him over for open officer positions, and declined to reinstate him to a trainer position he had previously held. January,

incensed, met with City employees in November 2018. At that meeting, he accused the City of discriminating and retaliating against him on account of his age and disability in not selecting him as an officer and by removing him as a trainer. He also made clear that he was considering suing the City for discrimination. The City, with the help of outside counsel, began to investigate. After several months without resolution, January, in February 2019, told the City that he was going to complain to the EEOC. Then, a month later, January went to Huntsville's City Hall to make copies for his EEOC complaint. The parties had different accounts of how that visit went. According to the City, employees immediately suspected that January was somehow intoxicated. Employees reported that January slurred his words, was "partially incoherent," and seemed unlike himself. By January's telling, he, on the day in question, was suffering from sleep deprivation and hypoglycemia (which, he notes, he had told the City months before could read as intoxication). January eventually went to the City Manager's office with several City officials. While there, officials repeatedly asked to drug test January, which he declined to allow. Officials refused to let January drive himself home and finally let him go only when his wife eventually arrived. The City placed January on administrative leave and investigated. Two weeks later, it fired him. Director of Public Safety Kevin Lunsford, the decisionmaker, explained that January was fired because: 1) despite a drug test taken the next day showing no intoxication, there remained a "high probability" that January was impaired at City Hall; 2) January was insubordinate because he refused to leave City Hall when told to do so; 3) January's lack of cooperation and intoxication harmed the City's reputation; and 4) January was disrespectful in intimidating and scaring Poe. Given January's past warning that any further violation could end his employment, the City terminated him. And, at roughly the same time, it informed January that the investigation into his discrimination complaint determined that it lacked merit.

Plaintiff sued, claiming retaliation under the ADA, the Rehabilitation Act, and the ADEA, and discrimination under the ADA. Eventually, and over Plaintiff's request for a Rule 56(d) continuance, the district court granted summary judgment to the City on all claims. January appealed. The Fifth Circuit affirmed. The court explained that beyond temporal proximity, Plaintiff produced no evidence that Lunsford's reasoning concerning his intoxication was false (such that he was not actually intoxicated at the time) or pretextual (such that Plaintiff's protected activities were the real reason for his firing). The court explained that it has said temporal proximity isn't enough. Nothing Plaintiff provides "makes the inferential leap to [retaliation] a rational one." Because he failed to rebut this proffered justification for his termination, summary judgment was proper.

***J.W. v. Paley,* No. 21-20671 (5th Cir. August 28, 2023)**

A school resource officer, Officer Paley, tased a special-needs student who physically struggled with school staff while attempting to leave school following a violent episode. Officer Paley continued to tase Jevon, using the taser for about 15 seconds total, including when the student was lying facedown on the ground and not struggling. As a result of the tasing, the student urinated, defecated, and vomited on himself. The student's mother sued the officer and the school district, bringing constitutional claims under 42 U.S.C. Section 1983 and disability discrimination claims under the Americans with Disabilities Act and the Rehabilitation Act. The district court granted summary judgment to the officer and school district. The Fifth Circuit concluded, based on recent Supreme Court precedent, that the district court incorrectly subjected the disability discrimination claims to administrative exhaustion as Plaintiff was seeking a remedy that IDEA cannot provide (compensatory and punitive damages). On the merits, however, the Fifth Circuit concluded that the district court correctly granted summary judgment to the officer and school district. The court explained that the officer's use of his taser in this situation was poor judgment, especially after Plaintiff's son had ceased struggling, but Plaintiffs failed to

create a genuine dispute as to whether the officer intentionally discriminated against Jevon because of his disability. The court explained that Section 504 of the Rehabilitation Act and Title II of the ADA are not the proper vehicles for remedying "all unreasonable, inappropriate, unprofessional, and/or unduly harsh conduct by public agents." The Fifth Circuit also held that Plaintiffs' failure to accommodate claim failed as there was no evidence that the officer had notice of the limitations and necessary accommodations concerning the student's disability of that he was aware or should have been aware of further accommodations that would have calmed the student down. Finally, with regard to the substantive due process claim, the Fifth Circuit determined the actions of the officer to be corporal punishment, a claim which is precluded because Texas provided adequate post-punishment civil or criminal remedies. As such, the court affirmed summary judgment for Officer Paley on the Fourteenth Amendment substantive due process claim.

***Milteer v. Navarro County*, No. 23-10872 (5th Cir. April 24, 2024)**

Rick Milteer, a disabled veteran who was diagnosed with hearing loss in both ears, cancer, a throat tumor, PTSD, hypertension and diabetes, and who was also an observant African American Messianic Jewish believer, was hired by Navarro County as an IT manager within the Texoma High Intensity Drug Trafficking Area division (HIDTA). After Milteer filed a Charge of Discrimination with the EEOC complaining of lack of accommodations, religious discrimination and retaliation, he was terminated one month later for an alleged data breach. Milteer received his right-to-sue letter and filed suit against the County, alleging he suffered an adverse employment action and retaliated against for requesting disability and religious accommodations.

The County moved for summary judgment, arguing that it was only the "nominal" employer and "nothing more than an administrator that processes his payroll and benefits for Texoma HIDTA. The district court disagreed and found evidence that the County was the entity that hired and fired Milteer, and that HIDTA was a separate entity. However, the district court then applied the *McDonnell Douglas* burden-shifting framework and determined that the County had produced evidence of a legitimate, non-discriminatory reason for terminating Milteer – it was instructed to terminate Milteer by the Texoma HIDTA Executive Board. It also determined that Milteer did not come forward with evidence to show this reason was pretext for religious discrimination. As to his accommodation claim, the district court held that Milteer failed to produce any evidence that he informed the County of his disabilities or requested an accommodation from the County. And as to the retaliation claim, the district court found that the adverse action and the timing were explained by the nature of the HIDTA Board notifying the County that it had voted to terminate Milteer.

On appeal, the Fifth Circuit found that the district court erred in determining that the County and HIDTA were separate legal entities, and that HIDTA was not a legal entity but a partnership with the County. The Court then found that the District Court's error impacted its analysis and vacated and remanded the case with the instruction that the district court should treat the County and HIDTA as a single entity and review its decision.

***Mueck v. La Grange Acquisitions*, 75 F.4th 469 (5th Cir. July 21, 2023, revised August 4, 2023)**

In 2019, Clint Mueck received his third citation for Driving While Intoxicated ("DWI"). As a term of his probation, Mueck, an alcoholic, was required to attend weekly substance abuse classes. Some of these classes conflicted with shifts that Mueck was scheduled to work as an operator at a plant owned by La Grange Acquisitions, L.P. Mueck informed his supervisors that he was an alcoholic and that several of the court-ordered substance abuse classes would conflict with his scheduled shifts. When Mueck was unable to find coverage for these shifts, La Grange, citing this scheduling conflict, terminated Mueck. After exhausting his administrative remedies through the Equal

Employment Opportunity Commission, Mueck sued La Grange under the American with Disabilities Act ("ADA") for intentional discrimination, failure to provide reasonable accommodation, and retaliation. Following the close of discovery, La Grange moved for summary judgment on each of these claims. The District Court granted the motion in its entirety, first finding that Mueck failed to provide sufficient evidence from which a jury could conclude that his alcoholism was a disability under the ADA as required by his intentional discrimination and failure-to-accommodate claims. Additionally, the District Court held that Mueck had failed to show that he requested an accommodation as required for both his failure-to-accommodate claim and retaliation claim. Mueck appealed. He raised four issues: (1) whether, as a threshold matter, the District Court erred in finding that he failed to produce evidence that his alcoholism is a disability under the ADA, (2) whether the District Court therefore erred in granting summary judgment as to his intentional discrimination claim, (3) whether the District Court erred in granting summary judgment as to his failure-to-accommodate claim, including on the alternate basis that he had not requested an accommodation, and (4) whether the District Court similarly erred in granting summary judgment as to his retaliation claim on the ground that he had not engaged in a protected activity. Addressing each issue in turn, the Fifth Circuit affirmed explaining that here, the facts suggest only that a reasonable employer might have found that Plaintiff might have been seeking accommodation for his disability. To hold that La Grange was required to determine whether Plaintiff had a disability and needed accommodation in this situation would place the initial burden of identifying an accommodation request on the employer, not the employee. The Court could not find that Plaintiff's terse references to his struggles with drinking and self-identification as an alcoholic, made while discussing the legal implications of a recent DWI, were enough to place a legal responsibility on La Grange to probe whether Plaintiff was requesting a disability accommodation.

## XII. MISCELLANEOUS

***Cerda v. Blue Cube Operations,* 95 F.4th 996 (5th Cir. March 19, 2024)**

Elizabeth Cerda worked for Blue Cube from 2006 until 2020. Following rotator cuff surgery in 2017, she requested and was granted FMLA leave. She exhausted the 12 weeks' leave but remained on leave for a total of 18 months. When she returned, Cerda began visiting her ailing father during her 30-minute lunch break, but she regularly did not return on time. In 2020, Cerda asked about FMLA leave to care for him but did not receive a response and did not push the issue. Instead, she continued to take long lunch breaks. After co-workers complained, Blue Cube investigated, which revealed Cerda had been paid at least 99 hours that she did not work. During that investigation, Cerda missed work after she was exposed to COVID. When Blue Cube required her to use personal sick days to justify the absence, she threatened to come to work and infect her co-workers. Blue Cube terminated Cerda, who then sued claiming interference with her FMLA benefits and retaliation.

After the district court granted summary judgment for Blue Cube, Cerda appealed. The Fifth Circuit affirmed, finding that Cerda did not adequately notify Blue Cube of her need or intent to take leave beyond her lunch breaks. The Court also found that Blue Cube had a legitimate, non-retaliatory, and non-discriminatory reason for her termination.

***Chase v. Hodge,* 95 F.4th 223 (5th Cir. March 5, 2024)**

This case involves a business dispute over the formation and ownership of a limited liability company. Chase contends that he had an agreement with Hodge to have equal ownership in the business. However, the company was allegedly improperly formed with Hodge as the sole owner. Chase alleges this resulted in a breach of contract. The district court ruled for Hodge, citing both limitations and the statute of frauds as grounds for dismissal.

On appeal, the Fifth Circuit affirmed, addressing only the applicability of the statute of frauds which requires certain contracts to be in writing. The Court found that the agreement fell within the statue of frauds because the agreement's performance required more than a year.

***Clapper v. American Realty Investors,* No. 21-10805 (5th Cir. March 10, 2024)**

This is a lesson on how to act and not act before a jury. The Fifth Circuit held that a new trial is warranted when "improper closing argument irreparably prejudices a jury verdict. In this case, American Realty's two lawyers employed nearly every category of what the Fifth Circuit has previously held to be improper closing argument: they launched a barrage of personal attacks against Clapper's counsel; they threw a box of Kleenex at Clapper's counsel stating, "I know y'all have a potentiality of crying;" they stated that if Clapper's counsel had accused them of perjury in the street instead of the courtroom, he would have whooped his ass; they accused Clapper's counsel of trying to hide evidence and called him an embarrassment for the profession; and they mentioned several times that Clapper was from Michigan and people from Michigan have lower moral standards. The Fifth Circuit found that there was no doubt that these remarks, considered collectively, extended far beyond permissible hyperbole and were designed to bias the jury against Clapper and his counsel. The Court also highlighted the importance of civility in the practice of law, discouraging the use of abusive tactics and emphasizing the need for courtesy, candor and cooperation in all lawyer-to-lawyer dealings.

***Crown Castle Fiber v. City of Pasadena, Texas,* 76 F.4th 425 (5th Cir. August 4, 2023)**

This case is part of the battle between telecommunications providers that are attempting to expand next-generation wireless services (commonly called 5G) and municipalities that are resisting that expansion. The City of Pasadena used another method: aesthetic design standards incorporating spacing and undergrounding requirements. The city invoked those requirements to block Crown Castle's ability to develop a 5G network in the region, and Crown Castle sued for declaratory and injunctive relief, alleging that the minimum spacing restriction violated, and was thus preempted by, both 47 U.S.C. § 253(a) and Texas state law. Congress and the Federal Communications Commission ("FCC") anticipated those strategies and previously had passed the Federal Telecommunications Act ("FTA") and responsive regulations. As a result, the district court decided in favor of Crown Castle, permanently enjoined the city from enforcing the regulations against Crown Castle, primarily basing its decision on the expansive language of the FTA and an FCC ruling interpreting the Act in light of 5G technology and associated challenges.

The Fifth Circuit affirmed the District Court's judgment, including the permanent injunction. The court held that the FTA preempts the city's spacing and undergrounding requirements, and the city forfeited its arguments relating to the safe-harbor provision in the FTA. Nor did the district court abuse its discretion in ordering a permanent injunction. The court explained that, as the court found, the regulations affected only small cell nodes that would permit T-Mobile to offer extensive 5G service in Pasadena. Moreover, the court wrote that a party seeking a permanent injunction must establish (1) actual success on the merits; (2) that it is likely to suffer irreparable harm in the absence of injunctive relief; (3) that the balance of equities tips in that party's favor; and (4) that an injunction is in the public interest. All those factors weighed in Crown Castle's favor.

***Culley v. Marshall,* 601 US _ (2024)**

On February 17, 2019, Halima Tariffa Culley's son was pulled over by police while driving a car registered to his mother. Police arrested him, charged him with possession of marijuana and drug paraphernalia, and seized the vehicle. Culley unsuccessfully tried to retrieve the vehicle, and on February 27, 2019, the State of Alabama filed a civil asset forfeiture action in state court. After 20 months, the state court

granted Culley summary judgment, finding that she was entitled to the return of her vehicle under Alabama's innocent-owner defense.

Culley filed a class-action lawsuit in federal court claiming under 42 U.S.C. § 1983 that the failure of the state and local officials to provide a prompt post-deprivation hearing violated their rights under the Eighth and Fourteenth Amendments. The district court ruled for the defendants, and the U.S. Court of Appeals for the Eleventh Circuit affirmed as to those claims that were not moot.

The Supreme Court was presented with the question of what test a district court must apply when determining whether and when a post-deprivation hearing is required under the Due Process Clause. In a 6-3 decision, the Court held that in civil forfeiture cases involving personal property, the Due Process Clause requires a timely forfeiture hearing but does not require a separate preliminary hearing.

The Court acknowledged that the Due Process Clause of the Fourteenth Amendment generally requires notice and a hearing before the government seizes property, but differentiated between real property, which can be neither moved nor concealed, and personal property, which risks being removed, destroyed, or concealed before a civil forfeiture hearing. While the government must ordinarily provide notice and a hearing before seizing real property that is subject to civil forfeiture, a timely post-seizure forfeiture hearing provides the constitutionally required process after seizing personal property. In this case, the property subject to forfeiture is a vehicle—personal property—so a timely post-seizure forfeiture hearing is all the Due Process Clause requires. Additionally, for such personal property, a separate preliminary hearing before the forfeiture hearing is not required.

***DC Operating, LLC v. Paxton,* No. 22-50612 (5th Cir. May 7, 2024)**

DC Operating owns and operates a strip club in El Paso. It along with two of its employees, both who were under the age of 21 at the time of filing, filed suit challenging the constitutionality of SB 315, a Texas law enacted to curb human trafficking by raising the minimum age of employment at sexually-oriented businesses from 18 to 21. The plaintiffs argued that the law infringed on the employees' constitutional rights to expressive interest in nude dancing and occupational freedom. They also raised a claim of sex discrimination under the Equal Protection Clause.

After the district court upheld the constitutionality of the law, following similar rulings in other cases, the Fifth Circuit dismissed the appeal for lack of jurisdiction. Regarding DC Operating, the Fifth Circuit found it lacked standing. DC Operating never argued that the law burdened the constitutional right to business. It did not allege that the age of the dancers played a role in any message that DC Operating intended to convoy, that it possessed a constitutional right to hire certain employees, or that the law deprived it of equal protection.

With regards to the two employees, the Fifth Circuit noted that, at the time of the district court's decision, both employees were under the age of 21. However, before oral argument in the Fifth Circuit, both turned 21. Thus, they were no longer subject to the law they were challenging, and their appeal was moot.

***Espinal v. City of Houston,* 96 F.4th 741 (5th Cir. March 7, 2024)**

Espinal was a security guard at a Houston office building. He would patrol armed with a flashlight and a shotgun. A Houston police officer in plain clothes got sideways with Espinal over his weapon, left the property, and then returned with additional officers and arrested Espinal for aggravated assault. A Texas grand jury initially indicted Espinal but the charges were subsequently dropped. Espinal then sued the arresting officers and the City of Houston for false arrest, malicious prosecution and assault. The district court dismissed all of Espinal's claims based on qualified immunity and immunity under Texas law.

On appeal, the Fifth Circuit affirmed. The Court found that the officers had probable cause for Espinal's arrest. Further, even if the officers lacked probable cause, the grand jury's subsequent indictment of Espinal shielded the officers from liability under the independent intermediary doctrine. The Court further affirmed that defendants had immunity under the TTCA for any intentional torts, including assault.

***Good River Farms v. TXI Operations,* No. 23-50330 (5th Cir. April 25, 2024)**

Good River Farms sustained severe damage to its pecan farm after a "120-year flood" event along the Colorado River. It sued TXI Operations and Martin Marietta Materials who utilize the land directly across the river from Good River Farms for strip mining. Good River claimed that that mining resulted in the presence of a large pit filled with groundwater that breached and released a deluge of impounded surface water onto Good Farm's property. Three of Good River's claims were submitted to a jury – nuisance, Section 11.086 of the Texas Water Code (diversion), and negligence. Before the case went to the jury, the defendants moved for judgment as a matter of law. The judge denied it saying that he was going to let the case go to the jury without prejudice for defendants to re-urge the motion in light of what the jury does.

The jury found for Good River as to the Water Code claim and negligence. The district court entered judgment for Good River and awarding damages of $659,882. The district court further denied defendants' re-urged motion to dismiss. The Fifth Circuit affirmed, ruling that there was sufficient evidence to support the jury's conclusions. The Court further noted that the jury verdict demands deference.

***Jackson v. World Wrestling Entertainment, Inc.*, 95 F.4th 390 (5th Cir. March 8, 2024)**

Jackson and his nephew attended WrestleMania 38 at AT&T Stadium in Arlington. The nephew had purchased the tickets via SeatGeek.com as a surprise gift for Jackson. While at the show, a pyrotechnics blast caused Jackson to lose most of his hearing in his left ear. Jackson sued WWE in Texas state court for negligence, but WWE removed the case and requested arbitration per the ticket agreement. The district court granted the motion, finding that the nephew had acted as Jackson's agent when he purchased the ticket and that Jackson was bound by the terms of the ticket, including the arbitration agreement.

On appeal, Jackson argued only that his nephew did not have either actual or apparent authority to act on Jackson's behalf under Texas agency law, and that the arbitration agreement was therefore unenforceable as to Jackson. The Fifth Circuit disagreed, finding that Jackson was bound by the arbitration agreement. Although his nephew had purchased the tickets without Jackson's knowledge or control, he acted as Jackson's agent when he presented the ticket on Jackson's behalf for admittance to the event. The ticket's terms and conditions were clear that use of the ticket would constitute acceptance of the arbitration agreement.

***Johnston v. Ferrellgas*, 96 F.4th 852 (5th Cir. March 21, 2024)**

Johnston was injured when he used a propane gas tank manufactured and distributed by Ferrellgas. He had purchased the tank 2 days prior from a Lowe's and was attempting to connect it to his grill when a flash fire occurred. Johnston sued the grill manufacturer and Ferrellgas in state court, alleging strict products liability and negligence. After the case was removed to federal court, Johnston and Ferrellgas proceeded to trial before a seven-person jury. The jury found Ferrellgas liable for a manufacturing defect and negligence and awarded $7 million, which the district court reduced to $1.7 million.

On appeal, Ferrellgas contended that the district court erred in denying its motion for judgment as a matter of law due to insufficient evidence to support the verdict. The Fifth Circuit agreed finding that there was insufficient evidence that the tank was defective when it left

Ferrellgas' possession, a crucial element of a manufacturing defect claim. The Court also found that the negligence claim must fail as it was dependent on the tank having a manufacturing defect. The Court reversed on both claims and rendered judgment for Ferrellgas.

***Lozano v. Collier*, 98 F.4th 614 (5th Cir. April 11, 2024)**

Lozano, a Texas state prisoner and Sunni Muslim, filed suit against three officials of the Texas Department of Criminal Justice, alleging violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the Establishment Clause. Lozano's claims included the inability to shower privately before Jumah (a weekly prayer service), insufficient space to pray in his cell due to hostile cellmates, and lack of access to religious programming and instruction. The district court granted summary judgment in favor of the TDCH officials, finding that Lozano failed to demonstrate a genuine issue of material fact on whether the absence of a Muslim-designated unit or dorm violated the Establishment Clause. The court also found that Lozano provided no evidence to support his allegation that the faith-based dorms required inmates to study Christian materials.

On appeal, the Fifth Circuit reversed summary judgment as to Lozano's RLUIPA's claims regarding Jumah showers and adequate prayer space, finding that there was a genuine dispute of material fact as to whether Lozano's ability to practice his religion was substantially burdened. The Fifth Circuit also vacated the summary judgment on Lozano's RLUIPA regarding additional religious programming and his Establishment Clause claim for further proceedings, finding that Lozano had presented evidence regarding the faith-based dorm's curriculum.

***Murray v. UBS Securities, LLC*, 601 US _ (2024)**

In 2011, UBS hired Trevor Murray as a strategist in its commercial mortgage-backed securities business. Under Securities and Exchange Commission regulations, Murray was required to certify that his reports were produced independently and that they accurately reflected his own views. According to Murray, two leaders at UBS improperly pressured him to skew his research. Murray repeatedly reported this conduct to his supervisor, who declined to take action. UBS terminated Murray in 2012.

Murray sued UBS in 2014 alleging that UBS terminated him in response to his complaints about fraud on shareholders in violation of the Sarbanes-Oxley Act's antiretaliation provision, 18 U.S.C. § 1514A. The district court ruled for Murray, and UBS appealed, arguing that the district court erred by failing to instruct the jury that Murray had to prove UBS's retaliatory intent to prevail on his section 1514A claim. The U.S. Court of Appeals for the Second Circuit agreed with UBS and vacated the judgment of the district court.

The question for the Supreme Court was whether under 18 U.S.C. § 1514A, a whistleblower must prove his employer acted with "retaliatory intent" as part of his case in chief. In a unanimous decision, the Court concluded that while a whistleblower who invokes §1514A must prove that his protected activity was a contributing factor in the employer's unfavorable personnel action, he need not prove that his employer acted with "retaliatory intent."

Under the Sarbanes-Oxley Act of 2002, whistleblowers are protected from employers engaging in retaliation, such as firing, demoting, suspending, threatening, harassing, or discriminating in any way against an employee's employment conditions "because of" the employee's engagement in protected whistleblowing activities. A whistleblower must first demonstrate that their whistleblowing was a significant factor in the alleged adverse employment action, and then the burden shifts to the employer, who must prove that they would have made the same adverse employment decision regardless of the whistleblower's actions.

The Court reasoned that the word "discriminate" in the statute does not inherently require "retaliatory intent," which refers to animus or prejudice. Further, to require a whistleblower to prove "retaliatory intent," as UBS argues, would ignore the statute's mandatory burden-shifting framework. The Court was not swayed by UBS's contention that innocent employers will face liability for legitimate, nonretaliatory personnel decisions, holding that the burden-shifting framework precludes that outcome. Thus, a whistleblower who invokes 18 U.S.C. § 1514A must prove only that his protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint."

***Pizza Hut v. Pandya*, 79 F.4th 535 (5th Cir. August 22, 2023)**

Defendant was one of Pizza Hut L.L.C.'s largest franchisees in Pennsylvania, operating 43 restaurants there (plus one in Connecticut). Ultimately, though, Defendant failed to fulfill his contractual obligations, so Pizza Hut terminated the parties' various franchise agreements. Hoping to keep the restaurants open, Pizza Hut entered into two post-termination agreements with Defendant for him to continue operating the restaurants while the parties tried to find a buyer. The first agreement was unsuccessful. The second ended in this litigation. After several rounds of pleading, Defendant demanded a jury trial. Pizza Hut moved to strike the request under the second post-termination agreement's bilateral jury waiver. The district court enforced the waiver, and the case continued to a bench trial in which Pizza Hut prevailed. The only issue on appeal is whether the district court erred in striking Pandya's jury demand. Pandya contended that the jury waiver was procured by fraud and that the District Court failed to give due weight to the Seventh Amendment's inviolability. According to Pandya, the history of the Seventh Amendment showed that pre-dispute jury waivers were non-existent, and, even if they did exist, fraud can always invalidate a contract.

The Fifth Circuit affirmed holding that the Seventh Amendment right to a jury trial is unassailable but not unwaivable. Courts have long honored parties' agreements to waive the jury right if the waiver is knowing and voluntary. The court explained that it follows its sister circuits in holding that general allegations of fraud do not render contractual jury waivers unknowing and involuntary unless those claims are directed at the waiver provision specifically. Because Defendant failed to show that the jury waiver was unknowing and involuntary, he failed to meet his burden.

***Sauceda v. City of San Benito, et al.*, No. 19-40904 (5th Cir. August 15, 2023)**

On June 20, 2015, San Benito police officer Hector Lopez responded to a call by a relative of one of Ricardo Sauceda's neighbors who claimed Sauceda had made rude comments and gestures from across the street. Lopez approached Sauceda, who was standing in the front yard of his property behind a chain-link fence. Lopez spoke to Sauceda and demanded he produce identification. Sauceda, from behind the fence, declined and turned to go inside his house. Lopez pushed open the gate to Sauceda's yard. Sauceda told Lopez he needed a warrant and pushed back. Lopez broke through and grabbed Sauceda who was 50 years old and disabled. They struggled, and Lopez brought Sauceda to the ground. At one point, Lopez took out his baton. Sauceda claimed Lopez hit him with the baton, but the video evidence was inconclusive. Sauceda was taken into custody and received medical attention for a cervical sprain, a back sprain, and a contusion. He was charged with disorderly conduct, failure to identify, resisting arrest, and assault on a public servant. All of the charges were later dismissed. Sauceda filed the underlying suit against the City of San Benito and Lopez, individually and in his official capacity as an officer, alleging false arrest, use of excessive force, and municipal liability. The District Court granted summary judgment for defendants. Sauceda appealed.

The Fifth Circuit concluded that Plaintiff had raised genuine issues of material fact as to his claim for false arrest against Lopez. The court reversed and remanded concerning the

false arrest claim. The court otherwise affirmed. The court explained that because the hot pursuit exception does not apply (and because Lopez has not identified any other applicable exception to the warrant requirement), Plaintiff has raised genuine issues of fact as to whether Lopez had the authority to enter his property to arrest him for disorderly conduct. Further, the court wrote that its conclusion that Lopez lacked authority to make a warrantless entry onto Plaintiff's property applies equal force to Lopez's argument that he could have entered the property to arrest Plaintiff or failed to identify. Moreover, a rational factfinder could determine that Lopez arrested Plaintiff before Plaintiff applied any resistance.