RECENT FEDERAL CASES
OF INTEREST TO GOVERNMENTAL ENTITIES

TEXAS CITY ATTORNEYS ASSOCIATION
FALL CONFERENCE
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D. RANDALL MONTGOMERY
ASHLEY SMITH
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

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I. FIRST AMENDMENT

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

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

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

Contrary to the district court, which held that Graziosi spoke in her official capacity because her posts identified her as a police officer, the Fifth Circuit held that the identification was irrelevant, and what mattered was that the "statements [at issue] [were] not within the ordinary scope of Graziosi's duties as a police officer." On whether Graziosi's posts were a matter of public concern, the Court acknowledged that Graziosi "perhaps [had a] genuine desire to inform the community about the [police department's] failure to send a representative to the funeral." But it held that the content and context of Graziosi's speech weighed in favor of finding that it was, as a matter of law, speech on a non-public concern. The mayor's Facebook page was public, and so that factor—the form of the speech—weighed in Graziosi's favor. But the content "quickly devolved into a rant attacking [of the police chief's] ... leadership and culminating with the demand that he 'get the hell out of the way.' ... Therefore, the speech at issue here is akin to an internal grievance, the content of which is not entitled to First Amendment protection." The context—Graziosi's recently-ended suspension, and her "anger and dissatisfaction with [the chief's] ... decision" about attending the funeral—also weighed in favor of concluding that Graziosi's postings involved "not ... a matter of public concern, but instead, ... a dispute over an intra-departmental decision."

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

> Here, Greenville contends that it justifiably dismissed Graziosi to prevent insubordination within the department. We agree. Through her statements, Graziosi publicly criticized the decision of her superior officer and requested new leadership. Furthermore, she told leadership to "get the hell out of the way," underscoring that demand by stating, "seriously, if you don't want to lead, just go." Finally, Graziosi vowed to "no longer use restraint when voicing [her] opinions." These statements coupled with her vow of future and continued unrestrained conduct "smack of

> insubordination," and Greenville was well within its wide degree of latitude to determine that dismissal was appropriate.... Accordingly, Greenville has articulated a substantial interest in maintaining discipline and close working relationships and preventing insubordination.

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

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

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

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

Count Two alleged that Elonis made threats against his estranged wife. Elonis published several Facebook posts that described taking the life of his wife. Because of these posts, Elonis' wife obtained a protection-from-abuse order against Elonis. Soon after, Elonis posted a parody of a comedy sketch, describing a desire to kill his wife and diagramming his wife's home to explain how he would carry out such a plan. Elonis then posted on his Facebook: "Fold up your PFA [protection-from-abuse order] and put it in your pocket / Is it thick enough to stop a bullet?" Elonis also commented that he had enough explosives to "take care of the State Police and the Sheriff's Department." This statement formed the basis of Count Three for threats against local law enforcement.

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

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

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

the United States argued that threats are not protected speech and the government has a compelling interest in protecting the public from threats.

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

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

Frank Benes, a long-time City of Dallas employee, was terminated from the Dallas Water Utilities in early 2012. Throughout his career, Benes filed numerous complaints to his superiors and to high-ranking city officials about pay inequity based on his age and national origin. Benes also made numerous allegations that certain Dallas Water Utilities projects were plagued by fraud and waste. Although an outside firm found that these allegations were unsubstantiated, Benes continued to send complaints. In early January 2012, Benes emailed the members of the Dallas City Council, again alleging misuse of public funds, fraud, and other unethical activities related to the White Rock Spillway project. The following day, Jo Puckett, the Director of the Dallas Water Utilities, sent Benes a disciplinary notice for violating various personnel rules, which explained that Benes could be terminated. After a hearing, Benes was terminated.

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

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

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

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

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

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

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

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

Code, a paradigmatic example of content-based discrimination, singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter.

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

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

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

***Jeffrey J. Hefferman v. City of Paterson, New Jersey,* 136 S.Ct. 1412 (2016)**

Jeffrey Heffernan was a police officer for the City of Paterson, New Jersey. A fellow police officer observed Heffernan picking up a campaign sign for the mayoral candidate running against the incumbent. When a supervisor confronted him, Heffernan claimed that he was not politically involved, could not vote in the city of Paterson, and was picking up the sign on behalf of his mother. Heffernan was demoted to a walking post because his actions were considered to be "overt involvement in political activities." Heffernan sued the city of Paterson and claimed that the city had violated his First Amendment rights to freedom of speech and association. The city filed a motion for summary judgment and argued that, since Heffernan had not actually engaged in constitutionally protected speech, the City's actions had not violated his First Amendment rights. The district court granted the city's motion for summary judgment because there was no evidence Heffernan associated himself with the political candidate at issue. Heffernan admitted himself that he was not associated with the candidate, and therefore there is no evidence of a violation of his right to freedom of association. The U.S. Court of Appeals for the Third Circuit affirmed.

The Supreme Court held that even though a police officer did not engage in protected political activity, the City's mistaken belief that he did and subsequent retaliation is still actionable under the First Amendment. When an employer demotes an employee out of a desire the prevent or punish the employee for engaging in protected speech, that action violates the First Amendment, even if the employer made a factual mistake and no protected speech occurred. This is because the constitutional harm at issue consists in large part of discouraging employees from engaging in protected activities. The Court also held that this rule tracks the language of the First Amendment because it focuses on the harm the government actor committed, which is the same whether or not the employer made a factual mistake, and does not alter the burden that an

employee claiming a First Amendment violation must meet, which is to prove that the defendant had an improper motive.

***Advanced Technology Building Solutions, L.L.C. v. City of Jackson, Mississippi,* 817 F.3d 163 (5th Cir. 2016)**

ATBS and its owner brought a § 1983 action against city, alleging that the mayor, through certain city employees, retaliated against plaintiffs, in violation of the First Amendment, by influencing Joint Redevelopment Authority (JRA) to withdraw support for a project that ATBS proposed after its owner made public statements claiming corruption in the city government. After a jury verdict in favor of plaintiffs and award of $600,000, the district court granted the city's motion for judgment as a matter of law and Plaintiffs appealed.

The Fifth Circuit held that city council, rather than the mayor, was the final policymaker with respect to funding decisions. The mayor did not have final authority over individual funding decisions. Accordingly, the Court affirmed the judgement.

***Dr. Mary Louise Serafine v. Tim F. Branaman,* 810 F.3d 354 (5th Cir. 2016)**

A candidate for political office commenced action against Chairman and Executive Director of Texas State Board of Examiners of Psychologists, alleging that the Psychologists' Licensing Act violated her First and Fourteenth Amendments. The district court granted judgment for defendants and the candidate appealed.

The Fifth Circuit held that the candidate's campaign statements referring to herself on her political campaign internet website as a psychologist were entitled to full First Amendment protection. Her speech on her campaign website was far removed from the context of professional speech and she was not providing advice to any particular client but communicating with the voters at large, so the professional speech doctrine was inapplicable. The Court also concluded that the inclusion of "psychologist" on the website was not commercial speech, and therefore the prohibition against the candidate referring to herself on her political campaign internet website as a psychologist was not narrowly tailored to state's purported compelling interest in protecting mental health. Therefore, because the state's interest in prescribing misleading speech was limited in the political context, and because the Board's goal of prevention deception could be served by other means, the provision of Psychologists' Licensing Act governing "psychological services to individuals, groups, organizations, or the public" was an overbroad restriction on free speech as related to offers to provide such services without a commercial purpose.

II. SECOND AMENDMENT

***Jaime Caetano v. Massachusetts* –136 S.Ct. 1027 (2016)**

Jamie Caetano was convicted of possession of a stun gun in Massachusetts state court. Caetano appealed and claimed her conviction violated her Second Amendment right to possess a stun gun in public for the purpose of self-defense, which was necessary to protect herself from her abusive boyfriend. The Supreme Court of Massachusetts affirmed Caetano's conviction and held that a stun gun is not eligible for Second Amendment protection.

The Supreme Court overturned the lower courts holding that the Second Amendment protects the right to possess a stun gun for self-defense. It reasoned that the lack of common use of stun guns at the time of the Second Amendment's enactment, the unusual nature of stun guns as a modern invention, and lack of ready adaptability of stun guns for use in the military did not preclude stun guns from being protected by Second Amendment right to bear arms. The Court reiterated that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," *District of Columbia v. Heller*, 554

U.S. 570, 582, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

III. FOURTH AMENDMENT

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

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

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

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

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

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

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

Justice Stephen G. Breyer delivered the opinion of the 5-4 majority. The Court held that, in a claim regarding whether an officer used excessive force against a pretrial detainee, the plaintiff is not required to prove that the defendant thought the force was excessive but that the force was excessive based on an objective standard. Therefore, the court must determine whether, from the perspective of a reasonable officer on the scene at the time, the use of force in question was excessive. The Court held that the objective standard is in line with existing precedent that holds that the Due Process Clause protects pretrial detainees from excessive force that amounts to punishment, which can be shown through evidence that proves that the force in question was not reasonably related to the legitimate purpose of

holding detainees for trial. The objective standard also protects an officer who acts in good faith by taking into account the situation as the officer was aware of it at the time. The Court also noted that the use of force in question must be deliberate in order to give rise to an excessive force claim.

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

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

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

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

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

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

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

The Fifth Circuit held that under the totality of the circumstances that Officer

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

***United States v. Joe Angel Castillo*, 804 F.3d 361 (5th Cir. 2015)**

Defendant conditionally plead guilty to bringing in and harboring aliens, and subsequently appealed the district court's denial of his motion to suppress evidence arising from a traffic stop. The officer that pulled defendant over asserts that he stopped defendant on reasonable suspicion that he was driving in the left lane without passing, in violation of Texas law. The court followed *Abney v. State, Mouton v. State, and Baker v. State* and concluded that a court must determine, based on the statute, whether a sign is applicable on the facts of each case.

In this case, the officer first observed defendant 5.3 miles from the closest sign - far short of Abney's fifteen-to-twenty miles and between *Baker's* six and *Mouton's* four. The officer observed defendant for several minutes, like in *Baker*, and allowed an opportunity for defendant to change lanes, like in *Mouton* and unlike in *Garcia*. Finally, unlike in *Abney*, defendant advanced no credible alternative reason for driving in the left lane. All three cases support the conclusion that the officer had reason to suspect defendant was committing a traffic infraction. Because the officer had reasonable suspicion to stop defendant, the court affirmed the district court's denial of the motion to suppress.

***United States v. Luis Gerard Cervantes*, 797 F.3d 326 (5th Cir. 2015)**

Defendant conditionally pled guilty to aiding and abetting possession with intent to distribute marijuana. On appeal, defendant challenged the district court's denial of his motion to suppress evidence, alleging that he was stopped without reasonable suspicion in violation of the Fourth Amendment. In this case, a Border Patrol agent testified, among other things, that defendant's vehicle appeared to be sagging in the rear, and in his experience, that is indicative of narcotics smuggling because smuggling vehicles usually have multiple occupants. The agent further stated that defendant's type of driving behavior was consistent with other smuggling loads he had seen, and defendant's lack of eye contact indicated to him that the occupants of the vehicle wanted to shield themselves from the agents. The court concluded that the traffic stop did not violate the Fourth Amendment where, viewing the evidence in the light most favorable to the Government, and considering the totality of the circumstances, the agents had reasonable suspicion to stop defendant.

***United States v. Beene*, -- F.3d – 2016 WL 890127 (5th Cir. 2016)**

In June 2012, a dispatcher advised police officers that an unnamed caller reported that Defendant pointed a gun at people and then left the scene driving a gray Honda Accord. Officers knew Defendant to have dealt in illegal drugs. An officer drove on the state highway to reach Defendant's residence. As he approached Defendant's residence, he saw a silver Lincoln Continental parked in the yard with Defendant's wife sitting in it. The officer saw Defendant in a gray Honda Accord driving toward him. The officer intended to make a stop based on the dispatcher's information, but Defendant turned into his driveway before the officer could activate his sirens. Defendant parked in his driveway about five feet from the street.

After Defendant did not comply with the officer's orders, he was handcuffed due to his resistance. The officer also believed he had probably cause to arrest Defendant on the dispatcher's report and his history. Defendant was advised of his Miranda rights and placed in the back of the officer's vehicle. During this time, Defendant's wife began to yell, including stating that she owned the Honda that Defendant

had been driving. She advised that she did not know if there was a gun in the vehicle. When asked if they could search the vehicle, she asked if the officer had a warrant, which he did not.

At this point, another officer arrived with a drug sniffing dog who did a search pattern around the Honda Accord. The dog alerted, and on that basis, the officers believed they had probable cause to suspect that narcotics either were, or had been, inside the vehicle. Officers opened the passenger-side door, and immediately saw a bag of marijuana at the front of the driver's seat. They also found crack cocaine, a substantial amount of cash, and a loaded .380 caliber handgun. After being transported to the police station and being read his Miranda rights again, Defendant stated that he possessed the firearm that day only for self-defense.

After denial of his motion to suppress and denial of his motion for reconsideration, Defendant pled guilty in the district court to being felon in possession of firearm and ammunition, reserving his right to appeal the denial of his motion to suppress with respect to the search of his automobile and his post-arrest statements. He appealed on those issues.

The Fifth Circuit held that while the dog sniff search was permissible because the defendant's driveway was not part of curtilage of his residence, the search of defendant's vehicle was not a lawful search incident to arrest. The allowance of a search incident to arrest allows a search of an arrestee's vehicle when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. Defendant was arrested for resisting arrest and his vehicle would not contain evidence of that crime. Whether exigent circumstance were present sufficient to justify a warrantless search of defendant's automobile was an issue to be addressed by the district court. Therefore, the judgment was vacated and remanded for further proceedings. Because the Court remanded for further proceedings, the admissibility of Defendant's post-arrest statements could be considered if an alternative basis to justify the search of his vehicle was presented to the district court and accepted.

***Tammy Cass v. City of Abilene*, 814 F.3d 721 (5th Cir. 2016)**

Abilene Police Department ("APD") obtained a warrant to search Abilene Gold Exchange ("AGE") due to the believe that it was fencing stolen property. The owners of AGE were known to APD as they had cooperated with investigations in the past. Despite this, there were concerns about officer safety due to AGE's "anti-police" attitude, the presence of readily accessible weapons in the store, and the possibility that AGE might be "hiding something" that would cause them to shoot police officers. It was decided that for the safety of the officers, a team in body armor led by a uniformed officer would enter the business with guns drawn to secure the premises and execute the warrant. After drawing his weapon, Cass was shot. The parties dispute what was communicated upon entering.

The family members of Cass brought a § 1983 action against the city, chief of police, and detective, alleging retaliation in violation of First Amendment and various Fourth Amendment violations. The district court entered summary judgment for the defendants and the family members appealed.

The Fifth Circuit held that the chief of police was entitled to qualified immunity from the family members' claims because there was no summary judgment evidence that he was involved with the execution of the warrant or the decedent's death. In addition, the family members' First Amendment retaliation claims against the detective were precluded because there was a reasonable basis for the warrant and he did not make the decision of how to execute the warrant. The Court further agreed that there was no fact issue on whether the detective used excessive force when he fatally shot manager. Because Smith reasonably believed himself to be in immediate danger when he shot Cass, the shooting did not violate the Fourth Amendment.

***United States v. Christopher Robert Weast*, 811 F.3d 743 (5th Cir. 2016)**

A Fort Worth Police officer used peer-to-peer file sharing software to search for computer users sharing child pornography. The officer located an IP address whose corresponding user appeared to be sharing child pornography. He then used the peer-to-peer software to download six files shared by the user. The files had been stored on a computer that the user had nicknamed "Chris," and they contained apparent child pornography.

The officer used a publicly accessible website to determine the internet service provider (ISP) associated with the IP address from his search. A subsequent subpoena to that ISP revealed that the IP address was registered to Larry Weast. Law enforcement officers executed a search warrant at Weast's residence, where they found his son, Chris. Chris refused to be interviewed. The officers seized computer equipment from Chris's bedroom, including a hard drive that was later found to contain child pornography.

Chris was convicted in district court of receipt and possession of child pornography and appealed his conviction. The Fifth Circuit affirmed the conviction holding that defendant did not have reasonable expectation of privacy in internet protocol address or file shared on peer-to-peer network.

***Utah v. Strieff*, 579 U.S. ____ , 2016 WL 3369419 (June 20, 2016)**

Utah Detective Douglas Fackrell received an anonymous tip about drug sales in a South Salt Lake residence, so he surveyed the area over a short period of time and speculated there was drug activity taking place. Fackrell saw Edward Joseph Strieff, Jr. leaving the residence and stopped him for questioning. During the stop, Fackrell discovered Strieff had an outstanding warrant and arrested him. During the lawful search after his arrest, Fackrell found methamphetamine and a drug pipe on Strieff's person. The district court ruled that, although Fackrell did not have enough evidence to conduct an investigatory stop, the methamphetamine and drug paraphernalia obtained during the lawful search incident to arrest justified the admission of that evidence for trial. The Utah Court of Appeals affirmed the district court's ruling, but the Utah Supreme Court reversed and held that the evidence should have been suppressed because the warrant that was the basis for the arrest was discovered during an unlawful investigatory stop.

The issue for the Supreme Court was whether evidence seized incident to a lawful arrest on an outstanding warrant should be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful. The Court determined that the evidence found during the unconstitutional stop on an outstanding warrant was admissible.

It reasoned that in the absence of flagrant police misconduct, the discovery of a valid, pre-existing, and untainted arrest warrant weakened the connection between the unconstitutional investigatory stop and the evidence seized incident to the lawful arrest, which allowed the evidence to be used against the defendant. The Court held that evidence obtained in violation of the Fourth Amendment's protections should not be excluded from evidence when the costs of its exclusion outweighs its benefits. Exclusion is not justified when the link between the unconstitutional conduct and the discovered evidence is too attenuated. To determine whether the connection is attenuated, courts must examine the temporal proximity of the discovery of the evidence to the unconstitutional conduct, the presence of intervening circumstances, and the flagrancy of the police misconduct. Based on the analysis of those factors, when a valid warrant is discovered after an unconstitutional investigatory stop, the connection between the unconstitutional conduct and the discovery of evidence incident to a lawful arrest based on the warrant is sufficiently attenuated.

IV. EIGHTH AMENDMENT

Timothy Lee Hurst v. Florida, 136 S.Ct. 616 (2016)

Timothy Lee Hurst was charged and convicted of first-degree murder for killing his co-worker, Cynthia Harrison, during a robbery of the Popeye's restaurant where they both worked. He was sentenced to death and appealed. On appeal, Hurst was granted a new sentencing trial because the Supreme Court of Florida found that his counsel should have investigated and presented evidence of Hurst's borderline intelligence and possible organic brain damage. At his new sentencing trial, Hurst was prevented from presenting mental retardation evidence as an absolute bar to the imposition of the death penalty, though he was allowed to present it as mitigating evidence. The jury again sentenced Hurst to the death penalty by a vote of seven to five, and the Supreme Court of Florida affirmed.

In 2002, the Supreme Court decided the case Ring v. Arizona, in which the Court held that the Sixth Amendment required that the presence of aggravating factors, which Arizona's death penalty sentencing scheme viewed as essentially elements of a larger offense, be determined by the jury. The Supreme Court of Florida had previously held that the decision in Ring v. Arizona did not apply to Florida's death penalty sentencing scheme generally and specifically did not require that a jury's recommendation of the death penalty be unanimous or that a jury determine the factual issue of a defendant's potential mental retardation.

The Supreme Court ruled that the Florida death sentencing scheme violated the Sixth Amendment's right to a jury trial. Specifically, the Sixth Amendment requires a jury, not a judge, to find each element necessary to impose the death sentence. Although the Florida sentencing scheme required that the jury recommend a death sentence in order to impose the death penalty, the judge was only required to take the jury recommendation under consideration. Because the Supreme Court held in Ring v. Arizona that the Sixth Amendment required that a jury make all the critical findings necessary to impose the death penalty, the Florida sentencing scheme violated the Sixth Amendment in the same way the Arizona one did in Ring.

Henry Montgomery v. Louisiana, 136 S.Ct. 718 (2016)

In 1963, Henry Montgomery was found guilty and received the death penalty for the murder of Charles Hunt, which Montgomery committed less than two weeks after he turned 17. He appealed to the Louisiana Supreme Court, and his conviction was overturned because of community prejudice. At his new trial, Montgomery was again convicted, but he was sentenced to life without parole.

In 2012, the U.S. Supreme Court decided *Miller v. Alabama*, in which the Court held that mandatory sentencing schemes requiring children convicted of homicide to be sentenced to life imprisonment without parole violate the Eighth Amendment. In light of that decision, Montgomery filed a motion in state district court to correct what he argued was now an illegal sentence. The trial court denied Montgomery's motion, and the Louisiana Supreme Court denied Montgomery's application by holding that the decision in Miller does not apply retroactively.

The Supreme Court held that *Miller v. Alabama's* prohibition on mandatory minimum life sentences for juveniles applies retroactively. The Court held that, when the Court establishes a substantive constitutional rule, that rule must apply retroactively because such a rule provides for constitutional rights that go beyond procedural guarantees. When a state court fails to give effect to a substantive rule, that decision is reviewable because failure to apply a substantive rule always results in the violation of a constitutional right, while failure to apply a procedural rule might or might not result in an illegitimate verdict. The Court held that *Miller* established a substantive rule because it prohibited the imposition of a sentence of life without parole for juvenile offenders. The

Court's analysis in that case was based on precedent that established that the Constitution treats children as different from adults for the purposes of sentencing. Therefore, the rule the Court announced in *Miller* made life without parole an unconstitutional punishment for a class of defendants based on their status as juveniles, and such a rule is substantive rather than procedural.

***Richard E. Glossip v. Kevin J. Gross*, 135 S.Ct. 2726 (2015)**

On April 29, 2014, Oklahoma executed Clayton Lockett using a three-drug lethal injection procedure. The procedure went poorly; Lockett awoke after the injection of the drugs that were supposed to render him unconscious and did not die until about 40 minutes later. Oklahoma suspended all subsequent executions until the incident could be investigated and subsequently adopted a new protocol that placed a higher emphasis on making sure the injection was done properly. The new protocol also allowed for four alternative drug combinations, one of which used midazolam as the initial drug, as did the protocol used in the Lockett execution.

Charles Warner and 20 other death row inmates sued various state officials and argued that the use of midazolam as the initial drug in the execution protocol violated the Eighth Amendment's prohibition against cruel and unusual punishment. Warner and three other plaintiffs also moved for a preliminary injunction to prevent Oklahoma from moving forward with their executions. A federal district court denied the injunction and held that the plaintiffs had not provided sufficient evidence that they would prevail on the merits of their claims and that they had failed to identify a "known and available" alternative to the drug in question. The U.S. Court of Appeals for the Tenth Circuit affirmed.

On January 15, 2015, the Supreme Court declined to grant the petition for a writ of certiorari, and Charles Warner was subsequently executed. Richard E. Glossip and the other two death row inmates petitioned the Court again.

The Supreme Court held that Oklahoma's use of midazolam as the initial drug in the execution protocol did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. There was insufficient evidence that the use of midazolam as the initial drug in the execution protocol entailed a substantial risk of severe pain, compared to known and available alternatives, in violation of the Eighth Amendment. Because capital punishment has been held to be constitutional and some risk of pain is inherent in execution, the Eighth Amendment does not require that a constitutional method of execution be free of any risk of pain. Instead, a successful Eighth Amendment method-of-execution claim must identify a reasonable alternative that presents a significantly lower risk of pain, which the petitioners in this case were unable to do. Because the district court is entitled to a high degree of deference in its determination, the petitioners would have to prove that the district court's factual findings were clearly erroneous in order for the Court to overturn the ruling. In this case, the medical testimony supports the district court's determination that the use of midazolam did not create a substantial risk of severe pain, particularly in light of the safeguards the state imposed on the process.

***Francis Braunder v. Shirley Coody*, 793 F.3d 493 (5th Cir. 2015)**

Plaintiff, a state prisoner, who was a paraplegic, brought an action against the prison medical director, assistant warden, and prison doctors, alleging deliberate indifference to his serious medical condition. The district court held perfunctorily that there was a genuine issue of material fact and denied qualified immunity, rejecting the magistrate judge's contrary recommendation. Defendants appealed.

The Fifth Circuit determined that the record could not support a claim of deliberate indifference. The district court order did not identify the factual disputes that precluded summary judgment on the basis of qualified immunity even though the magistrate judge's report made a strong case to the contrary. The Court concluded that the prison doctors were not

deliberately indifferent to the prisoner's serious medical needs by failing to provide him with adequate pain management; the officials were not deliberately indifferent by subjecting prisoner to unsanitary showers; and the doctors did not fail to provide adequate training and supervision regarding proper wound care. The Court reversed the district court's decision and rendered judgment for the defendants.

V. FOURTEENTH AMENDMENT

***Fisher v. University of Texas at Austin, et al.*, 579 U.S. ___, 2016 WL 3434399 (June 23, 2016)**

Abigail Fisher, a white female, applied for admission to the University of Texas but was denied. She did not qualify for Texas' Top Ten Percent Plan, which guarantees admission to the top ten percent of every in-state graduating high school class. For the remaining spots, the university considers many factors, including race. Fisher sued the University and argued that the use of race as a consideration in the admissions process violated the Equal Protection Clause of the Fourteenth Amendment. The district court held that the University's admissions process was constitutional, and the U.S. Court of Appeals for the Fifth Circuit affirmed. The case went to the Supreme Court, which held that the appellate court erred by not applying the strict scrutiny standard to the University's admission policies. The case was remanded, and the appellate court reaffirmed the lower court's decision by holding that the University of Texas' use of race as a consideration in the admissions process was sufficiently narrowly tailored to the legitimate interest of promoting educational diversity and therefore satisfied strict scrutiny.

The Supreme Court agreed that the University's use of race as a consideration in the admissions process was legal under the Equal Protection Clause because it was narrowly tailored to service a compelling state interest. It relied on precedent which established that educational diversity is a compelling interest as long as it is expressed as a concrete and precise goal that is neither a quota of minority students nor an amorphous idea of diversity.

In this case, the Court determined that the University of Texas sufficiently expressed a series of concrete goals along with a reasoned explanation for its decision to pursue these goals along with a thoughtful consideration of why previous attempts to achieve the goals had not been successful. The University of Texas' plan was also narrowly tailored to serve the compelling interest because there were no other available and workable alternatives for doing so.

***United States v. Texas*, 579 U.S. ___, 2016 WL 3434401 (June 23, 2016)**

In June 2012, the Department of Homeland Security (DHS) implemented the Deferred Action for Childhood Arrivals (DACA) program, along with criteria for determining when prosecutors can choose not to enforce immigration laws under DACA. People who qualify for DACA may apply for work authorization. In 2014, DHS established a similar process for parents of citizens and lawful permanent residents as well as expanding DACA by making more people eligible. The new program was known as the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.

Texas and other states sued to prevent the implementation of DAPA and argued that it violated the Administrative Procedure Act because it had not gone through the notice-and-comment process, and because it was arbitrary and capricious. The states also argued that DAPA violated the Take Care Clause of the Constitution, which clarifies the President's power. The district court held that the states had standing to file the suit and temporarily enjoined the implementation of DAPA because the states had established a substantial likelihood of success on the notice-and-comment claim. The U.S. Court of Appeals for the Fifth Circuit affirmed and held that the states had standing as well as a substantial likelihood of success on their substantive and procedural claims.

The Supreme Court affirmed the judgment of the Fifth Circuit, thereby upholding the block on the deferred deportation policies. However, the decision was a 4-4 split. On July 18, 2016, the Department of Justice requested a rehearing of the matter in order to obtain a definitive decision on the matter.

***Whole Woman's Health v. Hellerstedt,* 579 U.S. ___, 2016 WL 3461560 (June 27, 2016)**

In 2013, the Texas Legislature passed House Bill 2 (H.B. 2), which contained several provisions related to abortions. One such provision required that any physician performing an abortion have admitting privileges at a hospital within 30 miles of where the abortion was performed, and another provision required that all abortion clinics comply with standards for ambulatory surgical centers. The petitioners are a group of abortion providers who sued the State of Texas seeking to invalidate those provisions in H.B. 2 as they relate to facilities in McAllen and El Paso. The petitioners argued that H.B. 2 denied equal protection, unlawfully delegated lawmaking authority, and constituted arbitrary and unreasonable state action. The district court dismissed the equal protection, unlawful delegation, and arbitrary and unreasonable state action claims and granted declaratory and injunctive relief against the enforcement of the two contested provisions of H.B. 2. The U.S. Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of the equal protection, unlawful delegation, and arbitrary and unreasonable state action claims and partially reversed the injunctions because the plaintiffs failed to show that they placed a substantial burden in the path of a woman seeking an abortion.

The Supreme Court determined that H.B. 2 imposed an unconstitutional undue burden on women seeking a legal abortion and was, therefore, unconstitutional. In applying the substantial burden test, the Court determined that H.B. 2 did not confer medical benefits sufficient to justify the burdens they imposed on women seeking to exercise their constitutional right to an abortion. Therefore, the provisions unconstitutionally impose an undue burden. The Court held that the judicial review of such statutes need not be wholly deferential to the legislative fact-finding, especially when the factual record before the district court contradicted it. In this case, the evidence presented before the district court showed that the admitting privileges requirement of H.B. 2 did not advance the state's interest in protecting women's health but did place a substantial burden in the path of a woman seeking an abortion by forcing about half of the state's abortion clinics to close. This additional layer of regulation provided no further protections than those already in place. Similarly, the requirement that abortion clinics meet the standards for ambulatory surgical centers did not appreciably lower the risks of abortions compared to those performed in non-surgical centers. These requirements were so tangentially related to the actual procedures involved in an abortion that they were essentially arbitrary. If these requirements took effect, only seven or eight facilities in the entire state would be able to function, which is in and of itself a substantial burden on women seeking abortions because those remaining facilities would not be able to meet the demand. The Court also held that the petitioners were not precluded from challenging the provisions as they were applied despite previous litigation on whether the provisions were unconstitutional on their face, especially given the evidence about how their enforcement had actually affected abortion access across the state.

***Salazar-Limon v. City of Houston,* --- *F.3d* ---, 2016 WL 3348794 (5th Cir. June 15, 2016)**

Salazar was driving with three other men in his truck and had been drinking. Officer Thompson observed Salazar's truck weaving between lanes and speeding in excess of the posted limit. In response, Officer Thompson turned on his lights and sirens, and Salazar pulled over on the right shoulder of the elevated overpass, next to a low retaining wall. Officer Thompson and Salazar dispute certain details of what happened next, but it is undisputed that: 1) Officer Thompson tried to handcuff Salazar; 2)

Salazar resisted; 3) a brief struggle ensued (in which neither party was injured); and 4) after the brief struggle, Salazar pulled away, turned his back to Officer Thompson, and walked away. At this point, Officer Thompson pulled out his handgun and ordered Salazar to stop. Salazar did not immediately do so, instead taking one or two more steps and then reaching towards his waistband, which was covered by a shirt. Thompson testified that he feared Salazar was retrieving a weapon and shot him in the back. Salazar became partially paralyzed. Thompson found out afterward Salazar was not armed. Salazar was charged with, and pleaded *nolo contendere* to, resisting arrest and driving while intoxicated. Salazar sued but his claims were dismissed by Thompson's and the City's motion for summary judgment. Salazar appealed.

"In order to overcome a qualified immunity defense, a plaintiff must allege a violation of a constitutional right, and then must show that 'the right was clearly established . . . in light of the specific context of the case.'" Moreover, "[t]his [plaintiff's] burden is not satisfied with 'some metaphysical doubt as to the material facts,' by 'conclusory allegations,' by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." "The '[u]se of deadly force is not unreasonable when an officer would have reason to believe the suspect poses a threat of serious harm to the officer or others.'" Unless Salazar presented competent summary judgment evidence that he did not reach toward his waistband (for what Officer Thompson perceived to be a weapon), Officer Thompson's decision to shoot was not a use of unreasonable or excessive deadly force. Salazar did not present any such evidence. Therefore, Thompson was properly granted qualified immunity. And since Salazar has not shown a violation of his constitutional rights, all of his Monell claims against the City of Houston failed as a matter of law.

***Birchfield v. North Dakota*, 579 U.S. ___, 2016 WL 3434398 (June 2, 2016)**

Danny Birchfield drove into a ditch in Morton County, North Dakota. When police arrived on the scene, they believed Birchfield was intoxicated. Birchfield failed both the field sobriety tests and the breath test. He was arrested, but he refused to consent to a chemical test. Birchfield was charged with a misdemeanor for refusing to consent to a chemical test in violation of state law. He moved to dismiss the charge and claimed that the state law violated his Fourth Amendment right against unreasonable search and seizure. In a similar case, police were called to the South St. Paul boat launch where three men were attempting to pull their boat out of the water and onto their truck. William Robert Bernard, Jr., admitted he had been drinking and had the truck keys in his hands, but he denied driving the truck and refused to perform a field sobriety test. He was arrested on suspicion of driving while impaired (DWI) and taken to the police station, where he refused to consent to a chemical test in violation of Minnesota state law. Bernard was charged with two counts of first-degree test refusal pursuant to state law. In a separate incident, Steve Beylund consented to a blood alcohol test to confirm he was driving under the influence after being informed it was a criminal offense in North Dakota to refuse a blood alcohol test. The test confirmed he was over the legal limit, and Beylund was charged with driving under the influence.

All three men challenged the state statutes criminalizing refusal to submit to a chemical test and argued that the statutes violated their Fourth Amendment rights to be free from unreasonable searches and seizures when there was no probable cause that would support a warrant for the test. Both the Supreme Court of Minnesota and the Supreme Court of North Dakota determined that criminalizing the refusal to submit to a chemical test was reasonable under the Fourth Amendment.

The Supreme Court held that the Fourth Amendment does not permit warrantless blood tests incident to arrest for drunk driving. It reasoned that warrantless breath tests are permissible under the search incident to arrest exception to the Fourth Amendment's warrant requirement because they do not implicate significant privacy concerns. They involve minimal physical intrusion to capture something

that is routinely exposed to the public, reveal a limited amount of information, and do not enhance any embarrassment beyond what the arrest itself causes. Blood tests, however, implicate privacy interests because they are much more physically invasive -- they require the piercing of the skin -- and they produce a sample that can be preserved and used to obtain further information beyond the subject's blood alcohol level at the time of the test. The Court also determined that criminalizing refusal to submit to a breath test is designed to serve the government's interest in preventing drunk driving, which is greater than merely keeping currently drunk drivers off the roads, and does so better than other alternatives. However, the same rationale did not apply to criminalizing refusal to submit to a blood test because of the greater degree of intrusion and the available alternative of the breath test.

VI. FAIR HOUSING ACT

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

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

At trial, ICP attempted to show discrimination by disparate impact, and the district court found that the statistical allocation of tax credits constituted a prima facie case for disparate impact. Using a standard for disparate impact claims that the U.S. Court of Appeals for the Second Circuit articulated in *Town of Huntington v. Huntington Branch* , the court then shifted the burden to TDHCA to show the allocation of tax credits was based on a compelling governmental interest and no less discriminatory alternatives existed. TDHCA was unable to show no less discriminatory alternatives existed, so the district court found in favor of ICP. TDHCA appealed to the U.S. Court of Appeals for the Fifth Circuit and claimed that the district court used the wrong standard to evaluate disparate impact claims. The appellate court affirmed and held that the district court's standard mirrored the standard promulgated by the Department of Housing and Urban Development, the agency tasked with implementing the Fair Housing Act.

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

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

VII. SECTION 1983

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

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

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

Certiorari was granted on the first issue with the understanding that San Francisco would argue that Title II of the ADA does not apply when an officer faces an armed and dangerous individual. Instead, San Francisco merely argued that Sheehan was not "qualified" for an accommodation because she "pose[d] a direct

threat to the health or safety of others," which threat could not "be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services." This argument was not passed on by the court below. The decision to dismiss this question as improvidently granted, moreover, was reinforced by the parties' failure to address the related question whether a public entity can be vicariously liable for damages under Title II for an arrest made by its police officers.

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

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

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

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

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

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

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

Darby walked toward the protestors blocking the truck, including Singleton, and ordered them to "[g]et out of the road." The protestors did not obey his command.

Approximately five seconds later, Darby leveled a stream of pepper spray toward Singleton and several other protestors in the road. Darby did not spray any of the protestors on the sides of the road who were not obstructing traffic. Singleton described the burning in her eyes as extremely painful. After Singleton left the protest, she visited her doctor, who treated and released her that same day.

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

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

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

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

Third, Singleton and her compatriots resisted Darby's attempt to clear the road. Singleton admits that she heard Darby's warning before he pepper sprayed her group. The video demonstrates that Darby gave Singleton sufficient time to at least begin walking out of the road before he deployed the pepper spray. Singleton nevertheless did not move. Although Singleton testified in her deposition that Darby did not give her enough time to react, we must credit the video evidence over Singleton's contrary testimony.

Thus, Darby, as a reasonable officer, was justified in using some degree of force to clear the road. The force Darby employed was not disproportionate to the need. Deploying pepper spray was not an unreasonable way to defuse the situation. Indeed, it was probably the least intrusive means available to Darby. To reiterate, the protestors vastly outnumbered Darby. As one of only two police officers on the scene, Darby could not have individually handcuffed and arrested each of the numerous protestors blocking the road. In addition to the obvious difficulty of one officer attempting to handcuff so many violators, Darby faced the

likelihood that such an action could motivate a larger number of protestors lining the road to join in the road-blocking enterprise or otherwise retaliate against Darby. Darby's decision to utilize pepper spray was therefore not an unreasonable way to gain control of a potentially explosive situation.

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

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

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

***John F. Kerry v. Fauzia Din,* 135 S.Ct. 2128 (2015)**

Fauzia Din, who is a United States citizen, filed a visa petition for her husband Kanishka Berashk, a citizen and resident of Afghanistan. Nine months later, the State Department denied the petition based on a broad provision of the Immigration and Nationality Act that excludes aliens on terrorism-related grounds. Berashk asked for clarification of the visa denial and was told that it is not possible for the Embassy to provide him with a detailed explanation of the reasons for denial.

After several other unsuccessful attempts to receive explanation of the visa denial, Din sued and argued that denying notice for aliens who were not granted a visa based on terrorism grounds is unconstitutional. The district court held that Din did not have standing to challenge the visa denial notice. The U.S. Court of Appeals for the Ninth Circuit reversed and held that the government is required to give notice of reasons for visa denial based on terrorism grounds.

The Supreme Court felt differently. It held that no Constitutional rights were violated when the government failed to give a full explanation of why an alien's visa was denied. The Due Process Clause of the Fifth Amendment states that no citizen may be deprived of "life, liberty, or property" without due process, but judicial precedent has held that no due process is owed when these interests are not at stake. Because none of these interests are implicated in the denial of a nonresident alien's visa application, there is no denial of due process when the visa application is rejected without explanation. Although "liberty" has been construed to refer to fundamental rights, there is no precedent that supports the contention that the right to live with one's spouse is such a fundamental right.

***Carol J. Vincent v. City of Sulphur,* 805 F.3d 543 (5th Cir. 2015)**

A city resident, Vincent, who had been banned from city-owned property after he was

accused of making threats against the mayor and councilman, brought a § 1983 action against city and police officers in state court, alleging violations of his First, Fourth, and Fourteenth Amendment rights. Following removal, the district court held that officers were entitled to qualified immunity as to the majority of Vincent's claims, but denied qualified immunity on the procedural due process and direct municipal liability claims concluding that issuance of the no-trespass order without notice and an opportunity to be heard violated Vincent's procedural due process rights. The officers appealed.

The Fifth Circuit disagreed that Vincent's procedural due process rights were violated because the alleged constitutional right was not clearly established at the time of the incident, so the officers were entitled to qualified immunity.

***Slade v. City of Marshall* – 814 F.3d 263 (5th Cir. 2016)**

This case concerns the events that led to the death of Marcus Dewayne Slade. On the night of January 4, 2013, officers of the Marshall Police Department were dispatched to investigate a disturbance. When officers arrived on the scene, they found a naked and agitated Marcus having a physical altercation with a man who was seated in a car. Officer John Johnson approached Marcus, who was yelling and refusing to calm down. When Marcus began acting aggressively toward another officer, Officer Johnson deployed his taser. Marcus fell to the ground, but continued to struggle with officers as they tried to subdue him. It took the sustained efforts of several officers to handcuff Marcus. Officers subsequently placed Marcus in a patrol car and transported him a short distance to the Harrison County Jail; the drive took no more than five minutes. The transporting officer reported that Marcus was speaking throughout the drive. Shortly after arriving at the jail, officers noticed that Marcus was unresponsive. Officers immediately began performing CPR and summoned paramedics, but Marcus was pronounced dead at the scene. The cause of death was later determined to be PCP toxicity.

Dorothy Slade, Marcus's mother, filed a wrongful death suit under 42 U.S.C. § 1983 against the City of Marshall and several of the officers involved in the incident. Among other claims, Slade alleged that the officers had violated her son's constitutional rights by failing to seek medical treatment for Marcus until he became unresponsive at the jail. The district court granted summary judgment in favor of the defendants because Slade could not establish a causal link between the officers' alleged denial of medical care and her son's death.

The Fifth Circuit affirmed the district court's ruling holding that a plaintiff seeking to recover under Texas's wrongful death statute must demonstrate that the defendant's wrongful actions more likely than not caused the decedent's death—not just that they reduced the decedent's chance of survival by some lesser degree. Slade first argues that the standard does not apply if there is an obvious need for medical treatment which is ignored based upon the Sixth Circuit's decision in *Estate of Owensby v. City of Cincinnati*. The Court held the 6th Circuit opinion relied upon by Slade was not applicable since it was not a case of causation.

Slade further argues that the Court should apply the "loss of chance" doctrine as a matter of federal common law. Under this doctrine, "[i]t is not necessary to prove that a [plaintiff] would have survived if proper treatment had been given, but only that there would have been a chance of survival." However, the Court held that § 1983 seeks to deter abuses of power that have actually occurred and compensate victims who have actually been injured by such abuses. The traditional causation requirement is a reasonable way to identify when liability is appropriate. Therefore, the "'loss of chance' doctrine is 'not relevant' in the § 1983 context."

VIII. QUALIFIED IMMUNITY

***Cole v. Carson,* 802 F.3d 752 (5th Cir. 2015)**

Seventeen-year-old Ryan Cole was a junior at Sachse High School. Ryan suffered

from obsessive-compulsive disorder. The night before the shooting, he quarreled with his parents, and later took guns and ammunition from their gun safe. He visited his friend Eric Reed Jr. late that night carrying weapons. The next morning, October 25, 2010, Ryan visited Eric again carrying two handguns: a revolver and a Springfield 9mm semi-automatic. At around 10:45 in the morning Ryan allowed Eric to take the revolver, and used Eric's cellphone to ask his grandparents to pick him up at a nearby CVS.

During the course of the morning, police were informed that Ryan was carrying at least one gun and acting aggressively, and they began looking for him. After Ryan left Eric's house with his remaining handgun, he was seen by several officers and ordered to stop. He continued to walk away from the officers and placed the gun against his own head. He walked towards a set of train tracks separated by a narrow wooded area and grassy strip from Highway 78, a major road. The CVS where he was to meet his grandparents was located on the other side of the wooded area, across Highway 78.

Three police officers—Hunter, Cassidy, and Carson—were attempting to locate Ryan on the other side of the wooded area, near Highway 78 and the CVS. Ryan crossed the wooded area and backed out of the woods near Officer Hunter, who was some distance from Officers Cassidy and Carson. The officers believed Ryan was unaware of them when he backed out, and remained quiet so as not to alert him. Then Ryan made some turning motion to his left. The officers say that he turned to face Officer Hunter and pointed his gun at him, while the Coles argue that he merely began to turn toward the CVS, still with his gun pointed at his own head. Whether any warning was given is disputed, but Officers Hunter and Cassidy opened fire, hitting Ryan twice. In addition, Ryan's gun discharged, hitting his own head, and leaving stippling—gunpowder residue around the wound due to the gun being fired from less than thirty inches away.

Ryan fell, and the officers ceased firing. He was picked up by an ambulance and taken for treatment of his severe injuries. Over time, Ryan has made a significant recovery, but lives with profound disabilities. He has incurred extensive medical bills and continues to require care. After the shooting, the three officers had an opportunity to confer before making their statements to police investigators—statements which conveyed that Ryan was given a warning and that he pointed his gun at Officer Hunter prior to being shot. The Coles argue that these statements are lies contradicted by recordings and physical evidence.

The officers' statements resulted in Ryan being charged with aggravated assault on a public servant—a felony. As a result of the assault charge, Ryan was placed under house arrest. The assault charge was dismissed by the District Attorney on May 8, 2012, and Ryan received deferred adjudication for an unlawful carrying charge. The Coles incurred substantial legal fees in order to confront the aggravated assault charge, which they allege was concocted by the officers to justify the shooting.

In their First Amended Complaint the Coles brought § 1983 claims against Officers Cassidy and Hunter for excessive force and against all three officers for manufacturing and concealing evidence in order to get Ryan falsely charged with assault. The defendants moved to dismiss asserting absolute and qualified immunity defenses. The court then issued a Memorandum Opinion and Order denying the Motion to Dismiss with respect to the § 1983 claims based on both excessive force and conspiracy to conceal and manufacture evidence to bring a false charge. The officers appealed.

The Court first addressed the excessive force claim. The "use of deadly force, absent a sufficiently substantial and immediate threat, violate[s] the Fourth Amendment." The threat must be "immediate." The Court must consider the totality of the circumstances, including relevant information known to the officers. Here, the Court concluded that the fact that Ryan was holding a gun to his head, that the officers believed he had made some threat to use it

against a peer, and that the officers knew Ryan was attempting to evade officers, could not in the circumstances here justify the use of deadly force. Though Ryan was approaching a busier area from which several witnesses observed the shooting, he was shot in a relatively open area with only the officers immediately present. He was on foot and walking, not running, and he did not know Officers Hunter, Cassidy, and Carson were there. Merely turning towards the officers as Ryan did without some other aggressive act is insufficient to warrant the use of deadly force. The Court further concluded that it was objectively unreasonable under clearly established law to shoot Ryan.

With regard to the allegation that Officer Carson lied and concealed evidence in order to protect Officers Hunter and Cassidy after the shooting, the Court held that where police intentionally fabricate evidence and successfully get someone falsely charged with a felony as cover for their colleagues' actions, there may be a due process violation.

***Mullenix v. Luna,* 136 S.Ct. 305 (2015)**

In Mullinix, the Supreme Court clarified the application of qualified immunity to use of force cases. On the night of March 23, 2010, Sergeant Randy Baker of the Tulia, Texas Police Department followed Israel Leija, Jr., to a drive-in restaurant, with a warrant for his arrest. When Baker approached Leija's car and informed him that he was under arrest, Leija sped off, headed for the interstate. Baker gave chase and was quickly joined by Trooper Gabriel Rodriguez of the Texas Department of Public Safety (DPS). Leija then entered the interstate and led the officers on an 18–minute chase at speeds between 85 and 110 miles per hour. Twice during the chase, Leija called the Tulia Police dispatcher, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit. The dispatcher relayed Leija's threats, together with a report that Leija might be intoxicated, to all concerned officers. As Baker and Rodriguez maintained their pursuit, other law enforcement officers set up tire spikes at three locations. DPS Trooper Chadrin Mullenix, upon learning that that other spike strips were set up, decided to pursue another tactic: shooting at Leija's car in order to disable it. Mullenix had not received training in this tactic and had not attempted it before, but he informed one of the officers in pursuit of his plan and radioed his supervisor for permission. Before receiving a response, Mullenix got in position on an overpass. Witnesses testified that Mullenix still could hear his supervisor advising that he should "stand by" and "see if the spikes work first."

As Leija approached the overpass, Mullenix fired six shots. Leija's car continued forward beneath the overpass, where it engaged the spike strip, hit the median, and rolled two and a half times. It was later determined that Leija had been killed by Mullenix's shots, four of which struck his upper body. There was no evidence that any of Mullenix's shots hit the car's radiator, hood, or engine block. Respondents then sued Mullenix under § 1983, alleging that he had violated the Fourth Amendment by using excessive force against Leija. Mullenix moved for summary judgment on the ground of qualified immunity, but the District Court denied his motion. Mullenix appealed, and the Court of Appeals for the Fifth Circuit affirmed holding there were genuine issues of fact as to whether or not the trooper acted recklessly considering the "immediacy of the risk."

The Supreme Court held that Mullenix was entitled to qualified immunity for his actions in the context of his situation. It noted that it had previously considered—and rejected—almost that exact formulation of the qualified immunity question in the Fourth Amendment context. The Court held that the proper question in such cases was whether the Fourth Amendment prohibited the officer's conduct in the specific situation with which he was confronted. In this case, Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road. The relevant inquiry, therefore, was whether existing precedent placed the

conclusion that Mullenix acted unreasonably in these circumstances "beyond debate." After a thorough review of the available case law considering car chases, which the court characterized as a hazy legal backdrop and which did not "squarely govern" the facts here, the Supreme Court found that the constitutional rule applied by the Fifth Circuit was not beyond debate. Because it was not clearly established that Mullenix's actions were inappropriate in response to specific situation at hand, the appellate court and the district court erred in holding that Mullenix was not entitled to qualified immunity.

***Erony Pratt v. Harris County, Texas,* -- F.3d – 2016 WL 2343032 (5th Cir. 2016)**

Deputies entitled to qualified immunity, even though one testified his actions may be unconstitutional

This is a §1983 excessive force case where the trial court granted the officers' qualified immunity motions despite one of the officer's testifying that his actions may have been unconstitutional.

Pratt was involved in a minor traffic accident. Upon arriving at the scene, deputies observed Pratt "running in circles . . . imitating a boxer." When deputies attempted to interact with him he was uncooperative and started to walk away. After several warnings the deputies deployed their Tasers. Pratt continued to resist but was eventually handcuffed and restrained. EMS arrived, but Pratt did not have a pulse. The autopsy report noted the examiner could not "definitively separate[]" the effect of Pratt's ingestion of cocaine and ethanol, from the other possible contributing factors—which, at least, included Pratt's car accident, various altercations, tasing, and hog-tying—that culminated in his asphyxiation. At the time of Pratt's arrest, the County had a policy which prohibited officers from using hog-tie restraints. Pratt's mother sued the individual deputies and the County. The district court granted qualified immunity to the deputies, even though one testified his actions may be unconstitutional.

The 5th Circuit affirmed. The Court listed various facts including Pratt's continued resistance and the escalation of force techniques used before the deputies were finally able to subdue him. The record shows that both officers responded "with 'measured and ascending' actions that corresponded to [Pratt's] escalating verbal and physical resistance." Additionally, the court held that an officer's use of a hog-tie restraint is not, *per se*, an unconstitutional use of excessive force." And even though one deputy testified his belief was the practice of hog-tying may be unconstitutional, "the constitutionality of an officer's actions, is neither guided nor governed by an officer's subjective beliefs about the constitutionality of his actions or by his adherence to the policies of the department under which he operates."

***Cary King, et al., v. Lloyd G. Handorf,* -- F.3d – 2016 WL 2621454 (5th Cir. 2016)**

Landowners whose property was inspected by two tax assessors after they challenged substantial increase in ad valorem taxes brought state-court action against assessor and others, alleging that the inspection was conducted in a manner that violated their state and federal constitutional rights. While Melba King consented to the appraisal, the Kings objected to the assessors peering into the bathroom and kitchen of the house through the glass and measuring a workshop that the Kings argue was not under the tax protest. After Melba King ordered the assessors to leave, she noticed the door to the pool house was ajar. Following removal, defendants moved for summary judgment, raising qualified immunity as a defense for assessor. The district court denied qualified immunity for the assessor determining that he had violated the Kings' Fourth Amendment Rights. The assessor appealed.

The Fifth Circuit held that assessor's actions did not constitute a "search" under the Fourth Amendment and, thus, assessor was entitled to qualified immunity because he had consent to be on the property and it was not clearly established that what he did was a

violation of the Kings' Fourth Amendment rights.

***Mendez v. Poitevent,* –F.3d – 2016 WL 2957851 (5th Cir., May 19, 2016)**

This is a §1983/excessive force case where the 5th Circuit affirmed dismissal based on qualified immunity of the individual officer. During an attempted arrest and the ensuing violent struggle, Juan Mendez, Jr., an 18 year-old United States citizen, was shot to death by a Border Patrol Agent, Taylor Poitevent. Mendez's estate brought action against Poitevent, alleging claims of excessive force in violation of the Fourth Amendment, and alleging various intentional tort claims against the United States. The District Court held that Poitevent was entitled to qualified immunity, and thus granted him summary judgment. The district court also granted summary judgement for the United States on Plaintiffs' intentional tort claims. The estate appealed. The Fifth Circuit affirmed the district court's rulings.

After receiving a radio report of smuggling near the Mexico border, Poitevent, who was uniformed and in a marked vehicle, pursued a suspect truck into a residential cul-de-sac, where the truck's two passengers bailed out and began to run towards a fence. In response, Poitevent bailed out as well and chased them on foot, shouting for them to get on the ground. On the other side of the fence was the Rio Grande and border to Mexico. One passenger escaped over the fence, but Poitevent caught Mendez, who struggled against the arrest. The Court went into great detail regarding the struggle. During the struggle Mendez —later revealed to be high on cocaine and marijuana— overpowered Poitevent and struck him in the temple causing severe disorientation (and later revealed a concussion). Poitevent testified that he believed his life to be in danger. Mendez eventually wriggled free and began running towards the fence at which time Poitevent drew his service pistol and fired two shots. At the time Mendez was shot, he had run about 15 feet from Poitevent and both shots killed him. The Texas Rangers investigated the shooting and concluded that Poitevent "was clearly within his right to protect himself and others."

The district court determined that Poitevent was entitled to qualified immunity on plaintiffs' Fourth and Fifth Amendment claims. The Court analyzed the record and held the officer's use of deadly force was not excessive given the circumstances and his disorientation, and thus no constitutional violation occurred because it was reasonable for him to believe that the suspect posed a threat of serious harm to him or to others. The district court also granted the United States summary judgment on plaintiffs' intentional tort claims because Poitevent's use of force was privileged. The Court affirmed the district court's ruling on this issue as well.

IX. BIVENS SUIT

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

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

On appeal, both cases presented the same fundamental question of first impression:

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

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

X. ZONING

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

Telecommunications service provider T-Mobile South, LLC (T-Mobile) submitted an application to construct a 108–foot cell tower resembling a man-made tree (monopine) in Roswell, Georgia. The location of the site, though planned inside a vacant lot, would be in an area zoned for single-family residences within a well-established residential neighborhood. Following an outpouring of public opposition to the tower, Roswell's Planning and Zoning Division recommended that the Mayor and city council impose certain conditions before approving the application. Specifically, the Planning and Zoning Division recommended that T-Mobile should relocate the site to another part of the property, erect a fence around the tower, and plant pine trees to shield it from residential owners' view. At the public hearing, city council members voted to deny the application.

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

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

XI. ADA

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

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

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

Justice Stephen G. Breyer delivered the opinion for the 6-3 majority. The Court held that an interpretation of the Act that requires employers to offer the same accommodations to pregnant workers as all others with comparable physical limitations regardless of other factors would be too broad. There is no evidence that Congress intended the Act to grant pregnancy such an unconditional "most-favored-nation status." However, Congress clearly intended the Act to do more than defining sex discrimination to include pregnancy discrimination. The Court held that a plaintiff may show that she faced disparate treatment from her employer according to the framework established in *McDonnell Douglas Corp. v. Green*, which requires evidence that the employer's actions were more likely than not based on discriminatory motivation, and that any reasons the employer offered were pretextual.

***Burton v. Freescale Semiconductor, Inc*., 798 F.3d 222 (5th Cir. 2015)**

Plaintiff was a Manpower (temporary employment agency) employee, contracted to work for Freescale in assembly in Texas. Due to heart palpitations, she made two trips to the emergency room in 2011. She also applied for workers' compensation, believing that her condition was caused by her work with toxic chemicals. She was fired about two weeks later:

> "According to [Bruce] Akroyd [of Freescale], a June 28th incident where Burton was caught using the Internet represented the 'final' straw .... Nonetheless, there is conflicting evidence on whether Akroyd actually knew about the Internet incident when he decided to terminate Burton and whether the Internet incident actually postdated the decision to terminate Burton."

There was a hitch in the plan, though: "[w]hen the time to actually terminate Burton drew near, Manpower requested supporting documentation from Freescale." Manpower was not persuaded that the reasons for her termination were valid. "Manpower recommended against termination based on the paltry documentation and the recent nature of Burton's workers' compensation claim, but Freescale insisted." Then, a representative of Manpower named Dorsey allegedly instructed another Manpower manager (Rivera) "to terminate Burton's assignment and to inform her it was based on four discrete incidents, at least two of which occurred after the decision to terminate her had already been made."

Burton brought claims against both Freescale and Manpower based on the ADA (for "regarded-as" discrimination) and state law (retaliation for filing a workers' compensation claim). The district court granted summary judgment on each claim.

On appeal, the Fifth Circuit reversed the district court's summary judgment on the ADA claim. It first confronts the issue of which defendant(s) might be held liable under the ADA. It has no trouble determining that Freescale, which controlled Burton's assembly-line job, constituted an employer. The closer issue is Manpower's liability, which handled the pay and other paperwork for Burton, but did not order her termination. "Manpower argues it cannot be liable for Burton's termination because Akroyd, a *Freescale* manager, made the actual decision to terminate her." Yet the Court held that this misapprehends the "right to control" examination. Manpower is an employer by virtue of sharing the employment relationship with Freescale.

The Court adopted the Seventh Circuit's position "a joint employer must bear some responsibility for the discriminatory act to be liable for an ADA violation." *Whitaker v. Milwaukee Co.*, 772 F.3d 802 (7th Cir. 2014). Specifically, a "staffing company is liable for the discriminatory conduct of its joint-employer client if it participates in the discrimination, or if it knows or should have known of the client's discrimination but fails to take corrective measures within its control." The Court noted that the undisputed evidence was that Manpower personnel carried out the actual termination despite its belief that the termination was legally dubious. That it might have been obliged under its service contract to carry out Burton's termination "is no defense. As an employer, Manpower had an independent obligation to comply with the ADA, and a contractual obligation to discriminate would be unenforceable."

***Delaval v. PTech Drilling Tubulars, L.L.C.*, –F.3d – 2016 WL 3031069 (5th Cir., May 26, 2016)**

Danny Delaval filed a lawsuit against his employer, PTech Drilling Tubulars, LLC, claiming that the company violated the Americans with Disabilities Act in terminating his employment. The 5th Circuit affirmed the trial court's granting of the employer's summary judgment.

In early March 2014, Danny Delaval, a manual machinist for PTech, told his supervisor that his health was suffering and that he needed to undergo medical testing on March 17, 2014. Delaval did not return to work for a week, but during that time, emailed with the owner who advised him to "follow doctor[']s orders" and to keep the company "informed as to what [n]eeds to be done." When asked for supporting information from a doctor to justify the absence, Delaval did not produce any support. PTech fired Delaval for violating its attendance policy. Delaval filed an ADA and age discrimination claims as well as a failure-to-accommodate claim. The trial court granted PTech's summary judgment as to both discrimination claims because Delaval failed to rebut PTech's legitimate, non-discriminatory reason for firing him. The court then sua sponte dismissed the failure-to-accommodate claim. Delaval timely appealed the dismissal of his ADA claims.

In response to a motion for summary judgment, an employee must present "substantial evidence" that the employer's legitimate, nondiscriminatory reason for termination is pretextual. Pretext is established either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or unworthy of credence. Delaval does not contend he was treated differently than any other employee. Further, the dispute as to whether he was in contact with any supervisors during his week-long absence does not address that the reason for terminating him was pretextual. The Court noted that management does not have to make proper decision, only non-discriminatory

ones. As a result, summary judgment was proper as to the discrimination claims.

With regard to the trial court sua sponte ruling on the reasonable accommodation claim without notice, the Court held that this was harmless error because Delaval did not describe any additional evidence that should have been considered by the district court or explain why additional discovery was necessary. On the merits of the failure-to-accommodate, time off, whether paid or unpaid, can be a reasonable accommodation, but an employer is not required to provide a disabled employee with indefinite leave. EEOC guidelines provide that "[a]n employer may require an employee to provide documentation . . . sufficient to substantiate" the limitation that allegedly requires an accommodation. "[T]he employer need not take the employee's word for it that [he] . . . has an illness that may require special accommodation." Where an employee refuses to provide such documentation, he causes a breakdown in the interactive process that can preclude an employer's liability. In sum, PTech was acting lawfully in asking Delaval to turn over documentation corroborating his contention that he was undergoing medical testing during his week-long absence. His failure to do so is justification for the trial court dismissing his claim.

XII. TITLE VII

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

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

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

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

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

The eight-to-one ruling, the Supreme Court held that even if the applicant does not inform the management of a religious practice, the 1964 civil rights law may be enforced against any employer who refuses to make an exception for that worker, when that refusal is based on at least a suspicion or hunch that the worker follows such a practice and wants to keep doing so, even if contrary to company policy. In a significant footnote, the ruling left open the possibility that an employer may still violate the law by failing to hire someone who

follows a religious practice, even if the employer were completely ignorant of that fact. The footnote, and its implications, caused Justice Samuel A. Alito, Jr. to object in a separate opinion. While he supported overturning the appeals court, he did so for his own reasons, rather than those of the Scalia opinion: he would have made it clear that Abercrombie & Fitch can avoid a damages verdict if it had no knowledge of the young woman's religious needs. The retailer does have the option of making that argument when the case returns to the appeals court.

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

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

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

***Ambrea Fairchild v. All American Check Cashing, Inc.* – 813 F.3d 959 (5th Cir. 2016)**

In December 2011, Ambrea Fairchild was hired by All American, a loan and check cashing company. She worked as an hourly manager trainee prior to becoming a salaried manager in March of 2012. Her duties remained similar but she was also responsible for training new employees. During her employment with All American, Fairchild received several written complaints regarding her performance.

In late September 2012, All American demoted Fairchild back to the manager trainee position to work on her weaknesses. Various reported and documented problems continued. A month after she was demoted, Fairchild learned she was pregnant. She advised her supervisors of her pregnancy in late November 2012. On January 23, 2013, All American terminated Fairchild. She sued for pregnancy discrimination (Title VII) and unpaid (unreported) overtime in violation of the FLSA. After a trial began and Fairchild closed her case-in-chief, the trial judge issued judgment for all American.

The Fifth Circuit affirmed the trial court's decision. The Court first addressed the FLSA claims and determined that an employee cannot prevail on an FLSA overtime claim if that "employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work." Fairchild could not prevail on her FLSA claim for overtime compensation for hours that she deliberately failed to report in violation of All American's policy and that All American otherwise did not have reason to believe she had worked.

For a pregnancy-based sex discrimination claim, an employer is liable for disparate treatment, which occurs when the employee's "protected trait actually motivated" the employer to take the adverse employment action. Fairchild's only direct evidence of motivation was a single hearsay statement of another employee made during a social lunch

but which the trial court did not admit. The other employee was not in the decision making chain and was in a different store. The district court did not abuse its discretion in excluding the evidence. Fairchild's only circumstantial evidence is the temporal proximity between All American learning that she was pregnant and her termination. However, assuming without deciding that evidence qualified, Fairchild failed to rebut All American's legitimate non-discriminatory reason for the termination. The Court noted the record was "replete" with legitimate bases to terminate Fairchild. The temporal aspect alone is insufficient to establish pretext.

***E.E.O.C. v. Rite Way Service, Inc.* -- F.3d – 2016 WL 1397778 (5th Cir. 2016)**

The Equal Employment Opportunity Commission (EEOC), on behalf of former employee, commenced action against Rite-Way (employer) claiming that it retaliated against Mekova Tennort (employee) as a result of her answering questions in response to employer's investigation into harassment allegations. The district court granted summary judgment in favor of employer and the EEOC appealed.

The Fifth Circuit noted that it has long been the law in its circuit as well as others that a plaintiff contending that she was retaliated against for proactively reporting employment discrimination need not show that the discrimination rose to the level of a Title VII violation, but must at least show a reasonable belief that it did. At issue on appeal is whether the "reasonable belief" standard applies to a retaliation claim brought by a third party witness who was fired soon after answering questions in response to a company investigation into harassment allegations. The Court determined that it did. The Court went on to rule that there was a fact issue concerning whether the employee could have reasonably believed that the conduct about which she chose to speak violated Title VII. The matter was reversed and remanded.

***Tyrikia Porter v. Houma Terrebonne Housing Authority Board of Commissioners,* 810 F.3d 940 (5th Cir. 2015)**

Plaintiff filed suit against her former employer, alleging claims of retaliation after her attempt to rescind her resignation was denied. Plaintiff offered her resignation, but before she finished her employment, she complained that she had been subjected to sexual harassment. Then Plaintiff attempted to rescind the resignation, but her rescission was rejected. The district court granted summary judgment in favor of employer and the employee appealed.

The Fifth Circuit reversed the district court's grant of summary judgment because rejecting an employee's rescission of resignation can sometimes constitute an adverse employment action and because the plaintiff demonstrated a substantial conflict of evidence on the question of whether her employer would have taken the action "but for" her complaint of sexual harassment.

***Mary King-White v. Humble Independent School District,* 803 F.3d 754 (5th Cir. 2015)**

Plaintiffs (high school student and her mother) filed suit against the school district and its employees alleging claims related to the sexual abuse of the student by a teacher. The district court dismissed the Title IX and § 1983 claims as untimely and student appealed. The Fifth Circuit held that Texas' general two-year limitations period for personal injury actions applied to the Title IX and § 1983 claims, and they were, therefore, time barred. The equitable tolling principles identified by Plaintiffs did not apply.

XIII. GOOD FAITH AND FAIR DEALING

***Daniel Hux v. Southern Methodist University* –F.3d – 2016 WL 1621720 (5th Cir. 2016)**

Hux was an undergraduate student and community advisor ("CA") at SMU during the 2010–2011 academic year. His troubles began in

early 2011, when he had a series of encounters with SMU staff members and an SMU student that eventually resulted in his dismissal as a CA on February 10, 2011. Hux appealed his termination to Steve Logan, SMU's Executive Director of Resident Life and Student Housing. Logan denied Hux's appeal by a letter dated February 21, 2011 that indicated that Hux had made certain staff members fear for their safety. Though Hux was allowed to remain enrolled as a student, he was prohibited from contacting those involved in the incidents and was told to stay away from certain dormitories.

On March 20, Hux attended a meeting for students interested in student government positions. That meeting was held in a dormitory that Hux, under the terms of the letter from Steve Logan terminating his CA employment, was under orders to avoid. After the meeting, several SMU police officers approached Hux, told him there was a protective order prohibiting him from being at the building, and searched Hux's person. One of Hux's relatives was waiting in a car to pick him up; officers also searched the car and found a handgun. The officers handcuffed Hux and put him into a police car. Twenty-five minutes later, they removed the handcuffs, returned the gun, and instructed Hux not to bring the gun to school or have it in his car. Hux left campus.

The next day, two officers met Hux outside one of his classes and drove him to the SMU police department. Hux was advised that he was being placed on a mandatory administrative withdrawal from the university due to his "continued inappropriate behavior and attempts to intimidate and threaten [housing department staff] members." Hux was given a letter memorializing the conversation. After Hux was forced to withdraw from the university, a university employee stated in an interview that Hux was no longer a student and indicated that Hux had violated university policy. Further, SMU administrators circulated a picture of Hux coupled with a notice that community members should be on the lookout for him.

Hux sued, alleging nineteen causes of action, including that the school harmed him by falsely alleging he was "crazy" and had plans to shoot former First Lady Laura Bush during a visit to the campus. The district court granted the defendants' Rule 12(b)(6) motion to dismiss on most of the claims and granted summary judgment for defendants on the rest of the claims after discovery. The only claim in issue on this appeal—the notion that SMU breached a duty of good faith and fair dealing—was among those dismissed before discovery for failure to state a claim. Analyzing Texas law, the district court explained that Hux had not alleged facts that, taken as true, would give rise to the type of special relationship that creates a duty of good faith and fair dealing under Texas law.

The Fifth Circuit affirmed noting that Texas law does not generally impose a contractual duty of good faith and fair dealing and rejects it in most circumstances. While it does apply if there is a fiduciary or "special" relationship between the parties, neither was present in Hux's case, despite Hux's allegations that SMU officials encouraged him to confide in them, to seek their guidance and direction, and to trust and rely on them. Furthermore, Texas law does not impose a duty of good faith and fair dealing in a student-university relationship.

XIV. WRONGFUL DEATH

***Chaz Z. Rodgers v. Lancaster Police & Fire Department* –F.3d – 2016 WL 1392065 (5th Cir. 2016)**

Chaz Rodgers's son, Anthony Hudson, died from a gunshot wound. Hudson was leaving a party when Devon Candler drove by and began shooting. Lancaster Police Department ("LPD") dispatched officers, who discovered Hudson lying unresponsive in the street with an apparent gunshot wound. Lancaster Fire Department ("LFD") dispatched emergency medical technicians ("EMTs"), who assisted Hudson and transported him to Methodist Dallas Hospital ("MDH"), where medical personnel pronounced him dead. Rodgers sought to hold the Lancaster police and fire departments, law-enforcement officers, and a hospital and its medical personnel liable. The district court sua sponte dismissed the matter without prejudice based on Rodgers

failing to plead facts upon which relief could be granted because, as a non-lawyer, she could not sue pro se on behalf of the estate. See 28 U.S.C. § 1915(e)(2)(B)(ii). The court dismissed the wrongful-death claims for want of subject-matter jurisdiction, reasoning that they arose under state law, and there was no diversity. The court did not consider whether Rodgers also stated a claim for relief under any federal civil-rights laws. Rodgers appealed pro se and the Fifth Circuit reversed and remanded.

Because Rodgers pleaded a claim under the federal civil rights laws, there was federal-question jurisdiction. Federal civil-rights laws extend federal-question jurisdiction by incorporating state wrongful-death statutes. Thus, an individual may bring a claim under federal civil-rights laws through Texas's wrongful-death statute.

Texas provides for survival actions: "A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives." Therefore, only a personal representative, administrator, or heir may sue on behalf of the estate. Whether a pro se litigant could represent an estate in a survival action was an issue of first impression in the Fifth Circuit.

While an individual may proceed pro se in civil actions in federal court, those not licensed to practice law may not represent the legal interests of others. The district court dismissed Rodgers's pro se survival action because she was not authorized to practice law.

The Court held that a person with capacity under state law to represent an estate in a survival action may proceed pro se if that person is the only beneficiary and the estate has no creditors. The matter was remanded for further determination of whether Rodgers is the sole beneficiary.

XV. REDISTRICTING

***Sue Evenwel v. Greg Abbott, Governor of Texas, et al.* –136 S.Ct. 1120 (2016)**

The Texas Constitution requires that the state legislature reapportion its senate districts during the first regular session after every federal census. After the 2010 census, the legislature created a redistricting plan that was signed into law. However, a three-judge panel of the federal district court found that there was a substantial claim that this redistricting plan violated the Voting Rights Act and issued an interim plan for the 2012 primary elections that was subsequently adopted and signed into law.

Plaintiffs Sue Evenwel and Edward Pfenniger are registered Texas voters who sued and claimed that the interim plan that was adopted and signed into law violated the Equal Protection Clause of the Fourteenth Amendment. They argued that the new districts do not adhere to the 'one person, one vote' principle, which the Supreme Court had previously held exists in the Equal Protection Clause of the Fourteenth Amendment, because they were apportioned based on total population rather than registered voter population, and while the new districts are relatively equal in terms of total population, they vary wildly in relation to total voter population. The district court granted the defendants' motion to dismiss and held that the plaintiffs failed to state a claim based on Equal Protection Clause jurisprudence, which allows total population to be the basis for district apportionment. The Supreme Court ruled that the "one person, one vote" principle of the Equal Protection Clause allows a state to design its legislative districts based on total population. The Court held that constitutional history, judicial precedent, and consistent state practice all demonstrate that apportioning legislative districts based on total population is permissible under the Equal Protection Clause.

***Wesley W. Harris v. Arizona Independent Redistricting Commision, et al.,* 136 S.Ct. 1301 (2016)**

In 2012, the Arizona Independent Redistricting Commission redrew the map for the state legislative districts based on the results of the 2010 census. Wesley Harris and other individual voters sued the Commission and alleged that the newly redrawn districts were under-populated in Democratic-leaning districts and over-populated in Republican-leaning ones, and therefore that the Commission had violated the Equal Protection Clause of the Fourteenth Amendment. The Commission argued that the population deviations were the result of attempts to comply with the Voting Rights Act. The district court found in favor of the Commission and held that the redrawn districts represented a good faith effort to comply with the Voting Rights Act.

The Supreme Court ruled that Arizona's redistricting plan was acceptable. Although the desire to gain advantage for one political party over another does not justify deviating from absolute equality of districts, doing so for "legitimate considerations," such as to achieve compliance with the Voting Rights Act, does not violate the "one person, one vote" principle of the Equal Protection Clause of the Fourteenth Amendment.

XVI. FULL FAITH & CREDIT

***V.L. v. E.L., et al.,* 136 S.Ct. 1017 (2016)**

V.L. and E.L., a lesbian couple, were in a long-term relationship and raised three children together, of which E.L. was the biological parent. They eventually decided that V.L. should adopt the children and filed a petition to do so in Georgia state court, which granted the petition. In 2011, while living in Alabama, V.L. and E.L. ended their relationship. V.L. filed a petition in Alabama state court that alleged the E.L. had denied her access to her children and interfered with her parental rights. V.L. asked the Alabama state court to register the Georgia adoption judgment and order custody or visitation, which the court did, and E.L. appealed. The Alabama Court of Civil Appeals held that the lower court had failed to conduct an evidentiary hearing. The Alabama Supreme Court reversed and held that the Georgia state court did not have subject-matter jurisdiction to enter an adoption order for V.L. while still recognizing E.L.'s parental rights and therefore the Alabama courts did not have to recognize that judgment under the Full Faith and Credit Clause.

The Supreme Court ruled that the Full Faith and Credit Clause of the Constitution requires the Alabama state courts to recognize a Georgia state court's adoption order. It stated that a state may only refuse to afford full faith and credit to another state's judgment if that court did not have subject-matter jurisdiction or jurisdiction over the relevant parties. In this case, Georgia law gives the state courts jurisdiction over adoption cases, and there is no established Georgia rule to the contrary, so the judgment should be afforded full faith and credit by other state courts.

XVII. DUE PROCESS

***Michael Wearry v. Burl Cain, Warden,* 136 S.Ct. 1002 (2016)**

Eric Walber was murdered on April 4, 1998. Nearly two years after the murder, Sam Scott, who was incarcerated at the time, contacted authorities and implicated Michael Wearry in the murder. Scott had been friends with the victim and claimed that Wearry had confessed the crime to him. However, Scott gave an account of the murder that differed from the actual facts and changed his story several times before Wearry's trial. The prosecution's other main witness was also incarcerated at the time of trial and had made a prior inconsistent statement to the police that he also recanted. Wearry was convicted and sentenced to death.

After Wearry's conviction, information emerged that revealed that the prosecution had failed to disclose evidence that cast doubt on these witnesses' testimony and would have materially aided Wearry's defense at trial.

Wearry sought state postconviction relief and argued that the state had violated his due process rights under *Brady v. Maryland* by failing to disclose the potentially exculpatory evidence and that he had received ineffective assistance of counsel. The state court determined that, even if the state should have disclosed the evidence and Wearry's counsel was ineffective, he was not prejudiced, and the Louisiana Supreme Court denied further relief.

The Supreme Court ruled that to prevail on a claim that suppression of evidence violated his due process rights under *Brady v. Maryland*, a defendant need only show that the suppressed evidence was sufficient to undermine confidence in the verdict. The state violates the due process rights of the accused when it suppresses evidence "material either to guilt or to punishment." Evidence is material when there is "any reasonable likelihood" that its presentation would influence the jury. In this case, there was no doubt that the suppressed evidence would have undermined the jury's confidence in the verdict, and therefore the state court improperly evaluated the materiality of the evidence.

XVIII. EFFECTIVE ASSISTANCE OF COUNSEL

***Maryland v. James Kulbicki*, 136 S.Ct. 2 (2015)**

In 1993, James Kulbicki fatally shot his 22-year-old mistress the weekend before a scheduled hearing on unpaid child support in an ongoing paternity suit between the two. At Kulbicki's trial, the prosecution presented evidence that the bullet removed from the victim's brain and the bullet taken from Kulbicki's gun were a close enough match that they likely came from the same package. After being presented with this ballistics evidence, as well as other physical evidence and witness testimony, the jury convicted Kulbicki of first-degree murder.

Kulbicki filed a petition for post-conviction relief in state court in which he argued that he received ineffective assistance of counsel because his attorneys failed to question the legitimacy of the ballistics evidence. Kulbicki's petition was denied at the trial level, but the Maryland Court of Appeals reversed and vacated Kulbicki's conviction.

The Supreme Court held that vacating the conviction was not proper. The Maryland Court of Appeals improperly examined the conduct of Kulbicki's lawyers based on contemporary views of ballistic evidence rather than how such evidence was viewed at the time of Kulbicki's original trial. The Court held that, at the time of Kulbicki's original trial, ballistic evidence was highly respected, and there was no reason for counsel to devote time to analyzing that evidence rather than other avenues of defense. Because effective assistance of counsel does not require attorneys to go looking for a needle in a haystack that might not exist, the Court held that Kulbicki received effective assistance of counsel.

XIX. BATSON

***Timothy Tyrone Foster v. Bruce Chatman*, -- S.Ct. – 2016 WL 2945233 (2016)**

In 1986, Timothy Tyrone Foster, an 18-year-old black man, was charged with murdering Queen White, an elderly white woman. At the trial, the prosecution used peremptory strikes against all four of the qualified black jurors. Pursuant to the Supreme Court's decision in *Batson v. Kentucky*, which prohibits the use of peremptory strikes on the basis of race, the defense objected to those strikes, and the burden shifted to the prosecution to prove that there were race-neutral explanation for the strikes. The prosecution provided reasons, and the trial court held that the reasons were sufficient. An all-white jury convicted Foster of murder and imposed the death penalty. Foster obtained the prosecutor's notes through an open records request. The notes included lists in which the black prospective jurors were marked with a "B" and highlighted in green; notations identifying black prospective jurors as "B#1," "B#2," and "B#3;" notations that ranked the black prospective jurors against each other in case the prosecution had to accept a black juror; and a strike list in which the five black panelists

qualified to serve were they first five names in the "Definite Nos" column. Some of the notes also directly contradicted the prosecution's "race-neutral" explanations for its strikes and its representations to the trial court.

Foster petitioned for a writ of habeas corpus in Butts County Superior Court and submitted a new *Batson* challenge based on the prosecutor's notes obtained through the Georgia Open Records Act. The court denied Foster's petition. The Georgia Supreme Court affirmed the denial of the writ. The U.S. Supreme Court granted certiorari and ruled that Foster showed purposeful discrimination in his *Batson* challenge.

XX. FEDERAL EMPLOYMENT DISCRIMINATION LAW

***Marvin Green v. Megan J. Brennan*, -- S.Ct. – 2016 WL 2945236 (2016)**

Marvin Green began working for the United States Postal Service in 1973. In 2002, he became the postmaster at the Englewood, Colorado, post office. In 2008, a postmaster position opened in Boulder, and Green applied but did not receive the position. He filed a formal Equal Employment Opportunity (EEO) charge regarding the denial of his application, and the charge was settled. In 2009, Green filed an informal EEO charge and alleged that his supervisor and supervisor's replacement had been retaliating against him for his prior EEO activity. Throughout that year, Green was subject to internal Postal Service investigations including a threat of criminal prosecution. He ultimately signed an agreement that he would immediately give up his position and either retire or accept a much lower paying position. Green chose to retire and filed subsequent charges with the EEO Office, which dismissed his claim. Green then sued in district court and alleged, among other claims, that he had been constructively discharged. The district court held that Green's constructive discharge claim was barred because he did not contact an EEO counselor within 45 days of signing the agreement, which was the last allegedly discriminatory act, and the U.S. Court of Appeals for the Tenth Circuit affirmed.

The Supreme Court held that the limitations period for a constructive discharge claim under federal employment discrimination law begins to run when the employee gives notice of resignation, not on the effective date of the issue.

XXI. REMAND

***James H. Watson v. City of Allen*, et al. -- F.3d – 2016 WL 2610169 (5th Cir. 2016)**

Watson, a Louisiana citizen who received a citation after his motor vehicle was photographed running a red light in Texas filed a putative class action in Texas state court against the State of Texas, fifty-three Texas cities, and others, challenging the lawfulness of red light camera ordinances, alleging violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) and various state laws. The action was removed to federal court, and certain defendants and the RICO claim were dismissed. The district court denied plaintiff's motion to remand and plaintiff appealed. Watson argues on appeal that the case should have been remanded to state court following the dismissal of the RICO claim because the exercise of supplemental jurisdiction over the state claw claims was improper and because the case falls within CAFA's mandatory abstention provisions.

The Fifth Circuit held that the 30-day time period for filing motion to remand did not apply to remand motions based on the mandatory abstention provisions of the Class Action Fairness Act (CAFA); the motion to remand was filed within reasonable time because Plaintiff acted diligently to gather evidence and file his motion; the home state abstention provision of CAFA applied in this case because the primary defendants were Texas defendants and its application precluded removal under CAFA; and the district court's exercise of supplemental jurisdiction over Texas state-law claims was not proper.

XXII. EMPLOYMENT

***Stephen C. Stem v. Ruben Gomez,* 813 F.3d 205 (5th Cir. 2016)**

Plaintiff Stem was a second year officer when he shot and killed an individual. He was later discharged without receiving a signed, written complaint from any city official prior to his dismissal. He filed a § 1983 action against the city and its mayor alleging that his termination without notice or hearing deprived him of due process. The district court dismissed complaint and denied the officer's motion for leave to amend complaint. The officer appealed.

The Fifth Circuit held that dismissal for lack of subject matter jurisdiction was not warranted because Plaintiff stated a claim for relief under a federal statute and the claim was not frivolous. However, the officer did not have a protected property interest in continued employment and the dismissal of his § 1983 claim was proper. His claims for back pay or benefits as well as those claims against the mayor were barred by sovereign immunity and properly dismissed. Finally, the Court reversed the district court's denial of leave to amend, remanding for an explanation of the district court's exercise of discretion.

XXIII. REHABILITATION ACT

***Rochelle Flynn v. Distinctive Home Care, Inc.,* 812 F.3d 422 (5th Cir. 2016)**

A contract pediatrician, who provided medical services at the Air Force base, brought an action against the government contractor, alleging she was discriminated against because of her Autism Spectrum Disorder–Mild diagnosis, in violation of the Rehabilitation Act. The district court granted summary judgment in the contractor's favor and the pediatrician appealed.

As a matter of first impression, the Fifth Circuit held that the Rehabilitation Act does not incorporate the ADA's requirement that defendant be the plaintiff's "employer." The Rehabilitation Act authorizes employment discrimination suits by independent contractors.

XXIV. SAME SEX COUPLES

***Cleopatra De Leon v. Greg Abbott,* 791 F.3d 619 (5th Cir. 2015)**

Two homosexual couples, one wishing to marry in Texas and another seeking to have their Massachusetts marriage recognized under Texas law, brought action to challenge prohibition of same-sex marriage under Texas constitutional amendment. The district court granted the couples' motion for preliminary injunction barring enforcement of the prohibition and Texas officials appealed.

The Fifth Circuit held that no lawful basis existed for the state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character, and the Constitution did not permit a state to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex. This decision was in accordance with the Supreme Court's decision in Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

XXV. RELIGIOUS FREEDOM RESTORATION ACT

***East Texas Baptist University v. Burwell,* 793 F.3d 449 (5th Cir. 2015)**

Plaintiffs, religious organizations, filed suit under the Religious Freedom Restoration Act (RFRA), challenging a requirement that they either offer their employees health insurance that covers certain contraceptive services or submit a form or notification declaring their religious opposition to that coverage. The district court enjoined the government from enforcing the requirement.

The Fifth Circuit concluded that the acts plaintiffs are required to perform do not involve providing or facilitating access to contraceptives, and plaintiffs have no right under RFRA to challenge the independent conduct of third parties. Because plaintiffs have not shown

that the regulations substantially burden their religious exercise or, in University of Dallas, have not demonstrated a substantial likelihood of doing so, the court need not reach the strict-scrutiny prong or the other requirements for an injunction. Accordingly, the court reversed the judgment of the district court.

XXVI. MISCELLANEOUS

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

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

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

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

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

Neither the Government's nor McFadden's interpretation fares any better. The Government's contention that § 841(a)(1)'s knowledge requirement as applied to analogues is satisfied if the defendant knew he was dealing with a substance regulated under some law ignores § 841(a)(1)'s requirement that a defendant know he was dealing with "a controlled substance." That term includes only drugs listed on the federal drug schedules or treated as such by operation of the Analogue Act; it is not broad enough to include all substances regulated by any law. McFadden contends that a defendant must also know the substance's features that cause it to fall within the scope of the Analogue Act. But the key fact that brings a substance within the scope of the Analogue Act is that the substance is "controlled," and that fact can be established in the two ways previously identified. Contrary to McFadden's submission, the canon of constitutional avoidance "has no application" in the interpretation of an unambiguous statute such as this one. But even if the statute were ambiguous, the scienter requirement adopted here "alleviate[s] vagueness concerns" under this Court's precedents.