RECENT FEDERAL CASES
OF INTEREST TO GOVERNMENTAL ENTITIES

TCAA ANNUAL MEETING
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I. FIRST AMENDMENT

***Harmon v. Dallas County*, No. 18-10353 (5th Cir., July 9, 2019)**

This case is about an employment relationship that did not turn out well. Norvis Harmon, a former deputy constable, brought this action under 42 U.S.C. § 1983 against Dallas County and then-Constable Derick Evans. He alleges the defendants violated his First Amendment rights when he was terminated for reporting the illegal acts of Evans and others to law-enforcement authorities. Harmon additionally alleges the defendants denied him equal protection of the law in refusing to hear his grievance. This is Harmon's second lawsuit based on these facts, as he previously filed a state-court lawsuit against Dallas County aggrieving the circumstances of his termination. He did not enjoy a favorable judgment in that suit. The district court disposed of Harmon's claims through a series of summary-judgment and 12(c) rulings. The district court dismissed Harmon's claims against Dallas County as barred by res judicata, and dismissed Harmon's claims against Evans in his individual capacity on the basis of qualified immunity

Applying Texas law, the Fifth Circuit affirmed the district court's dismissal of plaintiff's claims against the county and the Constable in his official capacity as barred by res judicata where plaintiff had previously filed a state court action against the county. The court also affirmed the district court's dismissal of plaintiff's claims against the Constable in his individual capacity based on qualified immunity, because it was not clearly established at the time whether a law enforcement officer's involvement in an investigation with outside law enforcement enjoyed protection under the First Amendment. Furthermore, the Constable was entitled to qualified immunity on the First Amendment's Petition Clause claim where plaintiff's grievance from his termination did not constitute a matter of public concern and plaintiff did not allege that he was treated differently than similarly situated deputy constables.

***Robinson v. Hunt County*, No. 18-10238 (5th Cir., April 15, 2019)**

Deanna J. Robinson sued Defendants Hunt County, Sheriff Randy Meeks, and several employees of the Hunt County Sheriff's Office (HCSO), alleging unconstitutional censorship on the HCSO Facebook page, including deletion of certain comments of hers including highly offensive remarks about HCSO and a recently deceased police officer. The district court denied a preliminary injunction and later dismissed the complaint for failure to state a claim. Robinson appealed both decisions.

The Fifth Circuit affirmed the dismissal of plaintiff's claims against the individual defendants because the only claims against the individual defendants were plaintiff's individual-capacity claims for monetary damages and her official-capacity claims for equitable relief, which she did not appeal. However, the court vacated the dismissal of plaintiff's claims against Hunt County, because plaintiff sufficiently pleaded an official policy of viewpoint discrimination on the HCSO Facebook page. In this case, the complaint alleged that Hunt County had an explicit policy of viewpoint discrimination on the HCSO Facebook page. The court also held that, to the extent the district court determined that plaintiff's declaratory judgment claims against Hunt County were redundant of her claims for injunctive relief, this conclusion was inconsistent with the purposes of the Declaratory Judgment Act and therefore an abuse of discretion. Furthermore, plaintiff's request for declaratory relief was not duplicative of her claims for compensatory damages. Finally, the court vacated the district court's preliminary injunction order and remanded for further proceedings.

Buchanan v. Alexander, **No. 18-30148 (5th Cir., March 22, 2019)**

Buchanan, a former LSU education professor, was fired from her tenured professorship in June 2015 for allegedly violating the university's sexual harassment policy. The veteran educator was dismissed (over the contrary recommendation of a faculty panel) based on her "professionalism and her behavior" when she visited schools in the district as well as alleged use of profanity and references to sex while speaking with her students. The professor filed suit in January 2016 alleging that her termination violated her First and Fourteenth Amendment right to free speech and academic freedom, and her Fourteenth Amendment procedural and substantive due process rights. Plaintiff also alleged a facial challenge to LSU's sexual harassment policies. Dr. Buchanan sought reinstatement and declaratory and injunctive relief.

The Fifth Circuit affirmed the district court's dismissal of plaintiff's as-applied challenge and held that the district court correctly concluded that plaintiff's speech was not protected by the First Amendment. In this case, plaintiff's speech was not a matter of public concern, because the use of profanity and discussion of professors' and students' sex lives were clearly not related to the training of Pre-K–Third grade teachers. The court vacated plaintiff's facial challenge and held that she failed to sue the proper party, the Board of Supervisors, which is responsible for the creation and enforcement of the policies at issue. Although the court need not address the district court's holding on qualified immunity because plaintiff's claims failed, the court nevertheless affirmed that all defendants were entitled to qualified immunity on her damages claims.

Three Expo Events, LLC v. City of Dallas, **No. 17-10632 (5th Cir., October 24, 2018)**

Plaintiff, Three Expo Events, L.L.C. (Three Expo), is a Texas limited liability company engaged in the business of producing and presenting adult love- and sex-themed conventions in major cities of the nation. After staging such an event in the City of Dallas's Convention Center in August 2015 (Exxxotica 2015), the City and Three Expo informally agreed to a second convention (Exxxotica 2016) to be held at the Convention Center on May 20-21, 2016. There was some opposition to the event and eventually Dallas City Council adopted Resolution No. 160308, which denied Three Expo's requests to contract with the City to hold a three-day adult entertainment expo at the Dallas Convention Center. Three Expo filed suit against the City and sought a preliminary injunction preventing the City from enforcing the resolution. The district court denied Three Expo's motion for a preliminary injunction and no Exxxotica event took place in Dallas in 2016. After the denial of the injunction, Three Expo amended its complaint, alleging that the City's actions and resolution in denying Exxxotica 2016 access to the Convention Center violated the First Amendment, the Equal Protection Clause, and the Bill of Attainder Clause of the United States Constitution. After discovery, the City filed a motion to dismiss for lack of jurisdiction, contending that Three Expo lacked standing to bring suit. The district court granted the City's motion, holding that Three Expo lacked Article III standing. Three Expo appealed.

The Fifth Circuit reversed the district court's judgment, holding Three Expo established the three elements required for standing on each of its claims and should be permitted to proceed with its suit. The court held that the district court's decision that Three Expo lacked standing was based on clear errors in the factual findings and the district court's manifest failure to apply the well-established principles of law governing Article III standing to the entire evidence of record.

Glass v. Paxton, **No. 17-50641 (5th Cir., August 16, 2018)**

Three professors from the University of Texas at Austin challenged a Texas law permitting the concealed carry of handguns on campus and a corresponding University policy

prohibiting professors from banning such weapons in their classrooms. The professors argued that the law and policy violate the First Amendment, Second Amendment, and Equal Protection Clause of the Fourteenth Amendment. The district court dismissed the claims.

The Fifth Circuit affirmed the district court's dismissal of the claims. The court held that plaintiffs lacked standing to bring a First Amendment claim and rejected their claim of "standing based on their self-imposed censoring of classroom discussion caused by their fear of the possibility of illegal activity by persons not joined in this lawsuit." The court held that none of the cited evidence alleged a certainty that a license-holder would illegally brandish a firearm in a classroom, and thus the alleged harm was not certainly impending. The court also held that plaintiffs' claim that the Campus Carry Law and University policy violated the Second Amendment because firearm usage in their presence was not sufficiently "well regulated" was foreclosed by precedent. Finally, the court rejected plaintiffs' claim that the law and policy violated their right to equal protection under the Fourteenth Amendment because the University lacks a rational basis for determining where students can or cannot concealed-carry handguns on campus. The court held that plaintiffs failed to address Texas's arguments concerning rational basis.

Griggs v. Chickasaw County, **No. 18-60401 (5th Cir., July 18, 2019)**

Lamon Griggs served as Chickasaw County's Solid Waste Enforcement Officer for fifteen years before the County's Board of Supervisors unanimously eliminated his position in 2015. After his position was eliminated, Griggs brought a First Amendment retaliation claim under 42 U.S.C. § 1983 against Chickasaw County. Griggs alleged that his position was eliminated because he was running for sheriff as an Independent and against the Board's preferred candidate, a Democrat. The matter went to trial, and a jury found for Griggs. The County appealed.

The Fifth Circuit affirmed the district court's denial of the county's motions for summary judgment, judgment as a matter of law, and new trial. The court held that the *Rooker-Feldman* doctrine was inapplicable (because Griggs challenged the decision of the Board, not the decision of a state court); Plaintiff's claim was not judicially estopped based on his response in his unemployment application (stating he was "laid off"); and Plaintiff's failure to appeal the Board's decision in state court did not preclude his First Amendment claim under section 1983. The court also held that Plaintiff's position was not a policymaking position, and the jury's verdict in favor of Plaintiff was supported by sufficient evidence. In this case, there was evidence that at least three of the five board members had retaliatory motive, and the evidence was legally sufficient to support the jury's verdict.

II. FOURTH AMENDMENT

Blake v. Lambert, **No. 18-60176 (5th Cir., April 5, 2019)**

After Defendant Lambert, a Mississippi school attendance officer, swore an arrest warrant affidavit against plaintiff for failure to ensure a child attended school, plaintiff filed suit alleging that defendant violated her Fourth Amendment rights because the affidavit lacked probable cause under *Malley v. Briggs* and was untruthful under *Franks v. Delaware*. The district court denied defendant's motion for summary judgment based on qualified immunity.

The Fifth Circuit affirmed as to the *Malley* claim and held that the affidavit lacked any facts to establish probable cause. However, the court reversed as to the *Franks* claim because it was incompatible with a *Malley* theory. The court held that a plaintiff cannot hold an officer liable under *Franks* for intentionally omitting important exculpatory information from a warrant affidavit when the officer has also committed a *Malley* violation by presenting a facially deficient warrant affidavit to the issuing judge.

***Linicomn v. City of Dallas,* No. 17-10101 (5th Cir., September 5, 2018)**

Vernon Linicomn brought a 42 U.S.C. § 1983 action asserting that Dallas police officers violated his Fourth Amendment rights by forcibly entering his house without a warrant, without his consent, and without reason to believe that any person inside was in imminent danger of harm; and by assaulting and arresting him with excessive force. Two of the officers, Maurico Hill and Cheryl Matthews, filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), which the district court granted. Vernon now appeals.

Because the District Court dismissed Hill and Matthews at the pleading stage, the relevant facts were those contained within Linicomn's Complaint, which included the following: Linicomn was awarded primary custody of his two minor children in his divorce from their mother, Linda, who suffers from mental disorders that rendered her unfit to be a custodial parent. After the divorce and prior to the incident involved in this lawsuit, Linda falsely reported to the City of Dallas's Police Department on numerous occasions that the welfare of the children was endangered while they resided with Linicomn. Police responded on each occasion, but no action was ever taken against Linicomn because each of the reports proved to lack substance or justification. On the date of the incident, Linda made another 911 call claiming that the children were being abused. Officers Gilbert and Oliver went to Linicomn's house, knocked on the door, but received no response. Accordingly, the officers departed without taking further action. Later that same night, Linda again called the police department and reported a "disturbance" pertaining to the children at Linicomn's residence. Officers Hill and Matthews responded and arrived at Linicomn's house between 9:30 and 10:41 p.m. Upon arrival, the officers met Linda, Dallas paramedics, and Dallas firefighters outside of Linicomn's home. Linda informed the officers that her daughter was "lethargic and sick" inside of Linicomn's house. The paramedics stated that they had been unable to gain entry to Linicomn's house. The officers tried to contact Linicomn by calling his cell phone and knocking repeatedly at his front door, but Linicomn did not respond. Officer Hill, then, contacted his supervisor, Sergeant Melquiades Irizarry, who then came to the house. Sergeant Irizarry spoke with Linda and directed Officer Hill to announce through the police public address system that they would enter the house—with or without Linicomn's cooperation. Eventually, Linicomn answered the door. Linicomn advised Sergeant Irizarry and Officer Hill, who were standing at the threshold of the doorway, that his daughter was asleep and did not need medical assistance. Meanwhile, Officer Matthews stood off to the side of the door with her back to Linicomn and the other officers. The officers did not have a warrant to enter Linicomn's house.

Linicomn refused to allow anyone entry without a warrant. Sergeant Irizarry placed his hand on Linicomn's shoulder and asked him to step aside so that the paramedics could enter and could verify that his daughter was safe. Linicomn pushed Sergeant Irizarry's hand away. Officer Hill then clasped Linicomn's right arm and shoulder. Linicomn pushed Officer Hill away, retreated, and tried to close the door to the house. But, Officer Hill and Sergeant Irizarry prevented Linicomn from closing the door, and Linicomn ran toward the back of the house. So, Officer Hill ran after Linicomn. Officer Matthews entered the house but remained near the front door. Inside the house, a struggle ensued. Officer Hill grabbed Linicomn and tried to take him to the floor; Linicomn resisted; and Sergeant Irizarry sprayed Linicomn with pepper spray. Linicomn was then handcuffed, escorted outside, and treated by paramedics. The officers spoke with Linicomn's children and confirmed that the children had been asleep and were not ill. The children also confirmed that Linda had a history of making exaggerated claims about their welfare.

The Fifth Circuit affirmed the district court's grant of defendants' motion for judgment on the pleadings. Although the court found plausible plaintiff's allegations that the officers' warrantless entry into his house violated his Fourth Amendment right (and the exigent circumstances exception did not apply), the

court could not conclude under the second prong of the qualified immunity analysis, that this right was clearly established under the circumstances of this case at the time of the officers' entry. Therefore, the officers were entitled to qualified immunity.

***Mitchell v. Wisconsin,* 588 US _ (2019)**

In May 2013, Gerald P. Mitchell was arrested for operating a vehicle while intoxicated. He became lethargic on the way to the police station, so the arresting officers took him to a hospital instead. An officer read him a statutorily mandated form regarding the state implied consent law, but Mitchell was too incapacitated to indicate his understanding or consent and then fell unconscious. Without a warrant, at the request of the police, hospital workers drew Mitchell's blood, which revealed his blood alcohol concentration to be .222.

Mitchell was charged with operating while intoxicated and with a prohibited alcohol concentration. He moved to suppress the results of the blood test on the ground that his blood was taken without a warrant and in the absence of any exceptions to the warrant requirement. The state argued that under the implied-consent statute, police did not need a warrant to draw his blood. Many states, including Wisconsin, have implied consent laws, which provide that by driving a vehicle, motorists consent to submit to chemical tests of breath, blood, or urine to determine alcohol or drug content. The trial court sided with the state and allowed the results of the blood test into evidence. Mitchell was convicted on both counts.

Mitchell appealed his conviction, and the court of appeals certified the case to the Supreme Court of Wisconsin with respect to the issue "whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law...violates the Fourth Amendment." The Supreme Court of Wisconsin accepted the certification and upheld the search 5–2, but without any majority for the rationale for upholding it.

The question presented to the Supreme Court is whether a statute that authorizes a blood draw from an unconscious motorist provide an exception to the Fourth Amendment warrant requirement. In an opinion authored by Justice Alito, the four-justice plurality of the Court concluded that when a driver is unconscious and cannot be given a breath test, the exigent-circumstances doctrine generally permits a blood test without a warrant. Writing for himself, Chief Justice John Roberts, and Justices Stephen Breyer and Brett Kavanaugh, Justice Alito noted that blood alcohol concentration (BAC) tests are searches subject to the Fourth Amendment. As such, a warrant is generally required before police may conduct a BAC test, unless an exception applies. The "exigent circumstances" exception allows the government to conduct a search without a warrant "to prevent the imminent destruction of evidence." The Court has previously held that the fleeting nature of blood-alcohol evidence alone does not automatically qualify BAC tests for the exigent circumstances exception, but additional factors may bring it within the exception. For example, in *Schmerber v. California*, 384 U.S. 757 (1966), the Court held that "the dissipation of BAC did justify a blood test of a drunk driver whose accident gave police other pressing duties, for then the further delay caused by a warrant application would indeed have threatened the destruction of evidence." Similarly, a situation involving an unconscious driver gives rise to exigency because officials cannot conduct a breath test and must instead perform a blood test to determine BAC. Under the exigent circumstances exception, a warrantless search is allowed when "there is compelling need for official action and no time to secure a warrant." The plurality pointed to three reasons such a "compelling need" exists: highway safety is a "vital public interest," legal limits on BAC serve that interest, and enforcement of BAC limits requires a test accurate enough to stand up in court. The plurality suggested that on remand, Mitchell can attempt to show that his was an unusual case that fell outside the exigent circumstances exception (perhaps because police conceded that they had time to get a warrant to draw his blood).

Justice Clarence Thomas concurred in the judgment but would have applied a per se rule under which "the natural metabolization of alcohol in the blood stream creates an exigency once police have probable cause to believe the driver is drunk, regardless of whether the driver is conscious."

Justice Sonia Sotomayor filed a dissenting opinion, in which Justices Ruth Bader Ginsburg and Elena Kagan joined. The dissent argued that the plurality "needlessly casts aside the established protections of the warrant requirement in favor of a brand-new presumption of exigent circumstances." Established precedent should determine the outcome in this case: unless there is too little time to do so, police officers must get a warrant before ordering a blood draw. The dissent also argued that the state statute "cannot create actual and informed consent that the Fourth Amendment requires."

***Okorie v. Crawford,* No. 18-60335 (5th Cir., April 12, 2019)**

The issue before the Court was whether the government can detain the owner of a business that is being searched not because of suspected criminal activity but instead for possible civil violations. In this case, a medical clinic was being searched during which time the doctor was detained for three to four hours. During that time, an investigator pushed the doctor down, drew his gun multiple times, and limited the doctor's movement and access to facilities such as the restroom. The Fifth Circuit affirmed the district court's dismissal of plaintiff's 42 U.S.C. 1983 claims against the investigator. The Court concluded that the doctor's allegations established a Fourth Amendment violation based on the intrusiveness of the detention, but that the sparse caselaw in this area had not clearly established that unlawfulness. As a result, the investigator was entitled to qualified immunity.

***Rich v. Palko,* No. 18-40415 (5th Cir., April 3, 2019)**

Plaintiff filed a 42 U.S.C. 1983 action alleging that officers had violated her adopted son's, Gavrila Dupuis-Mays, Fourth, Eighth, and Fourteenth Amendment rights, relating to a July 11, 2015, encounter. The officers moved to dismiss for failure to state a claim, and the district court granted the motion respecting Plaintiff's Eighth Amendment claim. But the court deferred the remaining claims for disposition after discovery on whether the officers were entitled to qualified immunity. Following discovery, the officers moved for summary judgment on grounds of qualified immunity. The district court, adopting the report and recommendation of the magistrate judge, denied qualified immunity, and the officers appealed.

Gavrila Dupuis-Mays sustained a brain injury as an infant and has cerebral palsy, mental retardation, bi-polar disorder, depression, ADHD, and epilepsy. In the days prior to the encounter, Dupuis-Mays was admitted for inpatient psychiatric evaluation for depressed ideation. He was released on July 10, 2015, and returned to a group home in McKinney, Texas, where he had been living. During the next two days, officers were called to the group home multiple times. The final of these visits was prompted by a call from Dupuis-Mays' caseworker who was requesting that Dupuis-Mays be transported to inpatient care because he was "in a psychotic phase, where he is verbally and physically aggressive towards staff." The officers transported Dupuis-Mays to the inpatient mental facility without incident. While waiting to be checked into the inpatient mental facility, Dupuis-Mays became unruly, including cursing and spitting at the officers, causing the officers to move Dupuis-Mays' head between his legs and hold him in that position for five minutes. After moving into a triage room, Dupuis-Mays again became unruly and while the officers were trying to regain control of Dupuis-Mays, his head fell into a corner cabinet causing a five-inch gash on his head. Notably, neither officer had a hand on Dupuis-Mays' head as he fell into the cabinet. The officers

promptly helped Dupuis-Mays up and carefully moved him to a seated position on the floor. They did not apply additional force.

The Fifth Circuit reversed the district court's denial of the officers' motion for summary judgment based on qualified immunity and held that the officers did not violate Dupuis-Mays's constitutional rights and were entitled to qualified immunity on the unlawful detention claim. Furthermore, even assuming the officers did violate Dupuis-Mays's constitutional rights, plaintiff failed to demonstrate that clearly established law put the officers on notice that their conduct was illegal. Rather, established law in this circuit suggested that the officers were acting legally by relying on the representations of credible persons that Dupuis-Mays met the statutory requirements for apprehension. The court also held that the officers were entitled to qualified immunity on plaintiff's claim that the officers violated Dupuis-Mays's Fourth Amendment rights by using excessive force to restrain him in the triage room. In this case, plaintiff failed to demonstrate that the officers violated clearly established law by moving Dupuis-Mays—who was increasingly aggravated, repeatedly spitting at the officers, and failing to comply with instructions to stop—to the floor, even though he collided with a cabinet on the way down. Finally, the officers were entitled to qualified immunity on plaintiff's claim that they prepared false police reports.

***Shumpert v. City of Tupelo,* No. 17-60774 (5th Cir., September 24, 2018)**

After a traffic stop in June of 2016, Antwun Shumpert ran from the car into a nearby neighborhood. TPD officers, including Officer Cook who was in the area with his police K9, pursued Shumpert. Officer Cook and his K9 eventually located Shumpert hiding in a crawl space under a house. Despite officer's commands to come out and warnings that the K9 would bite, Shumpert ran further under the house, prompting Officer Cook to release his dog which then bit Shumpert. Shumpert began to fight the dog and then ran from under the house and tackled Officer Cook, repeatedly striking him in the face. Fearing he was about to lose consciousness, Officer Cook shot Shumpert four times. Shumpert later died as the result of his gunshot wounds.

Shumpert's wife filed suit against the City and Officer Cook claiming constitutional violations under 42 U.S.C. § 1983, and excessive force, wrongful death, negligence, and negligent or intentional infliction of emotional distress under 28 U.S.C. § 1343. Plaintiffs also asserted Mississippi state law claims against Officer Cook. Both the City and Officer Cook filed motions for summary judgment. The district court held that Plaintiff failed to establish that the alleged constitutional violations resulted from the City's policies or procedures and granted summary judgment on behalf of the City. The court also determined that Plaintiff did not defeat Officer Cook's qualified immunity defense and granted summary judgment on that ground. Plaintiff appeal each of the summary judgment decisions.

The Fifth Circuit affirmed the district court's grant of summary judgment dismissing plaintiff's Fourth Amendment, 42 U.S.C. 1983 excessive force, and state law claims against the city and Officer Cook. The court affirmed the district court's grant of summary judgment to the City on plaintiff's Fourth Amendment and section 1983 claims where plaintiff failed to satisfy the requirements for municipal liability under *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 692 (1978). Because plaintiff failed to provide evidence of an official policy or custom of which a policy maker could be charged with actual or constructive knowledge that caused the constitutional violations, the district court properly granted summary judgment on the Fourth Amendment claims. The court also held that the district court properly determined that the officer was entitled to qualified immunity on the K9 force claim where plaintiffs failed to demonstrate that the officer's use of K9 force was objectively unreasonable in light of clearly established law. Furthermore, the officer was entitled to qualified immunity on the deadly force claim where his use of deadly force did not violate clearly established law. Finally, the state law claims were properly dismissed against the officer.

***United States v. Freeman,* No. 17-40739 (5th Cir., January 25, 2019)**

In this case, defendant was stopped twice over the course of several months while driving his truck along Farm-to-Market Road 2050 near the Texas-Mexico border, once by a county deputy and once by U.S. Border Patrol Agent Perez. Defendant was charged with conspiracy to transport an illegal alien within the United States and transportation of an alien within the United States for financial gain. Appellant-Government appealed the district court's ruling as to the second stop only.

The Fifth Circuit applied the *Brignoni-Ponce* factors and held that the district court's conclusion that the officer lacked reasonable suspicion to conduct the roving patrol stop was supported by the evidence. It concluded that while the district court noted that Agent Perez admitted to conducting roving patrol stops of all vehicles turning onto FM 2050 from Highway 59, the court said its decision did not hinge solely on that admission and was merely one aspect taken into consideration. At a later hearing regarding the detention of a material witness pending the instant appeal, the district court stated it found Plaintiff's passenger's testimony about Freeman's driving to be truthful. The district court also found that "the math did not add up" with respect to Freeman's speed, and that the agents never actually witnessed Freeman speeding. The district court found there to be "nothing evasive about the way that he was driving," and that the dust being kicked into the air was "as good as it got." The district court characterized the stop as a "fishing expedition" and commented that had the agents been a little more patient and stayed behind the vehicle longer, they could probably have developed reasonable suspicion.

***United States v. Reddick,* No. 17-41116 (5th Cir., August 17, 2018)**

Private businesses and police investigators rely regularly on "hash values" to fight the online distribution of child pornography. In this case, a private company determined that the hash values of files uploaded by defendant corresponded to the hash values of known child pornography images and passed this information on to law enforcement. At issue in this appeal was whether and when the use of hash values by law enforcement is consistent with the Fourth Amendment. The Fifth Circuit held that, under the private search doctrine, the Fourth Amendment is not implicated where the government does not conduct the search itself, but only receives and utilizes information uncovered by a search conducted by a private party. The Court reasoned that the government's subsequent law enforcement actions in reviewing the images did not effect an intrusion on defendant's privacy that he did not already experience as a result of the private search.

III. EIGHTH AMENDMENT

***Almeida v. Bio-Medical Applications of Texas, Inc.,* No. 17-50916 (5th Cir., October 31, 2018)**

Nurses Gloria Almeida and Irma Quiñonez sued their former employer, Fresenius Medical Care ("Fresenius"), for retaliation under Texas law alleging that they were terminated for refusing to engage in practices they reasonably believed would expose a patient to a substantial risk of harm or would be grounds for reporting them to the Texas Board of Nursing. Defendant maintained that the nurses were fired for insubordination. The district court granted Fresenius's motion for summary judgment. The Fifth Circuit affirmed. The court held that, although the district court erred by concluding that New Mexico law applied in this case, the protected conduct plaintiffs described was not a but-for cause of their terminations. The court explained that an employee bringing a retaliation claim under the Texas Occupational Code must demonstrate that he would not have been terminated but for his protected conduct. In this case, plaintiffs' refusal to train a patient independently was not a necessary, or but-for, cause of the firings.

***Delaughter v. Woodall,* No. 16-60246 (5th Cir., November 19, 2018)**

Plaintiff filed suit under 42 U.S.C. 1983 against the medical administrator and a medical services contractor for the Mississippi Department of Corrections, alleging that defendants violated his Eighth Amendment rights by failing to provide medically necessary hip replacement and reconstructive surgery. Plaintiff sought an injunction to obtain the surgery and damages for his pain and suffering. The district court granted summary judgment for defendants.

The Fifth Circuit held that the district court properly granted summary judgment in the medical services contractor's favor because there was no evidence that he failed to take reasonable measures to abate a substantial risk of serious harm to plaintiff. However, because the district court failed to address the *Ex parte Young* exception to sovereign immunity for claims for prospective injunctive relief as to the administrator, the court held that the injunctive relief claim should be remanded. The court further held that factual disputes about the reason for the delay prevented it from determining whether the administrator violated plaintiff's constitutional rights. Therefore, the court reversed as to this claim and remanded for further proceedings. Finally, the court vacated the district court's judgment denying appointment of counsel and remanded for reconsideration.

IV. TITLE VII

***Bogan v. MTD Consumer Group, Inc.*, No. 17-60697 (5th Cir., March 26, 2019)**

This case presents an unusual situation in which no prospective (or meaningful retrospective) relief was awarded after a finding of discrimination. Sheaneter Bogan filed suit alleging that she was fired because of her race and sex. A jury found in her favor but awarded her just $1 (perhaps because of a jury instruction on the consequences of a failure to mitigate, an argument that MTD pushed).

Plaintiff then asked the court for reinstatement and front pay. The district court held a hearing after which it denied both requests. With relation to front pay, the court held that MTD established that Bogan did not mitigate her damages. With regard to reinstatement, the district court cited four factors that it believed counseled against reinstatement and refused to order that remedy. The first two (appropriate) factors were 1) the position no longer existed as it did during her employment; and 2) Plaintiff had intended to change careers to social work. However, MTD's argument that it "would have terminated Plaintiff in the absence of any purported discrimination" because of "her inability to follow the rules and her attitude," was improper because the jury rejected this position. The Fifth Circuit further found that the final reason the district court cited in denying reinstatement – "discord between the parties" – was also problematic because of the apparent source of that acrimony. The court noted that antagonism is a natural by-product of lawsuits, often even more so for ones alleging discrimination. If the hostility common to litigation were sufficient for "denial of reinstatement, reinstatement would cease to be a remedy except in cases where the defendant felt like reinstating the plaintiff." The court held that the acrimony must rise to the level at which the parties' relationship is "irreparably damaged." Since the district court did not find that the relationship between Bogan and MTD rose to the level at which it was irreparably damaged and exceeded the antagonism that normally results from trials, it was improper to consider this factor in determining the requested remedy of reinstatement.

The Fifth Circuit held that the district court should not have relied on the latter two factors in denying reinstatement, and thus the court could not review its conclusion that plaintiff's reinstatement would not further the remedial goals of Title VII. Therefore, the court remanded for further proceedings without suggesting how the district court should exercise its discretion based on the two factors that remain or other permissible considerations that the district court may find relevant.

***Cicalese v. University of Texas Medical Branch* -- F.3d – Docket No. 18-40408 (5th Cir., May 16, 2019)**

Cicalese and Rastellini, a married couple, were born in Italy. They moved to the United States and both began working for UTMB in 2007. When they arrived in the United States, neither was licensed to practice medicine in Texas, but UTMB granted them faculty medical licenses and offered to renew those licenses indefinitely. All went well for several years but the couple began having problems after Dr. Danny Jacobs joined UTMB as Dean in late 2012. Plaintiffs alleged that Dr. Jacobs made derogatory comments regarding Italy/Italians, changed job performance evaluation criteria, and suspended certain programs in which Plaintiffs were affiliated. Problems intensified after Dr. Jacobs hired Dr. Douglas Tyler as chairman of surgery. Dr. Tyler allegedly made demeaning comments about Plaintiff(s), excluded them from departmental activities, demoted the plaintiff(s), reduced salaries, restricted work, etc.

The couple sued UTMB, alleging that "[d]irect and/or circumstantial evidence exists showing that [UTMB] intended to discriminate against [them] because of their national origin, in violation of Title VII." UTMB moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court granted UTMB's motion, concluding the couple had failed to state a plausible national origin discrimination claim or a hostile work environment claim under Title VII. Cicalese and Rastellini appealed the district court's dismissal of their national origin discrimination claims under Title VII against the University.

The Fifth Circuit vacated the district court's dismissal of plaintiffs' disparate treatment claims, holding that plaintiffs alleged sufficient facts to state a plausible claim that the University's various actions taken against them were motivated by anti-Italian bias. In this case, the district court erred by holding plaintiffs to a heightened pleading standard. The court affirmed as to the district court's disparate impact and hostile work environment claims and remanded in part for further proceedings.

***Fort Bend County, Texas v. Davis,* 587 US _ (2019)**

Lois Davis was an information technology (IT) supervisor for Fort Bend County, Texas. She filed a complaint with the county human resources department alleging that the IT director had sexually harassed and assaulted her, and following an investigation by the county, the director resigned. Davis alleges that after the director's resignation, her supervisor – who was a personal friend of the director – retaliated against her for making the complaint. Davis filed a charge with the Texas Workforce Commission alleging sexual harassment and retaliation. While the charge was pending, Davis allegedly informed her supervisor of a specific Sunday she could not work due to a "previous religious commitment," and the supervisor did not approve the absence. Davis attended the event and did not report to work. As a result, Fort Bend terminated her employment.

After her termination, Davis submitted to the Commission an "intake questionnaire" in which she wrote in the word "religion" next to a checklist labeled "Employment Harms or Actions" but did not amend her charge of discrimination or explain the note. The Commission informed Davis that it had made a preliminary decision to dismiss her charge and issued a right-to-sue letter. Davis filed her lawsuit in federal district court alleging both retaliation and religious discrimination under Title VII. The district court granted summary judgment in favor of the county on all claims.

The Fifth Circuit affirmed the lower court as to the retaliation claim but reversed and remanded as to her religious discrimination claim, finding genuine disputes of material fact that warranted a trial. On remand, Fort Bend argued for the first time that Davis had failed to exhaust her administrative remedies on the religious discrimination claim, as required by Title VII. The district court agreed, finding that administrative exhaustion is a jurisdictional prerequisite in Title VII cases. Because subject matter jurisdiction cannot be waived by failure to challenge it, the district court dismissed

Davis's religious discrimination claim with prejudice. The Fifth Circuit noted that Title VII requires plaintiffs to exhaust their administrative remedies by filing formal charges with the EEOC. It acknowledged that there is no consensus within the Fifth Circuit whether this requirement is a jurisdictional requirement (which may be raised at any point and cannot be waived) or merely a prerequisite to suit (and thus subject to waiver). Relying on the Supreme Court's decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), in which the Court held that the Title VII's statutory limitation of covered employers to those with 15 or more employees was not jurisdictional, the Fifth Circuit held that the administrative exhaustion requirement was also not jurisdictional. This holding is consistent with holdings in the First, Second, Third, Sixth, Seventh, Tenth, and DC Circuits, but inconsistent with holdings by the Fourth, Ninth, and Eleventh Circuits.

The question presented to the Supreme Court in this matter is whether Title VII's administrative-exhaustion requirement a jurisdictional prerequisite to suit, as three circuits have held, or a waivable claim-processing rule, as eight circuits have held. In a unanimous opinion authored by Justice Ginsburg, the Court held that Title VII's administrative-exhaustion requirement is a waivable claim-processing rule, not a jurisdictional prerequisite to suit. The Court reasoned that jurisdictional requirements are generally quite narrow and refer either to the classes of cases a court may hear (as in subject matter jurisdiction) or the persons over whom a court may exercise its authority (personal jurisdiction). Claim-processing rules, in contrast, broadly require parties to take certain steps in or prior to litigation. The Court noted that the requirement in Title VII that the complainant exhaust all administrative remedies appears in provisions separate and distinct from the parts of that statute that confer jurisdiction on federal courts to hear such claims. The Court held that the administrative-exhaustion requirement is more similar to other types of rules that the Court has held nonjurisdictional, such as the directions to raise objections in an agency rulemaking procedure before asserting them in court or to follow copyright registration procedures before suing for infringement.

***Kymberli Gardner v. CLC of Pascagoula, L.L.C.*, No. 17-60072 (5th Cir., February 6, 2019)**

This opinion or order relates to an opinion or order originally issued on June 29, 2018. In this case, a nurse alleged that an assisted living center allowed a hostile work environment to continue by not preventing a resident's repetitive harassment. Plaintiff filed suit under Title VII after she was terminated in part for refusing to care for an aggressive patient in a nursing home. In 2018, The Fifth Circuit reversed the district court's grant of summary judgment on the harassment claim and held that the evidence of persistent and often physical harassment by the aggressive patient was enough to allow a jury to decide whether a reasonable caregiver on the receiving end of the harassment would have viewed it as sufficiently severe or pervasive even considering the medical condition of the harasser. In this case, an objectively reasonable caregiver would not expect a patient to grope her daily, injure her so badly she could not work for three months, and have her complaints met with laughter and dismissal by the administration. The court allowed the district court to consider plaintiff's retaliation claim via direct evidence for the first instance on remand. On remand, the district court granted summary judgment in favor of Defendant on all claims. Plaintiff appealed with relation to her claims of hostile work environment and retaliation.

In 2019, the Fifth Circuit withdrew the prior opinion and substituted the following opinion. The Court acknowledged that the unique nature of the workplace was an important consideration in this case. However, the specific circumstances of such claims must be judged to determine whether a reasonable person would find the work environment hostile or abusive taking due account of the unique circumstances involved in caring for mentally diseased elderly patients. Under the facts of this case, the Fifth Circuit held that the allegations of harassment were so severe and pervasive that it raised a fact

issue requiring a jury to decide the question. As such, it reversed the entry of summary judgment on Plaintiff's harassment claim. Additionally, the Court remanded Plaintiff's retaliation claim to the district court as it failed to consider Plaintiff's direct evidence of retaliation.

***O'Daniel v. Industrial Service Solutions,* No. 18-30136 (5th Cir., April 19, 2019)**

O'Daniel's suit claims her boss at repair company Industrial Service Solutions ultimately fired her over a post O'Daniel made on Facebook mocking a transgender woman who was using the women's restroom. O'Daniel argued that Title VII of the Civil Rights Act — which prohibits certain workplace bias — protects workers from discrimination based on sexual orientation and gender identity.

The Fifth Circuit affirmed the district court's dismissal of plaintiff's complaint against her former employers, ruling that O'Daniel's belief that Title VII shielded her from discrimination because she is straight wasn't a reasonable belief, citing a history of Fifth Circuit rulings that the law doesn't cover sexual orientation. The court held that plaintiff's Title VII retaliation claim failed because Title VII does not protect against discrimination on the basis of sexual orientation and, even if it did, the district court did not err in finding that plaintiff could not have reasonably believed discrimination on the basis of sexual orientation was a prohibited practice.

The case drew amicus briefs from the American Civil Liberties Union Foundation, the U.S. Equal Employment Opportunity Commission, the National Center for Lesbian Rights, the Lambda Legal Defense and Education Fund and others filing in support of O'Daniel's position in the case.

***Roberson-King v. Louisiana Workforce Commission,* No. 17-30899 (5th Cir., September 17, 2018)**

Angela Roberson-King worked as a rehabilitation counselor at Louisiana Rehabilitation Services (LRS), a division of Louisiana's Office of Workforce Development. In 2014, she applied to become a district supervisor at LRS. She interviewed for the position but did not receive it. Roberson-King then sued LRS in federal district court, alleging that she was denied a promotion because of her race in violation of Title VII of the Civil Rights Act and Louisiana tort law. The district court dismissed the state law claims under Federal Rule of Civil Procedure 12(b)(6) and granted LRS summary judgment on the Title VII claim.

The Fifth Circuit affirmed the district court's grant of summary judgment to LRS in an action filed by plaintiff alleging that she was denied a promotion because of her race in violation of Title VII of the Civil Rights Act. The court held that it was undisputed that plaintiff established a prima facie case of employment discrimination, but LRS asserted a justification that was not pretextual (that the white candidate was the more competitive candidate for the position because she was a Certified Rehabilitation Counselor, which Plaintiff was not). In this case, there was no evidence in the record of any discrimination in the promotion decision. The court explained that any difference in qualifications between the two candidates did not create a genuine issue of fact that plaintiff was clearly better qualified for the district supervisor position. The choice to value the other candidate's credentials over plaintiff's strengths was within the realm of reasonable business judgments.

***Thomas v. Tregre,* No. 18-30577 (5th Cir., January 10, 2019)**

After an internal affairs investigation regarding the injury of an arrestee was conducted, plaintiff and others were transferred to positions in the corrections department which defendant, the sheriff, believed were less likely to result in arrests. Plaintiff decided to quit

rather than accept the transfer. Plaintiff then sued the sheriff and parish for racial discrimination and retaliation under Title VII. Plaintiff further alleged that the sheriff retaliated against him by refusing to reinstate him to his previously held position after appellant filed an EEOC complaint.

The Fifth Circuit affirmed the district court's grant of summary judgment in favor of defendant. The Court held that Plaintiff failed to meet his requirement to show he applied for reinstatement to his former position, even though appellant asked his employer about reinstatement to the position in person and his attorneys requested reinstatement in a settlement letter.

In regard to the discrimination claim, the court held that plaintiff failed to create a genuine issue of material fact with respect to whether he was treated less favorably than other similarly situated employees outside the protected group and as to whether he was replaced with someone outside his protected class. In regard to the retaliation claim, the court held that plaintiff failed to produce evidence creating a genuine issue of material fact showing that his employer took an adverse employment action against him and that a causal connection existed between the protected activity and the adverse employment action.

***Wittmer v. Phillips 66 Co.*, No. 18-20251 (5th Cir., February 6, 2019)**

The Fifth Circuit reiterated that its holding in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), which held Title VII does not prohibit discrimination on the basis of sexual orientation, remains binding precedent in the Fifth Circuit. Appellant, a job applicant and transgender woman, sued a prospective employer alleging transgender discrimination. Appellant brought the transgender discrimination claim under Title VII's prohibition of sex discrimination. While the court affirmed the trial court's dismissal of appellant's claims on separate claims, the opinion expressly stated "*Blum* remains binding precedent in this circuit to this day." Along with penning the majority opinion, Circuit Judge James C. Ho also wrote a thorough concurring opinion in which he discussed the rational for the Fifth Circuit's continued precedent that Title VII does not prohibit discrimination on the basis of sexual orientation or transgender status.

V. SECTION 1983

***Alvarez v. City of Brownsville*, No. 16-40772 (5th Cir., September 18, 2018)**

On November 27, 2005, Alvarez, a then-seventeen-year-old ninth grade special education 386*386 student, was arrested by the Brownsville Police Department and taken to a detention center in Brownsville, Texas on suspicion of public intoxication and burglary of a motor vehicle. After being placed in one of the holding cells, Alvarez became somewhat disruptive, causing officers to move Alvarez to a padded cell. During the transport, Alvarez became non-compliant with the officers' instructions. A scuffle between Alvarez and one of the officers ensued during which Alvarez squirmed and flailed his arms. All of the events that took place at the jail before, during, and after Alvarez's incident with the officer were captured on video.

Internal investigations were performed to determine if the officer violated the department's use of force policy and to determine if there was probable cause for recommended the district attorney criminally charge Alvarez for assault of the officer. Due to oversight, the video of the incident (which showed no assault on the part of Alvarez) was not provided to the criminal investigation division or the district attorney. Alvarez was subsequently prosecuted for assault on a public servant, an offense to which he pled guilty and was eventually sentenced to prison. Approximately four years into Alvarez' prison sentence, the videos of Alvarez's incident with the officer surfaced during discovery for an unrelated § 1983 case. After the discovery of the videos, Alvarez filed an application for a writ of habeas corpus in Texas state court, claiming that the Brownsville Police Department had withheld the videos in violation of *Brady*. In

October 2010, after the state district court recommended that the writ of habeas corpus be granted and that Alvarez be given a new trial, the Texas Court of Criminal Appeals concluded that Alvarez was "actually innocent" of committing the assault. Alvarez's assault conviction was then set aside and all charges against Alvarez were later dismissed.

In April 2011, Alvarez sued the City of Brownsville, Officer Arias, and other individuals from the Brownsville Police Department, asserting various claims under §1983, which included nondisclosure of exculpatory evidence in violation of *Brady*. The district court granted Alvarez's motion for summary judgment concluding that there was a *Brady* violation as a matter of law, and Alvarez established "all substantive elements of a § 1983 municipal liability claim against the City of Brownsville." The district court held a jury trial to determine whether Alvarez was entitled to monetary damages for the Brady violation. Following a two-day jury trial, the jury awarded Alvarez $2,000,000 in compensatory damages. The parties agreed to attorneys' fees of $300,000 and the court entered final judgment in favor of Alvarez for $2,300,000. The City of Brownsville timely appealed.

In 2017, a panel of the Fifth Circuit reversed the $2,300,000 judgment awarded to Alvarez and dismissed Alvarez's action against the City of Brownsville. The panel opinion held that by entering a guilty plea Alvarez waived the right to assert the *Brady* claim foundational to his § 1983 action.

After rehearing this case en banc, the Court considered two important questions as to the merits of this case: (1) whether the City of Brownsville should have been subjected to municipal liability for Alvarez's claim under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and (2) whether Alvarez was precluded from asserting his constitutional *Brady* claim for his 42 U.S.C. § 1983 action against the City of Brownsville because he pled guilty. The Court held that plaintiff's *Brady v. Maryland* claim should have been dismissed as a matter of law on summary judgment because the city should not have been subjected to municipal liability for plaintiff's 42 U.S.C. 1983 claim. The Court also declined the invitation to disturb its precedent concerning a defendant's constitutional right to *Brady* material prior to entering a guilty plea.

***Arenas v. Calhoun*, -- F.3d – Docket No. 18-50194 (5th Cir., April 26, 2019)**

While patrolling the administrative segregation unit of a state prison, Officer John Calhoun saw that inmate Richard Tavara was hanging from a noose around his neck with a bedsheet suspended from the ceiling sprinkler head. Because he was unable to see Tavara's feet through the small window in the cell door, Calhoun could not tell whether Tavara was actually hanging and in need of medical assistance or was staging suicide to draw officers into the cell for an ambush. Instead of rushing into a potentially dangerous situation, Calhoun immediately summoned backup and waited for his supervisor to determine when it was safe to open the door. By the time the officers entered the cell nearly seven minutes later, Tavara was dead. Calhoun had never seen Tavara before his shift and knew nothing of his mental issues or why he had been placed in administrative segregation. Calhoun was equipped with a stab-proof vest and a can of pepper spray.

Maria Arenas sued Calhoun in his individual capacity under 42 U.S.C. § 1983, claiming that he had violated her son's Eighth Amendment right against cruel and unusual punishment. The district court granted summary judgment for Calhoun because, before that evening, he had lacked subjective knowledge of a substantial risk to Tavara's life. Additionally, the district court held that Calhoun's response to the suicide did not amount to deliberate indifference but was, at most, grossly negligent. The Fifth Circuit affirmed the district court's grant of summary judgment holding that that the officer's actions did not amount to deliberate indifference where he faithfully adhered to operating procedure. Additionally, the Court found that the officer did not effectively

disregard the known risk that the son might commit suicide.

***Arizmendi v. Gabbert,* No. 17-40597 (5th Cir., March 26, 2019)**

Plaintiff, Blanca Arizmendi, teaches high school French in Brownsville, Texas. Patrick Gabbert, the school district's criminal investigator, swore out an affidavit in support of a warrant for the arrest of Arizmendi for allegedly communicating a false report relating to the allegation that the school principal used her forged signature to improve his niece's grades in order to improve the niece's chances of getting an academic scholarship.

Arizmendi sued Gabbert for false arrest under 42 U.S.C. § 1983, contending that Gabbert knowingly or recklessly misstated material facts in the arrest affidavit. Additionally, Plaintiff contended that once the false statements were excised from Gabbert's warrant affidavit, it did not support probable cause for the offense for which she was arrested. Gabbert argued that he was entitled to summary judgment because even if he made material false allegations in his affidavit, the other allegations in the warrant established probable cause to arrest Arizmendi for a different (lesser) offense than the one for which he sought a warrant.

The Fifth Circuit reversed the district court's denial of defendant's motion for summary judgment, holding that, although the validity of the arrest could not be saved by facts stated in the warrant sufficient to establish probable cause for a different charge from that sought in the warrant, Gabbert was entitled to qualified immunity because this was not clearly established at the time of his conduct.

***City of Escondido v. Emmons,* 586 US _____ (2019)**

In April 2013, Escondido police officers responded to a domestic violence call, which ended in the arrest of Maggie Emmons's husband. He was later released. In May 2013, police received a 911 call about another domestic disturbance at the same residence. The same officer responded, along with a second officer, and the 911 dispatcher informed the officers that two children could be in the residence and attempts to return the 911 call had gone unanswered.

When the officers arrived at the residence, they knocked on the door but received no answer. Through a side window, the officers spoke with Emmons wife and convinced her to open the door so they could perform a welfare check. As officers were speaking with her, an unidentified man told Emmons to back away from the window.

A few minutes later, and after additional officers had arrived, a man opened the apartment door and came outside. One of the officers told the man not to close the door, but the man closed the door and tried to walk past the officer. The officer stopped him, took him to the ground, and handcuffed him. Police body-camera video shows that the officer did not hit the man or display any weapon, and that the man was not in any visible or audible pain either as a result of the takedown or while on the ground. Minutes later, officers helped the man up and arrested him for the misdemeanor offense of resisting arrest and delaying a police officer.

The man turned out not to be Emmons's husband but rather her father, Marty Emmons. Marty Emmons sued all the police officers present and the City of Escondido for use of excessive force, among other claims, in violation of the Fourth and Fourteenth Amendments. The federal district court rejected the excessive force claim as to all but the officer who took down Marty Emmons. With respect to that officer, the district court found that the law was not clearly established that the officer could not act the way he did in that situation, so he was entitled to qualified immunity.

The Ninth Circuit reversed and remanded for trial on the excessive force claims against two of the officers, finding that the right to be free of excessive force was clearly established at the time of the events in question.

The issue presented to the Supreme Court is whether the Ninth Circuit properly analyzed whether the law was clearly established as to the unlawfulness of the conduct of the two police officers in this situation.

In a per curiam opinion issued without argument, the Court reversed the Ninth Circuit as to one of the officers and vacated the lower court decision as to the other officer. The Supreme Court noted that the Ninth Circuit failed to provide any explanation for reinstating the excessive force claim against an officer whom the district court determined through video evidence did not exert any force whatsoever against arrestee. As to the officer who physically stopped him, the Ninth Circuit's broad and unsupported statement that the right against excessive force is clearly established is insufficient to meet the requirement that a clearly established law "must be defined with specificity." In this case, the Ninth Circuit should have considered whether clearly established law prohibited the officers from exercising the force they used in these circumstances. By failing to analyze the law with the requisite specificity, the Ninth Circuit erred in finding that the arresting officer was not entitled to qualified immunity.

***Cherry Knoll, LLC v. Jones,* No. 18-50494 (5th Cir., April 22, 2019)**

Cherry Knoll, LLC, a construction company, alleges that it was misled in an attempt by the city to carve out a parcel of land needed for a road rehab project. It asserted a claim against the City under 42 U.S.C. 1983 for violating its rights to procedural due process, substantive due process, and equal protection by filing the Subdivision Plats without its consent and over its objection. The district court dismissed the lawsuit.

The Fifth Circuit reversed the district court's dismissal of Cherry Knoll's complaint against the City of Lakeway, the city manager, and HDR Engineering in a dispute over a plat of land that Cherry Knoll had purchased in Lakeway. The Court held that Cherry Knoll LLC's well pleaded factual allegations make it plausible that the City Council made the deliberate decision in 2014 to file the subdivision plats over Cherry Knoll's objection and to use the filed plats as leverage in its land-acquisition effort. Cherry Knoll's allegations also make plausible its claim that HDR was a "willful participant in joint action" for purposes of section 1983. Specifically, the Court held that these allegations satisfied the standard for official municipal policy under Pembaur v. City of Cincinnati and the district court erred in finding otherwise. The court remanded the dispute, siding with Cherry Knoll's assertion that the city deprived the company of the rights to its land by filing subdivision maps, or plats, despite objections, which ultimately brought the price of the land down. The court also held that the district court erred in determining that the city manager was entitled to the protection of qualified immunity at the Rule 12(b)(6) stage. Accordingly, the court remanded the matter and reinstated Cherry Knoll's state law claims.

***Garza v. City of Donna,* -- F.3d – Docket No. 18-40044 (5th Cir., April 30, 2019)**

After Jose Luis Garza died by suicide in jail, plaintiff filed a 42 U.S.C. 1983 action alleging violations of the Fourteenth Amendment's Due Process Clause in the time leading up to, and immediately following, Garza's suicide. In this case, Garza was arrested after his mother called the police stating that she feared for her son's life and was afraid he would hurt himself. Garza was arrested, booked into jail, and placed in a cell without any particular mental-health precautions being taken. Garza had a camera in his cell that was supposed to be monitored by police department employees. Garza obscured the camera's lens and hanged himself without any employee noticing on the camera monitors. Appellants presented both a conditions theory and numerous episodic-act theories to the District Court, all of which were rejected.

The Fifth Circuit affirmed the district court's grant of summary judgment to the City, declining to consider Appellants' suit as a conditions-of-confinement case. With regard to the claims of episodic acts, the Court held that

plaintiff failed to set forth evidence by which the various police department employees' actions might reasonably be attributed to the City. Therefore, the City was entitled to judgment as a matter of law.

Of note, the Court noted that the district court defined "subjective deliberate indifference" as follows: "a plaintiff must show that public officers were [1] aware of facts from which an inference of a substantial risk of serious harm to an individual could be drawn; [2] that they actually drew the inference; and [3] that their response indicates subjective intention that the harm occur." The Court noted that the district court's "intention" requirement, though taken from statements in decisions of the Fifth Circuit, is contrary to the weight of the Court's case law and to the Supreme Court precedent from which the Fifth Circuit's cases flow. However, it affirmed on other grounds as noted above.

***Lawson v. Stephens,* No. 17-40387 (5th Cir., August 21, 2018)**

Plaintiff filed a pro se 42 U.S.C. 1983 action against prison officials, alleging that he was denied access to rehabilitative programs and services, including sex offender treatment. The district court dismissed the suit and plaintiff filed a motion for reconsideration. The magistrate judge then sua sponte deemed plaintiff's motion withdrawn, and plaintiff subsequently appealed the district court's dismissal of the suit.

The Fifth Circuit held that it lacked jurisdiction to hear the case and thus could not reach the merits. The court considered defendant's motion for reconsideration still pending before the district court because the magistrate judge's withdrawal of the motion was ultra vires and without legal consequence. Therefore, plaintiff's motion for reconsideration remained pending in the district court. The panel held the appeal in abeyance and issued a limited remand to allow the district court to rule on plaintiff's motion.

***Murphy v. Collier,* No. 19-70007 (5th Cir., March 27, 2019); 587 U.S. _____ 2019 (March 28, 2019)**

Plaintiff, a death row inmate, petitioned the Texas Court of Criminal Appeals for a writ of prohibition seeking to prohibit his execution until the state allowed his preferred spiritual advisor – a Buddhist priest – to be physically present in the execution chamber at the time of execution. After the petition was denied, plaintiff filed a 42 U.S.C. 1983 complaint and a motion for stay of execution with the federal district court. The district court denied the motion for stay of execution as untimely and plaintiff appealed.

The Fifth Circuit affirmed and held that the district court rightfully recognized that the proper time for raising such claims had long since passed. In this case, Plaintiff was scheduled for execution on March 28, 2019, for the murder of police officer Aubrey Hawkins on December 24, 2000. His execution date was set on November 29, 2018. By his counsel's admission, he waited until February 28 to first request that the state allow his preferred spiritual advisor to not just meet with him prior to entering the chamber and watch from the viewing room, but actually enter the execution chamber with him; then he waited until March 20 -- eight days before the scheduled execution -- to raise his First Amendment and Religious Land Use and Institutionalized Persons Act claims; and these claims were not brought before the federal courts until March 26. The Fifth Circuit also took note, as did the district court, of the multiple warnings plaintiff's counsel has received in the past for filing last-minute motions.

However, the following day on March 28, 2019, the Supreme Court granted a stay of execution based on religious discrimination ordering that the State could not carry out Murphy's execution pending the timely filing and disposition of a petition for a writ of certiorari unless the State permits Murphy's Buddhist spiritual advisor or another Buddhist reverend of the State's choosing to accompany Murphy in the execution chamber during the

execution. While dissenting opinions expressed concern that Plaintiff's attorney engaged in dilatory tactics, Justice Kavanaugh in a concurring opinion reasoned that Texas' allowance of Christian or Muslim inmates to have their spiritual advisors present in the execution room but not Buddhist inmates represented what he called "denominational discrimination."

***Nieves v. Bartlett,* 587 US _ (2019)**

Russell Bartlett was arrested by Alaska state troopers Luis Nieves and Bryce Weight for disorderly conduct and harassment. Bartlett subsequently sued the officers for damages under 42 U.S.C. § 1983, making claims including false arrest and imprisonment, excessive force, malicious prosecution, and retaliatory arrest. The district court granted summary judgment to the officers on all claims. The U.S. Court of Appeals for the Ninth Circuit reversed the district court's ruling on the retaliatory arrest claim, explaining that under its own precedent, a showing of probable cause did not preclude a claim of retaliatory arrest. The appellate court noted that in 2012, the U.S. Supreme Court had clarified that its decision in *Hartman v. Moore*, 547 U.S. 250 (2006), which held that a plaintiff could not make a retaliatory prosecution claim if the charges were supported by probable cause, did not necessarily extend to retaliatory arrests. And since that time, the Ninth Circuit had held that a plaintiff could make a retaliatory arrest claim even if the arresting officers had probable cause.

The issue presented to the Supreme Court is whether probably cause defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983. Chief Justice John Roberts delivered the majority opinion which held that the presence of probable cause for an arrest defeats a First Amendment retaliatory arrest claim as a matter of law. The Court noted that to prevail on a First Amendment retaliatory arrest claim, the plaintiff must show that the official acted with a retaliatory motive and that the motive was the "but-for" cause of the plaintiff's injury. The Court looked to analogous situations to determine how to identify whether improper motive caused the injury: the torts of false imprisonment and malicious prosecution. Analysis of motive of these torts supports the conclusion that the presence of probable cause should defeat a retaliatory arrest claim, regardless of the subjective motive of the arresting officer. Thus, if the officer has probable cause, then even the presence of a retaliatory motive is irrelevant unless the plaintiff presents "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been" (an equal protection, rather than First Amendment, argument).

***Waller v. Hanlon,* No. 18-10561 (5th Cir., April 24, 2019)**

Defendants Richard Hoeppner and Benjamin Hanlon, both Fort Worth police officers on patrol during the early morning of May 28, 2013, were dispatched to 409 Havenwood Lane North to investigate a residential burglary alarm. Hoeppner and Hanlon arrived in separate vehicles and parked down the street from 409 Havenwood Lane North, so they could approach covertly. The officers proceeded on foot to 404 Havenwood Lane North, erroneously believing it was 409 Havenwood Lane North, which was across the street. The officers looked around the outside of the house and noticed the garage door was open. Hanlon then went to knock on the front door while Hoeppner stayed by the open garage.

Meanwhile, the officers' flashlights roused Jerry and Kathleen Waller, the residents of 404 Havenwood Lane North. Jerry Waller attributed the lights to his car alarm, so he went out to the garage to investigate. What happened next is the subject of dispute. Hoeppner and Hanlon, the only surviving witnesses to the encounter, recounted the following version of events in a series of statements to investigators. Waller, holding a small gun, entered the garage through a door that led in from the house. Hoeppner shined his 600-lumen flashlight in Waller's eyes specifically to conceal himself, drew his service weapon, and repeatedly ordered Waller to drop the gun. Hoeppner did not

identify himself as a police officer, but Hanlon, upon hearing Hoeppner shouting in the garage, rushed to the garage while yelling "Fort Worth PD." Waller ignored Hoeppner's repeated commands to drop his gun. Instead, Waller became combative and demanded that Hoeppner get the light out of his eyes. Waller eventually did put the gun down on the back of a car parked in the garage. Hoeppner moved toward the gun, but Waller suddenly lunged for the gun, retrieved it, and pointed it at Hoeppner. Fearing for his life, Hoeppner shot Waller five or six times, and Waller fell forward on top of the gun.

Seeking recompense for Waller's death, Waller's survivors filed suit complaining that Hoeppner used excessive force against Waller in violation of his Fourth and Fourteenth Amendment rights to be free from unreasonable seizures. They allege that Hoeppner did not reasonably fear for his safety when he shot Waller. They also claim that the officers conspired to cover up Hoeppner's use of excessive force. Specifically, Plaintiffs allege that forensic evidence substantially undermines the officers' version of events. Lastly, Plaintiffs sought declaratory relief for violations of analogous rights under the Texas Constitution.

The district court concluded that plaintiffs pleaded enough facts to plausibly allege that Waller was not holding a weapon when Hoeppner shot him and, thus, the officer did not reasonably fear for his safety when he shot Waller. It likewise concluded that Plaintiffs pleaded enough facts to allege that defendant police officers conspired with Hoeppner to veil the true circumstances of Waller's death by tampering with the scene and giving false statements. It accordingly denied the defendants' motions for a judgment on the pleadings. Lastly, the district court ruled that state law authorized the plaintiffs to pursue declaratory relief for violations of the Texas Constitution. The defendants appealed these rulings.

The Fifth Circuit affirmed in part and reversed in part. The Court agreed with the district court that plaintiffs plausibly alleged that Waller was unarmed and thus posed no reasonably perceivable threat when the officer killed him. However, the court held that plaintiffs' claims alleging that defendants denied them access to the courts were currently unripe. Finally, the court held that plaintiffs did not have standing to seek declaratory (as opposed to retrospective) relief for the past injury to Waller.

***Winzer v. Kaufman County*, No. 16-11482 (5th Cir., February 18, 2019)**

Dispatchers received calls about a man on a rural street, shooting a pistol and yelling "everyone's going to get theirs." Dispatchers relayed descriptions of a black male wearing a brown shirt. Officers arrived and observed a suspect matching that description, who fired at them, then disappeared into the trees. The suspect re-appeared 100-500 yards away. The officers advanced but again lost sight of the suspect. They began ordering him to drop his weapon and come out. After a few minutes, the officers spotted a figure on a bicycle, wearing a blue jacket, not a brown shirt, over 100 yards away. All of the officers claim the rider was armed. The rider was Gabriel Winzer, not the suspect. His father, Henry, claims that Gabriel was "unarmed" and did not move his hands in any way that might have suggested that he was reaching for something. An officer yelled "put that down!" Officers fired 17 shots within seconds of spotting Gabriel. Hit, Gabriel fled. While Henry was attempting to help Gabriel in their yard, officers advanced. Henry stated that the only gun they had was a toy, which he tossed toward the officers. When the officers attempted to cuff Henry and Gabriel, both resisted. Officers tased them. EMS pronounced Gabriel dead at the scene.

The district court dismissed all claims against the individual officers and the county. The Fifth Circuit affirmed that claims against the two officers were time-barred. With respect to qualified immunity, the Fifth Circuit ruled that the district court erred in excluding Henry's affidavit. It held that the summary judgment evidence created genuine issues of material fact with respect to whether the use of deadly force was objectively reasonable based upon the fact that there was some evidence that Gabriel did

not match the suspect's description, did not have anything in his hands, had both hands on the handlebar of his bike, and did not reach for anything. Further, it was undisputed that Gabriel was over 100 yards away, on a bicycle, and slowly approaching five officers barricaded behind three vehicles and with high powered rifles drawn and ready. The Court believed that it was for a jury to determine whether a reasonable officer on the scene, when confronted with these facts, would have determined that Gabriel posed such an imminent risk to the officers that use of deadly force was justified within seconds of his appearance.

VI. FMLA

***Tatum v. Southern Company Services, Inc.*, No. 18-40775 (5th Cir., July 22, 2019)**

Southern Company Services, Inc. ("SCS"), fired Brandon Tatum, and he sued claiming that SCS unlawfully fired him after he asked to take medical leave for high blood pressure. On summary judgment, the district court dismissed Tatum's claims of interference and retaliation in violation of the Family and Medical Leave Act ("FMLA").

The Fifth Circuit affirmed the district court's dismissal. The court held that SCS had a good-faith reason for plaintiff's termination – Tatum had a history of being reprimanded for swearing, quoting the bible, and generally being abrasive in colleague interactions. Additionally, Tatum had delayed reporting a safety concern. As such, SCS adhered to company policy in firing Tatum.

VII. QUALIFIED IMMUNITY

***Anderson v. Valdez*, No. 17-41243 (5th Cir., January 14, 2019)**

Plaintiff, Bruce Anderson's, job required an oath to report judicial misconduct. He now complains of retaliation for doing so — in violation of the First Amendment. Plaintiff filed suit against Chief Justice Valdez in his individual and official capacities, arguing that Valdez intervened in plaintiff's hiring as retaliation for plaintiff filing a complaint against Valdez. The parties disagree on whether, at the time of these events, Valdez knew that Anderson had filed his complaint with the State Commission on Judicial Conduct; they also dispute whether the reasons given by Valdez and the other justices for not hiring Anderson were pretextual. Valdez moved to dismiss, asserting that as Anderson's general professional obligations as a lawyer required his report of judicial misconduct, he spoke pursuant to his official duties in filing the complaint with the State Commission on Judicial Conduct — and that his speech was therefore not protected by the First Amendment. The Fifth Circuit affirmed the district court's denial of Valdez's motion to dismiss, holding that Anderson's general professional duties as a lawyer were not "official duties" that would transform the constitutionally protected speech of a citizen into the unprotected speech of a public employee. While Anderson had sufficiently alleged a First Amendment retaliation claim to survive a motion to dismiss, the Fifth Circuit allowed for the possibility that facts would come to light at the summary judgment phase undermining Anderson's allegations or implicating legal principles that were not yet clearly established as of May 2014.

Valdez now brings this interlocutory appeal from the district court's denial of his motion for summary judgment. The Fifth Circuit noted that this appeal presents a different issue than *Anderson I*. Valdez no longer argues that Anderson spoke in discharge of the general obligation of a lawyer to report judicial misconduct. He now argues that Anderson was specifically bound by the Texas Code of Judicial Conduct, which requires judges — and by incorporation, their staff — to report judicial misconduct to the State Commission on Judicial Conduct. He contends that Anderson spoke pursuant to this "official duty," and under *Gacetti v. Ceballos* his speech was unprotected.

On this appeal, the Fifth Circuit held that Valdez is entitled to qualified immunity because it was not clearly established as of May 2014 that where a briefing attorney swore as part of his employment to comply with a code of conduct requiring him to report judicial

misconduct to a specific state authority, he nonetheless spoke as a citizen in reporting a judge to that authority. It noted that while the issue of Anderson's job-imposed duty to report wrongdoing did not strip his speech of First Amendment protection has since gained clarity, this was not clearly established in May 2014, when the events he complained of occurred. Accordingly, the court reversed the district court's order denying Valdez's motion for qualified immunity and summary judgment in both his official and individual capacity.

***Cole v. Hunter*, No. 14-10228 (5th Cir., September 25, 2018)**

On remand from the Supreme Court, the Fifth Circuit considered this case in light of the Court's decision in *Mullenix v. Luna*. Plaintiffs filed suit under 42 U.S.C. 1983, alleging that officers used excessive force when they shot their son, Ryan Cole, on October 25, 2010. At the time of the shooting, Ryan was a seventeen-year-old high-school student in Sachse, Texas. Ryan suffered from obsessive-compulsive disorder. During the course of the morning of October 25, 2010, police were informed that Ryan was carrying at least one gun and acting aggressively, and they began looking for him. After Ryan left a friend'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. At one point, Ryan made a turning motion to his left. The officers say that he turned to face one of the officers and pointed his gun at him, while the Coles argue that Ryan merely began to turn toward the CVS (where he was reportedly headed to meet his grandparents), still with his gun pointed at his own head. Whether any warning was given is disputed, but officers opened fire, hitting Ryan twice. In addition, Ryan's gun discharged, hitting his own head. Over time, Ryan 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 one of the officers prior to being shot. The Coles argue that these statements are lies contradicted by recordings and physical evidence.

Ryan's parents allege that the officers violated Ryan's Fourth and Fourteenth Amendment rights during the shooting incident and by a subsequent fabrication of evidence. The officers filed dispositive pretrial motions in the district court, asserting the defense of qualified immunity. The district court denied these motions. In an earlier opinion, the Fifth Circuit affirmed the district court's denial of the officers' motions, with the exception of its denial of a motion to dismiss the Fourth Amendment claim arising from fabrication of evidence. This previous judgment was vacated by the Supreme Court in light of *Mullenix v. Luna*.

In *Mullenix*, the Court reviewed a denial of qualified immunity to an officer who had shot and killed a fugitive in a car chase. The Fifth Circuit court had decided that the officer violated the clearly established rule that deadly force was prohibited "against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." The officer in *Mullenix* reasonably perceived some threat of harm, but the Fifth Circuit had held the threat was not "sufficient." The Supreme Court reversed that decision finding that the rule articulated by the Fifth Circuit lacked a referent to define the "sufficiency" of threats. Precedents provided a "hazy legal backdrop" at best, and given these deficient sources, an officer could not reasonably derive an applicable rule to govern his or her conduct in the situation. The Supreme Court held that the Fifth Circuit had defined the applicable rule with too much "generality," and thus reversed the holding that the officer had violated clearly established law.

Even after taking into consideration *Mullenix*, the Fifth Circuit again affirmed the district court's denial of the officers' motion for summary judgment based on qualified immunity (finding that clearly established law existed with relation to the denial of qualified immunity, i.e. officers are prohibited from using deadly force

against a suspect where the officers reasonably perceive no immediate threat), otherwise reinstated the court's previous opinion in this case, and remanded for further proceedings. The Court noted the following established facts in coming to the determination: Cole posed no threat to the officers or anyone else at the time Cassidy and Hunter shot him; the officers' limited knowledge of Cole created no reasonable expectation of an immediate violent confrontation (Cole was a high school student distraught over a recent breakup); both officers knew that Cole had walked away from two police officers without violent confrontation; while Cole possessed a handgun, he did nothing to threaten the officers; the officers understood that Cole was unaware of their presence; the officers could see that the handgun was pointed at Cole's head; the officers opened fire before Cole had turned to face them, and before he registered their presence; and at no time did Cole pose, or reasonably appear to pose, an immediate threat to the officers or anyone other than himself.

***Gahagan v. US Citizenship & Immigration Services,* No. 17-30898 (5th Cir., December 20, 2018)**

The Fifth Circuit held that attorneys appearing pro se cannot recover fees under the Freedom of Information Act (FOIA). The court affirmed the district court's judgment in an action brought by an immigration attorney under FOIA to obtain government documents. In this case, plaintiff was unsatisfied with the government's responses to his FOIA requests and thus filed three separate pro se lawsuits where he was ultimately considered the prevailing party. Plaintiff was awarded costs but denied attorney fees under FOIA.

***Johnson v. Halstead,* No. 17-10223 (5th Cir., February 14, 2019)**

The Fifth Circuit denied a petition for rehearing and petition for rehearing en banc. The court substituted this opinion in place of its prior opinion.[1] The court affirmed the district court's judgment as to plaintiff's hostile work environment claim and held that plaintiff sufficiently alleged sustained harassment that undermined his ability to work. In this case, Plaintiff Delbert Johnson, a sergeant with the Fort Worth Police Department, claimed that he was repeatedly subjected to behavior that was hostile, intimidating, and bullying, because he is African American, and it was done publicly over a period of more than three years. Furthermore, Defendant, Chief of Police Jeffrey Halste, was deliberately indifferent to this racially hostile work environment after it was reported to him, allowing the continuation of behavior contributing to hostile work environment conditions.

The court also affirmed as to the 42 U.S.C. 1981 claim and held that Defendant retaliated after plaintiff complained about discrimination by transferring him to one of the worst shifts in the department. Therefore, plaintiff's allegations supporting unlawful retaliation establish a violation of his constitutional rights, one that a reasonable official would know was unlawful. However, the court held that defendant was entitled to qualified immunity on the First Amendment retaliation claim where it was not clearly established that an internal complaint of discrimination made only to supervisors, primarily to vindicate one's own rights, qualified as speech made as a "citizen" rather than as an "employee."

[1] In its prior opinion, the Fifth Circuit affirmed the district court's denial of qualified immunity to defendant, the chief of police, on plaintiff's hostile work environment claim where plaintiff, a police sergeant, sufficiently alleged that he sustained harassment that undermined his ability to work and defendant was deliberately indifferent to this racially hostile work environment. The court also affirmed the district court's denial of qualified immunity on 42 U.SC. 1981 claims where plaintiff's allegations of a retaliatory shift change supported a claim of unlawful retaliation that a reasonable officer would know was unlawful. However, the court reversed as to plaintiff's 42 U.S.C. 1983 First Amendment retaliation claim where defendant was entitled to qualified immunity, because it was not clearly established that an internal complaint of discrimination made only to supervisors, primarily to vindicate one's own rights, qualified as speech made as a citizen rather than as an employee. Accordingly, the court remanded for further proceedings.

***Perniciaro v. Lea,* No. 17-30161 (5th Cir., August 16, 2018)**

Dominick Perniciaro, III, who suffers from schizophrenia, has been committed to the Eastern Louisiana Mental Health System ("ELMHS") since he was arrested for battery and found incompetent to stand trial in 2013. Plaintiff has sustained numerous injuries throughout his commitment — some minor, some more serious — as a result of physical altercations with other patients and with guards. Plaintiff, filed suit under 42 U.S.C. 1983, alleging that he received inadequate medical care and that defendants failed to protect him from harm.

The Fifth Circuit affirmed the district court's judgment holding that the Tulane-employed defendants may raise the defense of qualified immunity. However, the court reversed the denial of summary judgment, holding that plaintiff failed to establish that defendants violated his clearly established rights. In this case, plaintiff failed to cite any case clearly establishing that the particular conduct at issue violated the professional judgment standard.

***Maria S. v. Doe*, No. 17-40873 (5th Cir., January 4, 2019)**

After Laura S., a Mexican citizen, was in the United States illegally when U.S. Customs and order Protection ("CBP") agents detained her near Pharr, Texas. In CBP custody, Laura signed a form indicating her decision to repatriate voluntarily. Laura was killed shortly after returning to Mexico. In this lawsuit, Laura's representatives seek damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971) against a US Customs and Border Protection (CBP) agent and his supervisor claiming they coerced Laura into signing the voluntary removal form, thereby denying her due process and causing her death.

The Fifth Circuit affirmed the district court's grant of summary judgment for defendants, holding that special factors precluded the extension of a *Bivens* remedy to this new context (noting the Supreme Court's recent decision in *Abbasi* where it stressed that any extension of *Bivens* to new factual scenarios is now a "'disfavored' judicial activity"). The court also held that defendants were entitled to qualified immunity where the agent's conduct was not objectively unreasonable.

***Samples v. Vadzemnieks*, No. 17-20350 (5th Cir., August 17, 2018)**

The Fifth Circuit reversed the district court's denial of summary judgment to a law enforcement officer based on qualified immunity in a 42 U.S.C. 1983 action alleging that he used excessive force when he tased plaintiff. On January 29, 2014, Samples was half-naked and incoherent and was wandering off from the officers when they tried to speak with him. After being tased, Samples fell back, fractured his skull, and suffered brain damage. The court held that the evidence was sufficient to show that the officer violated plaintiff's Fourth Amendment right to be free of excessive force. However, the officer's actions did not violate law that was clearly established at the time of the incident. In *Caroll v. Ellington*, and in this case, officers confronted a suspect whom they believed to be on drugs, attempted to verbally secure the suspect's compliance, and chose to deploy a taser despite their knowledge that the suspect was unarmed. On August 26, 2015, the Carroll panel decided that no clearly established law made the officer's decision to resort to the taser unreasonable.

VIII. ADA

***Miraglia v. Board of Supervisors of the Louisiana State Museum,* No. 17-30834 (5th Cir., August 24, 2018)**

Plaintiff filed suit against the Museum, alleging discrimination under the Americans with Disabilities Act and the Rehabilitation Act, and sought equitable relief and damages. Plaintiff, a quadriplegic with cerebral palsy who uses a wheelchair, alleged that the Lower Pontalba Building was not accessible. On the Friday before the Monday trial, the Museum purchased portable ramps, buzzers, and buzzer-

related signage. At the beginning of the bench trial, the Museum submitted evidence of the purchase and their intent to implement the equipment to the district court. The district court then held a short bench trial. After trial, the district court dismissed Miraglia's equitable claims as moot (as the Museum already purchased the ramps, buzzers, and associated signage and intended to implement them), awarded him monetary damages for emotional injury, and granted attorneys' fees in the amount of $30,050.35. Miraglia appealed the dismissal of his equitable claims. The Museum appealed the district court's award of damages and attorneys' fees.

The Fifth Circuit dismissed plaintiff's appeal of the district court's dismissal of his equitable claims as moot. The court held that plaintiff failed to prove a necessary element for monetary damages (intent), and thus the court reversed and rendered judgment in favor of the Museum in regard to that claim. However, the court held that plaintiff was still a prevailing party and affirmed the district court's grant of attorneys' fees.

***Providence Behavioral Health v. Grant Road Public Utility District,* No. 17-20571 (5th Cir., August 28, 2018)**

Providence filed suit against Grant Road after G`rant Road denied water, drainage, and septic services to Providence's intended psychiatric facility. The Fifth Circuit affirmed the district court's judgment dismissing Providence's claims of discriminatory motives. The court held that Grant Road was a local entity and thus not entitled to sovereign immunity; all of the evidence of discrimination presented by Providence was based on speculation rather than actual proof of Grant Road's discriminatory motives and thus the district court did not commit reversible error when it dismissed Providence's intentional discrimination claims under the Americans with Disabilities Act (ADA), the Fair Housing Acting (FHA), and the Texas Fair Housing Act (TFHA); and Providence's reasonable accommodation claims failed because providing water, drainage, and septic services had no relation to accommodating the expected disabilities of the patients planned to be treated at Providence and Providence's claims were unsupported. Finally, the district court did not abuse its discretion when it declined to hold that Grant Road was entitled to attorneys' fees.

***Shelton v. Louisiana State,* No. 18-30349 (5th Cir., March 26, 2019)**

This suit was originally brought by Nelson Arce, a deaf man on probation in Louisiana. According to the complaint, Arce had limited proficiency in written English and communicated primarily in American Sign Language (ASL). Arce complained that both his probation officer and a correctional center failed to provide a qualified ASL interpreter allegedly resulting in Arce not being properly advised regarding probation requirements and jail rules. Arce sued the State of Louisiana and Jefferson Parish Sheriff Joseph Lopinto under the Americans with Disabilities Act (ADA) and the Rehabilitation Act, alleging that he suffered discrimination while on probation and while incarcerated at the Jefferson Parish jail because the defendants failed to provide auxiliary aids necessary to ensure effective communication. Arce requested compensatory damages as well as declaratory and injunctive relief. Arce subsequently passed away and Shelton—the administrator of Arce's estate and the mother of his children—was substituted as plaintiff. The matter was tried before a jury who found that Arce was discriminated against in violation of the ADA, but that the discrimination was not intentional nor was there evidence that the discrimination caused injury to Arce. As a result, Shelton received no compensatory damages. The district court entered judgment in favor of Shelton and against Louisiana and Sheriff Lopinto and awarded $1 in nominal damages as to each defendant. Shelton then moved for an award of attorneys' fees and costs. The district court recognized that Shelton is a prevailing party but held that "special circumstances justify the denial of attorney's fees" because Shelton sought primarily monetary relief and received only nominal damages. Shelton appealed and argued that this was an unusual case justifying a fee award

because the litigation secured an ASL interpreter for Nelson Arce, achieved recognition of the rights of deaf probationers and prisoners to disability accommodations, deterred future ADA violations, and prompted necessary reforms in the defendants' policies toward deaf individuals.

The Fifth Circuit vacated the district court's denial of attorneys' fees in plaintiff's action under the Americans with Disabilities Act (ADA) and remanded for the district court to reconsider whether special circumstances justify the denial of attorneys' fees in this case. Although the district court correctly determined that *Farrar v. Hobby*, 506 U.S. 103 (1992), provided the relevant legal framework in this case, the Fifth Circuit held that the district court was in the best position to determine whether this lawsuit achieved a compensable public goal justifying a fee award.

IX. MISCELLANEOUS

***Caycho Melgar v. T.B. Butler Publishing Co.,* No. 18-41080 (5th Cir., July 10, 2019)**

The Fifth Circuit affirmed the district court's grant of summary judgment in favor of the employer on plaintiff's claims of discrimination based on age, disability, and national origin. The court held that an intake questionnaire, which does not contain a clear and concise statement of facts alleging unlawful employment practices, was insufficient to constitute a charge of discrimination. Therefore, plaintiff filed an untimely charge of discrimination which resulted in his failure to properly exhaust his administrative remedies. The court also held that equitable tolling did not apply in this case because plaintiff did not act with due diligence.

Moon v. City of El Paso, No. 17-50572 (5th Cir., October 15, 2018)

Brandon Lee Moon languished in prison nearly seventeen years for a crime he did not commit. Fortunately—albeit belatedly—post-conviction DNA testing exonerated him. Upon his release (and within two years), Moon sued various government and law enforcement personnel over his wrongful conviction and false imprisonment under Texas State law. All of appellant's claims were eventually dismissed by the trial court. With regard to the false imprisonment claim, the district court held it was time-barred by Texas' residual two-year statute of limitations because the limitations period began when appellant was imprisoned in 1988.

The Fifth Circuit made a "best Erie guess" and held that false imprisonment is a continuing tort under Texas state law and the limitations period began when Moon was released in 2004. In reaching this conclusion, the Fifth Circuit acknowledged that the Texas Supreme Court had "neither endorsed nor addressed the continuing tort doctrine" but determined the Texas high court would hold that false imprisonment is a continuing tort. (Notably, the majority opinion was written by Circuit Judge Don R. Willett, who served on the Texas Supreme Court prior to joining the Fifth Circuit on January 2, 2018.) The Court further held that Moon's due process claim against the county defendants was properly dismissed as time-barred; and absolute immunity barred defendant's due process claim against the prosecutor.

***Mount Lemmon Fire District v. Guido,* 586 US _____ (2018)**

In 2000, John Guido and Dennis Rankin were hired by the Mount Lemmon Fire District, a political subdivision of the State of Arizona. They were full-time firefighter captains, and at ages 46 and 54, respectively, were the two oldest full-time employees at the Fire District when they were terminated in 2009. Guido and Rankin filed age discrimination charges with the Equal Employment Opportunity Commission (EEOC),

which found reasonable cause to believe that the Fire District had violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34. Guido and Rankin subsequently filed suit against the Fire District.

The Fire District sought summary judgment on the basis that it was not an "employer" within the meaning of the ADEA, and the district court agreed. A three-judge panel of the Ninth Circuit reversed. Ruling counter to what other circuits have concluded, the appellate court stated that a political subdivision of a state does not need to have 20 or more employees, as private sector employers do, in order to be covered by the ADEA.

The issue presented to the Supreme Court was whether under the ADEA, the same twenty-employee minimum that applies to private employers also applies to political subdivisions of a state (as the Sixth, Seventh, Eighth, and Tenth Circuits have held), or does the ADEA apply instead to all state political subdivisions of any size, as the Ninth Circuit held in this case?

In a unanimous (8–0) opinion authored by Justice Ruth Bader Ginsburg, the Court held that the ADEA applies to all state political subdivisions, regardless of the number of employees. The Court first looked to the plain language of the statute, finding the two-sentence delineation in the definitional provision § 630(b), coupled with the expression "also means" at the start of §630(b)'s second sentence, establish two separate categories: persons engaged in an industry affecting commerce with 20 or more employees; and states or political subdivisions. The latter category has no numerosity limitation. For this reason, the Court found that Mount Lemmon Fire District was subject to the ADEA despite the number of full-time employees there. Justice Brett Kavanaugh took no part in the consideration or decision of this case.

***Shepherd v. City of Shreveport,* No. 18-30528 (5th Cir., April 3, 2019)**

This lawsuit arises from the death of William Shepherd, who was shot and killed by Corporal Tucker of the Shreveport Police Department in October 2013. Plaintiff (Shepherd's mother) filed suit alleging excessive force claims against the officer and the city. The district court granted summary judgment for the defendants.

The Fifth Circuit affirmed the district court's grant of summary judgment to defendants and held that, under the totality of the circumstances, the officer's use of deadly force was reasonable. In this case, the officer was responding to a 911 call to assist the fire department at Shepherd's home. He was informed by dispatch that there was a potentially violent male who had possibly suffered a stroke and who the female caller feared might hurt her. During this time, a neighbor called 911 to erroneously report that shots had been fired, and dispatch then notified the officer that there were reports of shots fired in the area. When the officer arrived, Shepherd had a knife in his hand. Eventually, Shepherd began moving towards the officer, disregarding the officer's command to get back, at which time the officer shot Shepherd once with his shotgun.

The court also held that the district court did not abuse its discretion by denying plaintiff's motion to supplement her brief in opposition to summary judgment, because she offered no explanation for why the supplemental materials were not included in the first brief and she fell far short of demonstrating that there was good cause for receiving a schedule adjustment to permit supplemental briefing.

***Tucker v. Collier,* No. 15-41643 (5th Cir., October 3, 2018)**

After officials of the TDCJ banned incarcerated adherents of the Nation of Gods and Earth from congregating together as their religion requires, plaintiff filed suit under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Fifth Circuit

vacated the district court's grant of summary judgment to defendants, holding that the state failed to make any argument that its ban on Nation assembly did not substantially burden plaintiff's exercise of his sincere religious beliefs. The court also held that there were genuine disputes of material fact as to whether the state's ban advanced a compelling interest through the least restrictive means. The court affirmed the district court's judgment on the issue of exhaustion of plaintiff's other claims (requests for certain resources to be used in the congregation services).

***Westfall v. Luna,* No. 16-11234 (5th Cir., September 13, 2018)**

Police officers arrived at Constance Westfall's home at 2:00 a.m. on a cold winter's night to investigate allegations made against her son of trespass into a neighbor's home. What could have been a simple inquiry quickly escalated, resulting in one officer entering Westfall's home and two officers forcing and holding her to the ground. Westfall claims that after police arrested her, they waited 30 minutes before calling for an ambulance, and she spent the rest of the night in the Southlake jail, after being released from the hospital, for interfering with police duties. All charges against Westfall were eventually dropped.

The Fifth Circuit reversed and remanded the district court's grant of summary judgment to Officers Nathaniel Anderson, Jose Luna, and Venessa Trevino on Westfall's false-arrest claims and to Luna (who allegedly body slammed Westfall) on the excessive-force claim. The court held that genuine fact issues exist as to the reasonableness of an officer concluding that they had authority to enter the home based on consent. The court affirmed the district court's grant of summary judgment to Trevino on the excessive-force claim; to Luna on the retaliation claim; and to Anderson, Luna, and Trevino on plaintiff's denial-of-medical-treatment claims. The court also affirmed the district court's dismissal of plaintiff's claims against Officers Chris Melton and Thomas Roberson, and failure-to-train claim against the City of Southlake. Finally, the court dismissed plaintiff's appeal of the district court's sealing order based on lack of jurisdiction.

United States v. Hathorn, No. 18-60380 (5th Cir., April 11, 2019)

In this case, defendant was convicted of a drug-trafficking offense and had multiple drug-related supervised release violations. The district court revoked Hathorn's supervised release and imposed a special condition of supervised release allowing probation officers to search his computers, cellular telephones, and all other electronics, to which Hathorn appealed.

The Fifth Circuit affirmed the district court's revocation of defendant's supervised release and its imposition of the special condition. The court held that the district court did not abuse its discretion by crafting a special condition that was reasonably related to the nature and circumstances of his drug offense and the history and characteristics of defendant. The court held that the deprivation of defendant's liberty was not more than was reasonably necessary to advance deterrence, protect the public from him, and serve his correctional needs. Finally, the court rejected defendant's claim that the special condition was inconsistent with the Sentencing Commission's policy statements and held that the special condition was consistent with USSG 5D1.3(d)(4), which addresses substance abuse.