RECENT FEDERAL CASES OF INTEREST TO CITIES

TEXAS CITY ATTORNEYS ASSOCIATION
SOUTH PADRE ISLAND, TEXAS
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I. FIRST AMENDMENT

Harris v. Pontotoc County Sch. Dist., 635 F.3d 685 (5th Cir. 2011)

Eighth grader Derek Harris was accused of hacking into the school's computer system thru his mom's school computer and causing the computer system to go down for a short time. Harris denied any wrong doing although he clearly was the hacker.

Harris was sent to alternative school; his mother was reassigned to an assistant teacher's position to limit her access to computers. After a verbal altercation with the school superintendent, Mrs. Harris was terminated.

Derek Harris sued the school district and the superintendent for violation of his due process rights and defamation. Mrs. Harris sued for wrongful termination in retaliation for protected First Amendment speech.

With respect to Derek Harris, the Fifth Circuit found that a transfer to an alternative education program does not deny access to public education and therefore does not violate the Fourteenth Amendment. The Court also looked at Harris' temporary suspension, the issues being whether Derek was adequately informed of the specific charges from which the suspension was derived and whether he was given an opportunity to present his side of the story. Because Derek had been given explanations of the accusations against him and an opportunity to respond (he denied the accusations), his due process rights were not violated. The Fifth Circuit also found that the allegedly defamatory statements were either hearsay, which are inadmissible at trial, or statements made directly to him. In order for the statements to be actionable, they must be made to a third party.

With respect to Mrs. Harris, the Fifth Circuit found that the First Amendment did not apply. Mrs. Harris alleged that she was terminated for protesting the actions against her son and threatening to take legal action. However, the First Amendment protects a public employee's speech only if the speech addresses a matter of "public concern." In this case, Mrs. Harris speech was about matters that were personal – the treatment of her son. Thus, Mrs. Harris failed to allege a violation of her First Amendment rights.

Doe v. Reed, 130 S.Ct. 2811 (2010)

Chief Justice Roberts wrote this 8-1 majority opinion holding that signatories to referendum petitions do not typically have a constitutional right to keep their identities private. However, the majority also held that courts should consider in any given case whether a particular referendum presents sufficiently unique circumstances that anonymity is required. In the instant case, a claim to anonymity was allowed to proceed in the lower courts on a Washington referendum on gay rights.

Opponents to a 2009 Washington law expanding the rights of same-sex domestic partners collected the requisite number of signatures (4% of the electorate) supporting a referendum to repeal the law, qualifying it to the ballot. Proponents of the referendum filed suit to block the application of another Washington law which treats referendum petitions as public records subject to disclosure.

The Supreme Court held that the referendum disclosure law is subject to First Amendment scrutiny. Placing one's signature on a petition is an expressive act implicating the First Amendment. However, the level of scrutiny must also account for a state's ability to implement voting systems, and the Court further observed that disclosure itself does not itself prevent political speech. Thus, disclosure of referendum petitions generally passes constitutional muster because it helps to combat fraud, eliminate mistakes, and promotes governmental transparency and accountability.

The Court left open the possibility that the proponents of the referendum could prevail on remand with respect to this particular referendum, holding that the proponents' claim that disclosure would have the purpose and

effect of facilitating harassment of individual signatories should be addressed in the context of that narrow claim. However, while the referendum proponents' "as applied" challenge remains viable, the majority of Justices express significant doubt as to the chances of that claim's success on remand. Of significance is this Court's apparent willingness—or at least the willingness of five members of the Court—to uphold disclosure regimes relating to elections.

***Christian Legal Society v. Martinez,* 130 S.Ct. 2971 (2010)**

The Christian Legal Society sought official recognition from Hastings College of Law as a registered student organization ("RSO") to receive certain benefits, including use of school funds, facilities and channels of communication. In exchange, RSOs are required to comply with the school's non-discrimination policy, which encompassed religion and sexual orientation; that is, they must agree to accept all students who wish to participate, become a member or seek leadership positions.

The CLS' application was rejected because its bylaws incorporated a "Statement of Faith" requiring its members to conduct their lives in accord with certain principles, including the belief that sexual activity should not occur outside of marriage between a man and a woman, and persons who engage in "unrepentant homosexual conduct" were excluded from affiliation. These bylaws did not comply with Hastings' open access policy.

CLS filed suit under § 1983 alleging that the denial of RSO status violated its First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. Critical to the Supreme Court's decision of the case was a stipulation by the CLS that the policy was an "all comers" policy—that recognition was available to any student group at Hastings that allowed any student to take part in the group.

With this background, the Supreme Court issued a sharply split 5-4 opinion authored by Justice Ginsburg, finding that Hastings had created a viewpoint-neutral "limited public forum," and that it was constitutionally entitled to provide equal access to that forum only to groups with open membership, in order to foster non-discrimination.

The dissenters (Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas) read the record of the case much differently, finding that the CLS was excluded from the policy as written, and that the policy singled out student groups for exclusion based on their beliefs. The CLS was the only group ever to be granted RSO status under the policy, and the "all comers" policy was supposedly never found until after discovery in the case was initiated.

***Morgan v. Swanson*, 610 F.3d 877 (5th Cir. 2010)**

Parents of elementary school students filed suit against two Plano ISD school principals alleging that the principals' ban on the distribution of religious messages by the students to other students while on school property resulted in "religious viewpoint discrimination." Both principals filed motions to dismiss based on qualified immunity and were denied. The Fifth Circuit affirmed holding that principals were not entitled to qualified immunity.

This case involves the distribution of religious messages at Christmas time. The children brought sealed goodie bags to school to give to their fellow students. The bags contained, among other items, a pencil with the message "Jesus is the reason for the season." Before the students were allowed to pass out the bags, school officials opened the bags, found the pencils and confiscated them. The pencils were then banned from school property. Two years later, a similar incident occurred over the distribution of candy canes that were given out along with a card explaining the Christian origin of the candy. The ban began to expand to the point to where the students were not allowed to use the term "Christmas" in conjunction with any school event or activity.

After suit was filed by several parents, the two principals moved for dismissal based on qualified immunity. The principals argued that (1) the Constitution does not prohibit viewpoint discrimination against religious speech in elementary schools and (2) the Plaintiffs' claims should be dismissed because they have failed to allege any conduct which constitutes a violation of Plaintiffs' clearly established constitutional rights.

The Supreme Court has long recognized that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S.* 503, 506 (1969). Likewise, for 67 years, the Supreme Court has recognized that school officials are subject to the Constitution and the Free Speech clause. The principals attempted to distinguish Supreme Court precedent by arguing that none of the cases stated that "elementary school" students are protected by the Free Speech clause. The Fifth Circuit held that Free Speech applies to all students while at school.

The principals further argued that, regardless of whether Free Speech applied to elementary students, they are entitled to qualified immunity because the law does not clearly establish that the Constitution prohibits viewpoint discrimination against religious speech in elementary schools. The Fifth Circuit pointed out that this Court has already held in a related case that elementary students are entitled to First Amendment rights. Thus, because the law was already clearly established, the immunity defense fails since a reasonably competent public official should know the law governing his conduct.

***Comer v. Scott*, 610 F.3d 929 (5th Cir. 2010)**

Terminated employee, who had served as Texas Education Agency's (TEA) Director of Science for curriculum division, filed complaint against Commissioner of TEA and TEA for declaratory and injunctive relief, alleging that her termination under DEA neutrality policy violated due process and Establishment Clause. The Fifth Circuit was presented with the question of whether the TEA neutrality policy constitutes an establishment of religion in violation of the First Amendment's Establishment Clause.

The TEA neutrality policy requires staff to remain neutral and refrain from expressing any opinions on any curricular matter subject to the Texas State Board of Education's ("Board") jurisdiction. The Board is statutorily tasked with establishing the curriculum. The TEA is an independent state actor. However, because the Board has no staff of its own, the Commissioner of Education provides TEA staff to assist the Board with administrative, procedural and clerical tasks necessary to develop the curriculum.

Comer was the TEA's Director of Science for the Curriculum Division and was charged with providing non-regulatory guidance concerning the state curriculum. Comer received an email to her TEA account about an upcoming presentation on teaching creationism in public schools and forwarded the email to 36 science teachers. Comer's supervisor determined that Comer's action of forwarding the email violated the TEA's neutrality policy as well as a prior directive prohibiting Comer from communicating with anyone outside the TEA in any way that implied an endorsement on curriculum.

In analyzing Establishment clause challenges, the Supreme Court has established a three prong framework: (1) "the statute must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion; and (3) "the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Comer focused her argument exclusively on the second prong, arguing that the TEA's neutrality policy's primary effect was to endorse religion. Comer focused on a Supreme Court decision that held that a Louisiana law proscribing the teaching of evolution, unless accompanied by a lesson on creationism, violated the Establishment clause. The Fifth

Circuit found no evidence that indicated the TEA's neutrality policy's "principal or primary effect" is to advance religion. The Court stated that it had no evidence before it that ordinary Texas citizens would look to TEA employees for authoritative statements on what the fifteen elected Board members might or might not one day endorse. Thus, the Court found it hard to imagine circumstances in which a TEA employee's inability to publicly speak out for or against a potential subject for the Texas curriculum would be construed or perceived as the State's endorsement of a particular religion. Accordingly, the Court concluded that the TEA's neutrality policy does not violate the Establishment clause of the First Amendment.

***United States v. Stevens*, 130 S.Ct. 1577 (2010)**

In an opinion written by Chief Justice Roberts, the Supreme Court ruled that the First Amendment protects expressions of animal cruelty depicted in videotapes and other commercial media. Noting that it had previously withdrawn "a few historic categories" of speech from the First Amendment's shield, the Court concluded that "depictions of animal cruelty should not be added to the list." This decision nullified a 1999 federal law passed by Congress in an attempt to curb animal cruelty by forbidding its depiction. That law, the Court said, sweeps too broadly. Justice Roberts stressed that it was not restricting the power of government to punish actual acts of animal cruelty, and it noted that such prohibitions have "a long history in American law." However, there was no similar history behind Congress's attempt to ban portrayals of acts of cruelty to creatures.

Stevens, an author and documentary film producer, sells information on and handling equipment for pit bulls. Undercover federal agents had bought from him copies of films documenting dog fights in Japan and in the U.S. Stevens claimed that the aim of his publications was to provide historical perspective on dog fighting. On the basis of the films, which depicted considerable cruelty, and other materials found in Stevens' home, he was charged with and convicted of violating the 1999 law, and was sentenced to 37 months in prison. A federal judge rejected his First Amendment challenge to the law, but the en banc Third Circuit Court struck it down. The Supreme Court upheld the challenge to the law in an 8-1 decision.

As written, the Court said, the law "creates a criminal prohibition of alarming breadth." Noting that the government had given assurances that it would enforce the law only against commercial portrayals of "extreme cruelty," the Chief Justice wrote that the Court would not uphold an unconstitutional law "merely because the government promises to use it responsibly."

The Court found that the 1999 law regulated expression on the basis of its content or message, which made the law invalid under the First Amendment, unless the government can overcome that presumption. Chief Justice Roberts wrote: "The Government proposes that a claim of categorical exclusion should be considered under a simple balancing test: 'Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." Calling that "a free-floating test for First Amendment coverage" and a "highly manipulable balancing test," the Court found the test "startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."

Justice Alito, in dissent, argued that the Court should not have used the overbreadth approach, but rather should have analyzed the 1999 law as it was enforced specifically against Stevens in this particular case—that is, the law as applied to this set of facts. While disagreeing with his colleagues that the law swept too broadly, Alito said that the Court should have

sent the case back to the Third Circuit to decide whether Stevens' videotapes were illegal under the law.

***Arizona Christian School Tuition Org. v. Winn*, 131 S.Ct. 1436 (2011)**

In this "taxpayer standing" case, the Supreme Court held that Arizona taxpayers do not have standing to challenge tax credits for contributions to religious schools. Arizona provides tax credits for contributions to school tuition organizations, which provide scholarships to students attending private schools. Respondents challenged the tax credit as a violation of the Establishment Clause. In a sharply divided 5-4 opinion, the Court held that respondents, merely by virtue of being taxpayers, do not have standing to challenge the tax credit for contribution program; a tax credit does not constitute government spending: "When the government declines to impose a tax…there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences." In dissent, Justice Kagan dismissed this distinction as a formality.

***Snyder v. Phelps*, 131 S.Ct. 1207 (2011)**

The Supreme Court held that political picketing at a military funeral is protected by the Constitution if it addresses publicly important issues, even if the speech is highly offensive. Snyder, the father of a deceased military service member, brought an intentional infliction of emotional distress and invasion of privacy suit against the fundamentalist Westboro Baptist Church and its members. At trial, Snyder was awarded millions of dollars in compensatory and punitive damages. Westboro challenged the verdict as grossly excessive and sought judgment as a matter of law that the First Amendment fully protected its speech.

In holding that the First Amendment shields Westboro from tort liability for its picketing, the Court stressed that it was ruling only on the facts presented by this particular demonstration and no other: Westboro obeyed the orders given by police for the protest; the demonstration took place on public land next to a public street approximately 1000 feet from the funeral, and separated by several buildings; the protest was peaceful and relatively quiet; and the messages conveyed by their signs involved issues of public policy, including the morality of homosexuality and the sins of the Roman Catholic Church and the sins of America as a whole, including the military's tolerance of homosexuality. While the parties disagreed with the legal interpretations of this speech, the majority of the Court declined to react emotionally to the message of Westboro or the context of Westboro's choice to convey the message at the service member's funeral: "On the facts before us, we cannot react to that pain [incurred by Westboro's speech] by punishing the speaker. As a nation, we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate." The sole dissenter, Justice Alito, agreed with Snyder that the Constitution's guarantee of free speech applies only to public issues, and does not apply at all in the exclusively private setting that the family believed to have existed at the funeral.

II. EQUAL PROTECTION AND DUE PROCESS

***McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010)**

In this challenge to various Illinois city handgun bans and related city ordinances, the Supreme Court held that the Second Amendment right to keep and bear arms is fully applicable to the States by virtue of the Fourteenth Amendment.

In overturning Chicago's ban on handgun possession by almost all private citizens, the Court declined to allow an unlimited right to weapons ownership; rather, the right is limited to weapons in "common use"

and des not extend to "dangerous and unusual" weapons. The Court did not specifically determine whether the Chicago law comported with the Second Amendment, but rather left to a lower court the question of whether the onerous registration regime was constitutional. The opinion has already been criticized for failing to specify a standard of review for challenges to firearm legislation.

***Terry v. Hubert*, 609 F.3d 757 (5th Cir. 2010)**

Two weeks after Hurricane Katrina, Terry was arrested for looting and transported to a correctional center. Three days later, Terry appeared before a judge in makeshift quarters, bond was set, and a show cause hearing was set one month later. The show cause hearing never occurred. Due to the chaos after Katrina, the Louisiana Supreme Court extended the indictment/information deadline for certain classes of crimes until January 6, 2006. The deadline passed and Terry was not indicted. Terry and his mother began writing letters to the warden asking why he wasn't being released since he was not indicted. He also complained that he had not seen an attorney and the law library had not responded to his requests for a writ of habeas corpus form. He was released on April 4, 2006 pursuant to a court order dismissing all charges. Terry then filed a § 1983 action against warden Hubert, alleging violations of his First Amendment right to access the courts and Fourteenth Amendment right to due process.

Prisoners have a constitutional right of access to the courts but that right does not guarantee a particular methodology. Inmates must demonstrate that the shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. The Court found that Terry had the ability to file a legally sufficient claim challenging his confinement based on the fact that he had access to writing and mailing materials as evidenced by his multiple letters to the warden, numerous state officials, and the courts. Within one day of Terry's request to the warden for help from inmate counsel, his request was satisfied. Moreover, Terry knew what to write in order to make out a legally sufficient claim - he did not need a writ of habeas corpus form. Because he was not prejudiced in his ability to file a legally sufficient claim, the warden was entitled to qualified immunity - he did not violate Terry's right of access to courts.

Terry's due process claim was based on the allegation that he was never charged with a crime. In addition to taking judicial notice that the state's criminal system was not operating under "normal" circumstances after Katrina, the Court also pointed out that a detainee is held for legal process when he is bound over by a magistrate. Terry was afforded a bond hearing; thus, the warden could reasonably have concluded that Terry's detention was pursuant to that process. The Court concluded that, in light of the circumstances surrounding Terry's incarceration, a due process violation would not have been sufficiently clear to a reasonable public officer and thus the warden is entitled to qualified immunity.

***United States v. Allen*, 625 F.3d 830 (5th Cir. 2010)**

ICE Agents executed a search warrant in Allen's home, seizing computers and external hard drives. Forensics discovered approximately 3300 child pornography images on his computer. Allen filed a motion to suppress evidence, contending that the search warrant was invalid under the Fourth Amendment because it lacked particularity and was not supported by probable cause. After his motion was denied, Allen pled guilty pursuant to a plea agreement, but reserved the right to appeal the motion to suppress.

On appeal, the Government conceded that the warrant was not sufficiently particularized. However, they argued that the agents involved in the search reasonably believed the warrant was valid because the warrant application, affidavit and attachments had been reviewed by several ICE agents and the US Attorney's Office prior to submission to the magistrate judge, who also reviewed the materials before signing the warrant. Thus, the

seizure falls under the good-faith exception to the exclusionary rule. The Fifth Circuit agreed: the evidence made it clear that the agent who sought the warrant reasonably believed the warrant was proper and supported by probable cause. He prepared the application for the warrant, the affidavit and the warrant; he had the US Attorney's Office review it before he submitted it to the magistrate judge; the magistrate judge took the time to review the affidavit and search warrant before signing the warrant; and before the search, the agent gave a copy of the affidavit, warrant and list of items to be seized to every agent who participated in the search. In short, the Court found that although the language of the warrant was flawed, a reasonable officer could have easily concluded that the warrant was valid based on the many levels of review the warrant had been subjected to.

***United States v. Gomez,* 623 F.3d 265 (5th Cir. 2010)**

Austin Police Dispatch received a 911 call from a person identified as "Mike." Mike stated that he had witnessed a Hispanic male brandishing a black and gray pistol at people at a gas station and then had hopped into a car with two other passengers. Mike provided a detailed description of the male, the passengers, and the car, including the license plate. The phone call originated from a payphone. Dispatch forwarded the information to responding officers but never told the officers that the tip came from a payphone.

The responding officers spotted the car and conducted a felony stop. When they removed the driver, who fit the description provided, the driver informed police that there was a handgun in the back of the car, belonging to the Hispanic passenger (riding in the back seat). The police removed Gomez at this point and spotted the handgun protruding from underneath the back of the driver's seat in plain view. Gomez was a convicted felon and was arrested for illegally possessing a weapon.

Gomez moved to suppress the evidence but was denied. On appeal, the Fifth Circuit reviewed to see whether the officers had reasonable suspicion to conduct a felony stop. In making this determination, the Court looked at four factors: (1) the credibility and reliability of the informant; (2) the specificity of the information contained in the tip; (3) the extent to which the information in the tip can be verified by the officers in the field; and (4) whether the tip concerns active or recent activity or has instead gone stale. The Court determined that all but the first factor were present. Thus, the only major dispute was whether the "anonymous" nature of Mike's call to 911 precluded a finding of reasonable suspicion. However, because the officers testified that they had no reason to believe they were acting on an anonymous tip since they were given a name, phone number and address of the informant, the officers reasonably believed they were acting on a credible and reliable tip. Accordingly, the Fifth Circuit affirmed the district court's denial of Gomez's motion for suppression.

***United States v. Olivares-Pacheco,* 633 F.3d 399 (5th Cir. 2011)**

Border Patrol agents spotted a truck occupied by 5 people driving on Interstate 20 near Odessa. While following the truck, agents noticed that the truck was dragging some brush. They pulled the truck over and noted that none of the passengers would make eye contact with them. At one point, one of the passengers pointed to the field off to the right of the truck and all the passengers turned and looked at the field (away from the agents). The agents thought this was an "obvious attempt to avoid eye contact" and pulled the truck over. At that point, the passengers admitted they were in the US illegally.

Appellant moved to suppress the evidence from the traffic stop, contending that it was not supported by reasonable suspicion and was thus in violation of the Fourth Amendment. The district court denied his motion.

In order to temporarily detain a vehicle, the Border Patrol agent on roving patrol must be aware of specific articulable facts together with rational inferences that warrant a reasonable

suspicion. In this sort of stop, the Fifth Circuit emphasizes eight factors: (1) the area's proximity to the border; (2) the characteristics of the area; (3) usual traffic patterns; (4) the agents' experience in detecting illegal activity; (5) the driver's behavior; (6) the aspects or characteristics of the vehicle; (7) information about recent illegal trafficking of aliens in the area; and (8) the number of passengers and their behavior. In this specific case, the truck was stopped over 200 miles from the border, so proximity was not a factor. The piece of brush that was being dragged – over 200 miles from the border – could have been picked up in a myriad of unsuspicious ways. The avoidance of eye contact is not entitled to any weight – the agents could not even confirm if the passengers were even aware of their presence. And the stretch of this portion of Interstate 20 was not known for smuggling aliens.

The Fifth Circuit reversed the district court and vacated the sentence against the Appellant. The facts known to the officers at the time of the stop portray an unremarkable and suspicionless situation.

III. EMPLOYMENT LAW

Lewis v. City of Chicago, 130 S.Ct. 2191 (2010)

In this mirror image to the previous term's *Ricci v. DeStefano*, minority firefighter applicants filed a disparate impact claim based on the City's use of results of a performance exam. In a unanimous opinion by Justice Scalia, the Supreme Court held that the petitioners' disparate impact claims were not barred by the statute of limitations, and further the Court expanded the range of circumstances in which disparate impact claims can be raised.

In 1995, the City's firefighter application process began with a written examination, based on which the applicants were separated into three groups: those who were "well-qualified," scoring 89% or higher; those who were "qualified," between 65% and 88%; and those scoring less than 65% who were deemed "unqualified." The City chose incoming firefighter classes by random selection of the "well qualified" applicants and subjected them to further screening; the City informed the "qualified" candidates that their applications would be kept but it was unlikely they would be asked to apply further. In the specific examination at issue, there were no "well qualified" minority applicants.

The petitioners in this case were minority candidates from the "qualified" group. They contended the examination had a discriminatory disparate impact in violation of 42 U.S.C. § 2000e-2(k)(1)(A)(i). The district court dismissed the claims based on the statute of limitations incorporated in the statute, which required that the petitioners bring their claims to the EEOC within 300 days of a violation (determined to be the establishment of the allegedly discriminatory policy—the administration of the test and the decision of how the results would be used to select candidates), which everyone agreed they did not do.

The Supreme Court held that the applicants could nevertheless bring their suit against the City as long as any disparate impact cause of action accrued during the 300 day statutory period. The Court rejected the concept that establishment of the policy itself triggered the period; rather, a disparate impact violation occurs whenever the particular employment practice is used and causes a disparate impact. That is, the "use" of a discriminatory practice is actionable, separate and apart from the adoption of the policy. Further, each time the City used the test results to make hiring decisions, it constituted a separate "use" of the policy, thus extending the statutory limitations period. In reaching this conclusion, the Court noted that reaching a contrary opinion would allow employers to engage in discriminatory practices with impunity merely because the discriminatory policy was well-established.

City of Ontario v. Quon, 130 S.Ct. 2619 (2010)

The City issued Quon, a city police sergeant, and other SWAT team members pagers

capable of sending text messages. Usage was limited and excess usage resulted in fees. The City required all of those to whom it issued pagers to acknowledge the City's computer usage policy, in which the City reserved the right to monitor all network activity and expressly stated that "Users should have no expectation of privacy or confidentiality when using these resources." While the policy did not expressly address the pagers, the City made it clear to Quon and others that it would treat text messages the same way it treated e-mails.

After Quon exceeded his usage allotment, he was warned that his messages could be audited, and Quon repaid the City for his overage charges. Quon continued to exceed his usage limit in subsequent months, and each time he repaid the City. Eventually, an audit of the accounts intended to determine whether the character limit was too low for work-related messages revealed that Quon was using the pager to send and receive personal (and sometimes sexually explicit) messages to his wife and girlfriend, among others. An investigation also showed that he sent personal messages while on duty, and he was disciplined.

Quon brought § 1983 claims against the City complaining that obtaining and reviewing his text messages violated the Fourth Amendment. The District Court determined that Quon had a reasonable expectation of privacy in the content of his text messages and focused its review on the intent of the audit, holding that as the audit was conducted to determine the efficacy of the usage limits, there was no Fourth Amendment violation. The Ninth Circuit reversed, determining that the search was not reasonable and that there were less intrusive means to verify the utility of the message limits.

The Supreme Court determined that even assuming Quon had a reasonable expectation of privacy, the search of the text messages was reasonable. Given the "special needs" of the workplace, a warrantless search by a government employer, when conducted for the investigation of work-related misconduct, is reasonable if it is justified at its inception, and the measures adopted are reasonably related to the objectives of the search. Here, the search was justified at inception because there were reasonable grounds for suspecting that the search was necessary for a noninvestigatory work-related purpose—that is, to analyze the usage limit of the City's wireless contract. The scope of the search was reasonable because it was an efficient and expedient way to determine whether the overages were caused by personal use or work-related messaging, and further because it was not intrusive. As he had been warned his messages were subject to audit, and as a police officer, he should have known his actions might come under legal scrutiny. Finally, the Court refused to declare that the City was required to implement the least intrusive search practicable. Accordingly, the Court reversed the Ninth Circuit and remanded the case.

Rent-A-Center, West, Inc. v. Jackson,
130 S.Ct. 2772 (2010)

Rent-A-Center ("RAC") requires its employees to sign an arbitration agreement as a condition to employment. There are two parts to the agreement: first, that employment disputes be settled by arbitration, and next, that any challenge to the validity of the arbitration agreement be settled by an arbitrator. Jackson brought an employment discrimination claim against RAC, who insisted on arbitration of the claim under the first part. Jackson, asserting the agreement was unconscionable, challenged the second part of the agreement, and RAC sought to have that challenge submitted to the arbitrator.

In an opinion written by Justice Scalia, the Supreme Court held that if Jackson had raised a specific challenge to only the second part—the agreement to arbitrate the validity of the agreement—a court would have had to decide the challenge. However, here, as the employee's unconscionability argument applied equally to the agreement to arbitrate all employment disputes, the general question should be submitted to an arbitrator.

***Kemp v. Holder, United States Department of Justice; AKAL Security, Inc.*, 610 F.3d 231 (5th Cir. 2010)**

Kemp was discharged from his position as a court security officer ("CSO") with the United States Marshals Service ("USMS") after failing to meet the minimum unaided hearing requirement established for CSOs.

Following his termination, Kemp filed suit alleging violations of the ADA, the RA, and Louisiana anti-discrimination law. He also claimed that he had been terminated in violation of his equal protection and due process rights. The district court granted AKAL's summary judgment motion on all claims in November 2008, and it entered summary judgment in favor of the government on all claims in March 2009. Kemp appealed the grants of summary judgment as to his ADA and RA claims only.

Kemp argued that by terminating his employment due to his failure to meet USMS's established unaided hearing requirement, AKAL violated the ADA, and USMS violated the RA. Both of these statutes prohibit employment discrimination against qualified individuals with disabilities, but the statutes govern different entities: the ADA applies only to public entities, including private employers, whereas the RA prohibits discrimination in federally-funded programs and activities. The RA and the ADA are judged under the same legal standards, and the same remedies are available under both Acts.

The ADA provides that no covered employer shall "discriminate against a qualified individual with a disability because of the disability of such individual in regard to ... discharge of employees." 42 U.S.C. § 12112(a). To prevail on his ADA and RA claims, Kemp must establish that (1) he is disabled within the meaning of the ADA, (2) he is qualified and able to perform the essential functions of his job, and (3) his employer fired him because of his disability

Kemp disputes the district court's holding that he failed to meet the "threshold requirement" of showing that he is disabled under the terms of the ADA. The issue decided was whether he is disabled as defined by the ADA by showing either that he has a physical impairment that substantially limited one or more of his major life activities or that AKAL and USMS regarded him as having such an impairment.

Kemp first challenges the district court's conclusion that, because his hearing impairment is not substantially limiting when it is mitigated through Kemp's use of his electronic hearing aid, he did not raise a genuine issue of material fact regarding whether he had "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(a). In reaching this holding, the district court relied on the Supreme Court's decisions in *Sutton v. United Air Lines, Inc.* and *Murphy v. United Parcel Service, Inc.*, which held that courts must take into account the benefit of any impairment-mitigating devices that the plaintiff uses in determining whether he is disabled within the meaning of the ADA. *See Sutton*, 527 U.S. 471, 482 (1999) ("[I]f a person is taking measures to correct for, or mitigate, a physical or *mental impairment*, the effects of those measures-both positive and negative-must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the [ADA]."), *superseded by statute*, ADA Amendments Act of 2008, Pub.L. No. 110-325, 122 Stat. 3553; *Murphy*, 527 U.S. 516, 521 (1999) (holding that the "determination of [a person's] disability is made with reference to the mitigating measures he employs."). Kemp contends that the district court's reliance on these cases is misplaced because the ADA Amendments Act of 2008 ("ADAAA") retroactively applies to overrule these decisions and permits ADA-defined disability to be discerned without regard to the mitigating effects of his hearing aids.

The ADA's definition of "disability" permits suits "by plaintiffs who, though not actually disabled are nonetheless 'regarded as having such an impairment.' To meet this standard, a plaintiff must show either that "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially

limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton*, 527 U.S. at 489. However, both of these showings require that the plaintiff demonstrate that the employer actually "entertain[ed] misperceptions about the individual-it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Id.*

To establish that he was fired as a result of a perceived "substantial limitation," Kemp was required to produce evidence that his employer regarded him as being "[u]nable to perform a major life activity that the average person in the general population can perform; or [s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195-96 (2002).

The Court found no genuine issue of material fact regarding whether Kemp is substantially limited in the life activity of hearing. His claim that AKAL and USMS regarded him as substantially limited in the major life activity of working also failed because the Supreme Court has held that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that [Kemp] allege [he is] unable to work in a broad class of jobs." *Sutton*, 527 U.S. at 491. The breadth of the exclusion is significant, as the ADA endeavored to leave employers free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment-such as one's height, build, or singing voice-are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.

To prevail, Kemp had to prove that he was regarded as "significantly restricted in the ability to perform either a *class of jobs or a broad range of jobs* in various classes as compared to the average person having comparable training skills and abilities." Kemp has failed to submit evidence establishing that either AKAL or USMS believed him to be limited to such a great extent. As mentioned above, the record reflects that AKAL did not even consider him to be substantially limited in his ability to work as a CSO, as it urged USMS to reinstate him even after USMS determined that he could not meet the unaided hearing requirement.

Kemp provided no evidence raising genuine issue of material fact regarding whether AKAL or USMS believed him to be significantly limited in his ability to work a broad class of jobs, not simply in his ability to "perform the tasks associated with [his] specific job," and thus he cannot establish "disability"..

Kemp failed to produce evidence of a physical or mental impairment that substantially limits one or more [of his] major life activities" or that he is "regarded as having such an impairment.

***Granger v. Aaron's, Inc.*, 636 F.3d 708 (5th Cir. 2011)**

Angel Granger and Casey Descant claimed that their store manager engaged in a pattern of sexual harassment. They reported it to Aaron's, but Aaron's failed to halt it. Both employees ultimately resigned and sought legal counsel jointly. Their attorney filed complaints of discrimination with the Office of Federal Contract Compliance Programs ("OFCCP"), an agency within the US Department of Labor that enforces equal employment opportunities for employees of federal contractors. The OFCCP could not resolve these claims because Aaron's was not a federal contractor; instead, Granger and Descant should have filed a complaint with the EEOC. The OFCCP never informed the Appellees or their attorney that they had filed with the wrong agency until after the 300-day period expired. At that point, the OFCCP closed

their files and transferred the complaints to the EEOC. The EEOC assured Appellees their complaints would be treated as timely and issued Right to Sue letters.

When Appellees filed their complaints in federal court, Aaron's filed a motion to dismiss, arguing that Appellees had failed to file a charge of discrimination with the EEOC within 300 days of their separation. Appellees argued that their claims were constructively filed with the OFCCP, pointing to a Memorandum of Understanding ("MOU") between the EEOC and the OFCCP that requires discrimination claims timely filed with the OFCCP to be treated as "dual-filed" with the EEOC. Alternatively, the Appellees argued that their 300-day deadline should be equitably tolled because of the OFCCP's representations that they were processing their claims. The district court held that the MOU did not apply because the OFCCP never had jurisdiction over Appellees' claims. The court did agree to equitably toll the deadline, however. The district court certified its decision for interlocutory appeal.

The Fifth Circuit affirmed on equitable tolling and did not address the interpretation of the MOU. Instead, the Court found that the Appellees and their attorney exercised due diligence in pursuing Appellees' rights: the Appellees secured counsel soon after their resignation, their signed complaints were submitted to the government months before the 300-day period expired, their attorney's staff made repeated contacts with the OFCCP who represented that the claims were being investigated, and Aaron's had failed to show that it was prejudiced by the delay.

***Harris v. Tunica, Inc.*, 628 F.3d 237 (5th Cir. 2010)**

Harris was a revenue auditor for Sam's Town Casino, which is owned by Tunica, Inc. She alleged that she was being discriminated against based on religion when they terminated her employment. On December 11, 2008, the EEOC issued Harris a "right to sue" letter informing her that she had 90 days to file suit. Harris hired a lawyer to file on her behalf. However, the lawyer's paralegal miscalculated the 90-day deadline and Harris' filing was outside the 90-day period. The district court dismissed Harris' suit, declining to extend equitable tolling. Harris appealed.

The Fifth Circuit affirmed the dismissal. Equitable tolling is typically extended only where "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & nn. 3-4 (1990). The Supreme Court further noted that "under our system of representative litigation, each party is deemed bound by the acts of his lawyer-agent." *Irwin*, 111 S.Ct. at 456. The Fifth Circuit concluded that the negligence of Harris' attorney and his staff did not entitle Harris to equitable tolling – a party is bound by the acts of their attorney.

***EEOC v. Philip Services Corp.*, 635 F.3d 164 (5th Cir. 2011)**

Nine employees of Philip Services ("PSC") filed charges with the EEOC, alleging racial discrimination. The EEOC found reasonable cause to support the charges and initiated the conciliation process as required by Title VII. After two weeks of negotiations, PSC withdrew from negotiations. The EEOC filed suit, alleging breach of contract against the PSC, arguing that there was a verbal agreement at the time PSC withdrew. The suit was dismissed on the grounds that Title VII's confidentiality provision was an "insurmountable impediment" to the EEOC's attempts to enforce the oral conciliation agreement.

Title VII provides that "[n]othing said or done during and as a part of such informal endeavors (conciliation) may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 20003-5(b). The statute does not make an exception as to the disclosure of conciliation material. Thus, an

inquiry as to whether an oral agreement to settle occurred during conciliation violates this clear prohibition. As the Fifth Circuit stated, "Keeping private what is 'said or done' during conciliation is necessary to encourage voluntary settlements." As this case addressed a matter of first impression, the Court declined to create any type of exception to the confidentiality provision of Title VII.

***Thompson v. N. Am. Stainless, L.P.*, 131 S.Ct. 863 (2011)**

Thompson's fiancée filed a sex discrimination charge with the EEOC against their employer, NAS. NAS subsequently fired Thompson. Thompson then filed his own EEOC charge and a subsequent Title VII suit contending that his firing was retaliation for his fiancée's EEOC charge. The District Court granted summary judgment on the ground that third-party retaliation claims were not permitted by Title VII, and the Sixth Circuit affirmed, reasoning that Thompson had not engaged in any activity protected by Title VII and thus was not entitled to sue.

The Supreme Court reversed the Sixth Circuit, deciding that an employer may no more fire an employee for a relative or close associate's sex discrimination claim than it can fire the complaining employee. That is, Title VII's prohibition of workplace retaliation against employees who complain of discrimination also protects that worker's fiancée; further, the fired employee could sue the employer for violating Title VII. The Court took a common sense approach to this analysis, reasoning that permitting employers a loophole through which they could retaliate against close family members while prohibiting such actions against complaining employees did not make sense. However, the Court attempted to limit the reach of its decision by making clear that the "close family member" might extend to spouses and future spouses, but probably not to more distant acquaintances.

***NASA v. Nelson*, 131 S.Ct. 746 (2011)**

Contract employees of the Jet Propulsion Laboratory sued NASA over a 2004 Bush administration antiterrorism initiative that extended the requirement of a standard background check to federal contract employees with long-term access to federal facilities. The lab employees did not have security clearances and were not involved in classified or military activities. Assuming without deciding that there is a right to informational privacy, the Court (in an opinion written by Justice Alito) held that NASA's background checks on independent governmental contractors were constitutional. The Court determined that questions about a history of counseling, drug treatment, or drug use did not violate any right to informational privacy as they were reasonable. In a pointed concurrence, Justice Scalia criticized the concept of informational privacy as having no Constitutional support. Justice Kagan took no part in consideration of the case.

***Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011)**

Kasten brought an antiretaliation suit against his former employer under the FLSA, claiming he was discharged because of his oral complaints regarding the placement of timeclocks in locations that prevented workers from receiving credit for time spent putting on and taking off work-related protective gear. The Supreme Court was faced with the question of whether, for purposes of the FLSA, an oral complaint was formal enough to be considered "filed," or whether complaints must be made in writing.

Holding that the purpose of the Act would be undermined if all complaints were required to be written, the majority held that a complaint could be "filed" orally. The Court did not reach the issue of to whom such an oral complaint could be made to be considered "filed" and therefore qualify for statutory protection, as the issue was not raised in the lower courts.

In dissent, Justices Scalia and Thomas found that the term "filing" implies a formality indicative of a legal action. As they did not agree that a mere complaint was sufficiently formal to merit FLSA protection, they did not reach the issue of whether a complaint must be in writing.

***Staub v. Proctor Hospital,* 131 S.Ct. 1186 (2011)**

Staub, a lab technician at Proctor Hospital in Peoria, Illinois, was required to attend occasional weekend training for the U.S. Army Reserves as well as a two-week training program during the summer. The Hospital fired Staub in 2004, and he later filed a lawsuit claiming that his supervisor was out to get him as a result of disapproval of his military service. However, the ultimate firing decision was made by a more senior executive, not Staub's supervisor. Staub prevailed at trial and was awarded damages. The Seventh Circuit reversed the trial court judgment, holding that there was no evidence that the decision-maker shared the supervisor's anti-military bias.

In a unanimous decision written by Justice Scalia, the Supreme Court reversed the Seventh Circuit, holding that an employer can be found liable for the discriminatory acts of supervisors, who do not themselves make employment decisions but do influence the employment decision-makers: "If a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." So long as the supervisor intends that the adverse action occur for discriminatory reasons, that intent is sufficient to impose liability on the employer.

Justice Alito, joined by Justice Clarence Thomas, concurred in the judgment but wrote that he would hold employers liable if the person making the firing decision "merely rubberstamps" a biased supervisor's recommendation, or when the decision-maker is "put on notice that adverse information about an employee may be based on antimilitary animus but does not undertake an independent investigation of the matter." Justice Kagan took no part in consideration of the case.

USERRA

***Carder v. Continental Airlines,* 636 F.3d 172 (5th Cir. 2011)**

Continental pilots who were members of the Reserves and National Guard filed a class action, alleging that management had "repeatedly chided and derided plaintiffs for their military service through the use of discriminatory conduct and derogatory comments regarding their military service and military leave obligations." Such comments included "Continental is your big boss, the Guard is your little boss" and telling pilots to choose between Continental and the military. The pilots also alleged the company had placed "onerous restrictions" on military leave and these restrictions affected the pilots' "opportunity to log flight hours toward participation in a retirement fund."

The sole issue on appeal was the trial court's dismissal of the plaintiffs' hostile environment claim on the basis that USERRA does not provide for such a claim. The Fifth Circuit affirmed dismissal of the hostile environment claim. The Court described the issue as one of interpreting the language in USERRA prohibiting the denial of any "benefit of employment" to a member of the uniformed services based on such membership or the performance of service. Noting differences between the statutory language of USERRA prohibiting the denial of benefits and Title VII's statutory language prohibiting discrimination with respect to "conditions" of employment (which permits claims for hostile environment), the Court held USERRA's language would not permit a hostile environment claim absent a denial of a tangible benefit.

The Fifth Circuit did note at least two caveats in reaching this decision. First, a number of courts, including the Eighth and Ninth Circuits, have recognized constructive discharge

claims under USERRA. A constructive discharge claim might arise where an employee could show his working conditions became "'so intolerable that a reasonable person would have felt compelled to resign.'" *Penn. State Police v. Suders*, 542 U.S. 129 (2004). Second, the Court noted the term "benefits of employment" under USERRA is quite broad and the issues raised by the plaintiffs in Carder might still permit recovery if they could show they lost such benefits because of their employer's actions.

IV. SECTION 1983

***Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808 (5th Cir. 2010)**

Cuadra served as a network specialist at a Houston high school and was responsible for reporting the school's student drop-out data to the State. Cuadra alleges that he was instructed by the Principal and Vice Principal to delete some of the student names from the drop-out list. After a local news station investigated and discovered that the high school had falsified the drop-out data, an investigation was commenced. A school official contacted the District Attorney and informed the DA of the allegations at the school. The then DA declined to prosecute. Cuadra eventually resigned after multiple reassignments within the school district.

A year after Cuadra's resignation, the new District Attorney sought and obtained a grand jury indictment against Cuadra for knowingly making a false alteration to a government record. After the indictment was quashed, a second grand jury re-indicted him. Cuadra's attorney met with the DA and presented a document – a "smoking gun" – that the Appellees possessed and did not disclose to the DA. The DA dismissed the indictment.

Cuadra turned around and filed a § 1983 suit, alleging violations of the Fourth and Fourteenth Amendment. After the district court granted summary judgment, Cuadra appealed. Cuadra argued that the Appellees violated his Fourth Amendment rights by intentionally withholding information and manipulating evidence to procure his indictment. Cuadra further argued that the Appellees violated his Fourteenth Amendment substantive due process right based on his prosecution.

The Fourth Amendment may be violated if the criminal charges were initiated without probable cause. However, if facts supporting an arrest are presented to an intermediary – such as a grand jury – the intermediary's decision breaks the chain of causation. The only exception is if the defendant tainted the deliberations of the intermediary. In this case, Cuadra only alleged "taint" instead of showing how the deliberations had been tainted. Allegations of tainting alone are not sufficient to overcome summary judgment.

With respect to Cuadra's Fourteenth Amendment claim, the Fifth Circuit found that such claim was foreclosed by the Supreme Court's decision in *Albright v. Oliver*, 510 U.S. 266 (1994). In *Albright*, the Court held that there was no Fourteenth Amendment due process right to be free from criminal prosecution unsupported by probable cause; rather, prosecution without probable cause falls under the Fourth Amendment. Accordingly, the Fifth Circuit affirmed the summary judgment on Cuadra's Fourteenth Amendment claim

***Kovacic v. Villarreal*, 628 F.3d 209 (5th Cir. 2010)**

Kovacic was escorted from a bar by Laredo Police after he had become intoxicated and was causing problems. The officers intended to take Kovacic to jail but the jail was overcrowded. The officers called Kovacic's friends at the bar and told them they were taking Kovacic to his hotel. However, Kovacic insisted that they drop him at a convenience store 5 miles from the hotel and he would call his wife at the hotel to come get him. The officers left him at the store and 30 minutes later, Kovacic was struck and killed by a car while he was walking on the roadway.

Kovacic's family filed suit against the officers and for false arrest, excessive force and

failure to protect. The court granted the officers motion to dismiss on all claims except a § 1983 due process claim under the "special relationship" theory. The officers filed an interlocutory appeal.

Although there is a substantive due process right to be free from bodily harm caused by the state, there is no constitutional duty that requires state officials to protect persons from private harms. An exception to this general rule is when there is a "special relationship" between the individual and the state. This relationship is formed when the state restrais an individual's freedom to act on his own behalf thru incarceration or other similar restraint. In that situation, the state does have a constitutional duty to protect individuals from danger, including private violence in certain situations.

In this case, the Appellees argued that the officers had a special relationship with Kovacic because they had taken him into custody. However, the accident occurred after Kovacic had been released from custody. The Court also found that there was no evidence in the record that shows the officers had any reason to think that Kovacic was not going to call his wife to pick him up or that Kovacic was lacking the resources to secure another way home. The Court concluded that reasonable, competent officers would not have determined that it would violate Kovacic's constitutional rights to honor his request to let him out at the convenience store; thus, the officers were entitled to qualified immunity.

***Morgan v. Swanson,* 627 F.3d 170 (5th Cir. 2010)(rehearing en banc granted, *Morgan v. Swanson,* 628 F.3d 705 (5th Cir. Dec. 17, 2010))**

This is the continuing saga of Plano ISD versus God and candy canes. Several parents filed suit on the behalf of their children after several Plano ISD principals confiscated and prohibited the distribution of candy canes, pencils with "Jesus loves me" on them, free tickets to a Christian drama and anything that had the word "Christmas" on it. The parents alleged that their children's First Amendment rights had been violated. The administrators filed a motion to dismiss based on qualified immunity but were denied.

The issue before the Fifth Circuit was whether it was clearly established at the time of the alleged misconduct that elementary students have a First Amendment right to be free from religious-viewpoint discrimination while at school. The Supreme Court has long recognized that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). This right applies to *all* students while at school. Thus, the school unconstitutionally discriminated against the speech of these elementary students.

In addressing the qualified immunity argument, the Court found that, in light of the overwhelming precedent, the Appellants had fair warning that the suppression of student-to-student distribution of literature on the basis of religious viewpoint is unlawful under the First Amendment. Thus, the Appellants were not entitled to qualified immunity. However, the Court noted that their holding did not preclude the district court from granting qualified immunity in this case should the facts demonstrate that this is other than non-disruptive, student-to-student speech.

***Rundus v. City of Dallas,* 634 F.3d 309 (5th Cir. 2011)**

Twice, Rundus has attempted to hand out free Bible tracts at the Texas State Fair, only to have his efforts thwarted by the State Fair of Texas ("SFOT"), a private corporation that runs the Fair. Rundus filed suit against SFOT and the City of Dallas, alleging that they had violated his First Amendment rights. The trial court found no state action was involved and dismissed Rundus' claims.

Rundus argued that the SFOT was a state actor by virtue of running the Fair. In order to show state action, Rundus most show either: (1) the restriction represents an official City policy or custom, or (2) SFOT's conduct in

enacting and enforcing the restriction is "fairly attributable" to the City of Dallas. He argued that the Fair was a joint venture between the City and the SFOT, that the SFOT pays a portion of Dallas police officers' wages earned during the Fair, that both the City and the SFOT had committed substantial financial sums to improve Fair Park, and that SFOT was required to maintain a reserve fund to ensure that the Fair would be held during times of financial distress.

The Fifth Circuit found that SFOT is a private corporation that runs a private event on public property. SFOT is not a state actor simply because they take advantage of law enforcement services provided to the public. And the City has no say in SFOT's internal decision making or SFOT's decision to enact or enforce the restriction on the distribution of literature during the Fair. Thus, the Fifth Circuit affirmed the district court's decision that no state action was involved and thus no First Amendment violation.

***Carnaby v. City of Houston,* 636 F.3d 183 (5th Cir. 2011)**

Houston police pulled Carnaby over for speeding. When Carnaby identified himself to police, he stated he was a "CIA Agent." The police attempted to verify this thru several calls but were unable to. When they approached the car again, Carnaby was on the phone. He handed the phone to the officers and said the man on the phone was a Houston officer who could verify he was an agent. The officer on the phone stated to the police that he believed Carnaby to be a CIA agent but had never confirmed that. The officers handed the phone back to Carnaby. The officers returned to their squad car to continue calls to the department. When they again approached Carnaby's vehicle, Carnaby took off in his car. The chase lasted 15 minutes until Carnaby pulled over. The officers approached the car from both sides, but Carnaby refused to lower his window and get out of the car. They smashed his window to pull him out. Carnaby leaned toward the floor of his car and his hands were not visible. With the door now open, Carnaby began to exit the vehicle but swung his hands – one holding an object. Seeing that, one of the officers fired and shot Carnaby in the back. He later died from his injuries. Carnaby did not have a weapon on him but did have three guns in his car.

The family sued the officers for excessive force along with a host of other claims. The district court granted the officers' motions for summary judgment based on qualified immunity as well as the City's motion for summary judgment because the City cannot be liable if the officers did not violate the Fourth Amendment.

The Fifth Circuit examined the Fourth Amendment excessive force claim on the basis of whether the use of deadly force was unreasonable in that situation. The use of deadly force is not unreasonable when an officer has reason to believe that the suspect poses a threat of serious harm to the officer. In this case, Carnaby reached down in his vehicle for a few seconds before exiting the car and swinging his hands towards the officer. Combined with the high speed chase that immediately preceded the incident, it was objectively reasonable for the officers to believe that Carnaby had a firearm and the use of deadly force was objectively reasonable. Thus, the officers were entitled to qualified immunity.

Mrs. Carnaby also argued that the City failed to train the officers properly in how to approach a high-risk vehicle and that this led to Carnaby's death. The Fifth Circuit stated that they had yet to address whether a municipality can ever be held liable for failure to train its officers when the officers did not commit any constitutional violation. The Court declined to address this issue here, specifically because Mrs. Carnaby failed to meet all the requirements for municipal liability.

***Zarnow v. City of Wichita Falls,* 614 F.3d 161 (5th Cir. 2010)**

Zarnow, a Wichita Falls physician, was an avid collector of weapons and licensed firearms dealer. While Zarnow was on vacation, employees at the clinic where he worked discovered a gun, ammunition, blasting caps and

fuses in his office, and the police were contacted. The first officer concluded that the found items—while not active explosive devices—were dangerous, and the ATF was called. Police applied for a warrant for Zarnow's home based on suspicion of possession of illegal explosives and devices; while awaiting the warrant police surrounded Zarnow's home and ordered him to exit the house. Zarnow offered to produce paperwork showing his entitlement to possess all of the materials recovered at his office, at which time officers began a consensual search of the home. When officers discovered a box marked "explosives" in plain view, Zarnow withdrew his consent and requested that the officers leave. By that time, however, the warrant had been issued, and the police seized firearms and ammunition (as well as other items not covered by the search warrant, such as currency, bonds and silver) and arrested Zarnow. The following day, the police chief laid out all of the firearms and ammunition for the media to view and photograph. Ultimately, however, a Wichita Falls grand jury declined to indict Zarnow, and no charges were brought against him.

Zarnow sued the City, police chief, and sixteen police officers in their individual and official capacities under § 1983, alleging violations of the Second, Fourth, Fifth, Sixth and Fourteenth Amendments. Several officers were later dismissed and all official capacity claims—except those against the police chief—were dismissed. All defendants moved for summary judgment on qualified immunity grounds, which was granted as to all but Zarnow's Fourth Amendment claims. On appeal, the Fourth Amendment claims against the individual officers were dismissed on qualified immunity grounds, and Zarnow's claims against the City and police chief in his official capacity were remanded.

The issue on remand was whether the City was responsible for the individual officers' misuse of the plain view doctrine during the home searches; the police chief had testified it was his practice to seize more than was necessary during an initial search so as to later "rule things in or out;" the officers testified that they understood "plain view" to allow seizure of any item that may be evidence of nay crime. The district court found the police chief to be a potential policymaker, but that the officers' use of the plain view doctrine was not a custom or policy of the City. Accordingly, summary judgment was granted to the City. Cross-appeals followed.

The Fifth Circuit reviewed the practices of the City and police department, as well as the fact that Wichita Falls is a "home rule" city, and found that the evidence demonstrated that the chief was the sole official responsible for internal police policy, and further that the City had impliedly delegated its policymaking authority to the chief. As there was not an official policy regarding the department's "plain view" practices, the court looked to whether there was a custom or policy demonstrated by either a pattern of unconstitutional conduct or a single unconstitutional action by a final policymaker. In this case, the court did not find a pattern of unconstitutional conduct, but only unintentionally negligent oversight within the department. As Zarnow did not claim a single action by a final policy maker at the district court, the Fifth Circuit refused to consider that element.

As a separate theory of municipal liability, Zarnow made a 'failure to train' claim; however, the court rejected the claim, stating that the officers' unlawful interpretation of the plain view doctrine did not amount to inadequate training. Finally, the Fifth Circuit did not reach the "moving force" element of the municipal liability analysis, as Zarnow was not able to establish a custom or policy of the City. Accordingly, the Fifth Circuit affirmed that the chief was a policy maker, but that Zarnow had not established a custom or policy sufficient to impose liability.

***Valle v. City of Houston*, 613 F.3d 536 (5th Cir. 2010)**

The Valles called the police when their son, suffering from depression, locked himself in the house. The police tried to get him to open the door and come out but he refused. After

failed attempts to negotiate with the son by a member of the Crisis Intervention Team ("CIT"), a Captain, who was not at that scene, authorized entry into the house. When the officers entered, the son allegedly charged at them with a hammer. After they missed with a taser and were unsuccessful stopping the assailant with three blasts of non-lethal soft impact bean bags from a shotgun, a third officer pulled his firearm and shot the son three times, killing him.

The Valles sued the City under Section 1983, alleging that the officers exercised excessive force in entering their home and lethal seizure of their son and that it was done pursuant to a City policymaker's orders (the Captain).

The Valles did not argue that the City had a formal written policy or custom that caused the unconstitutional seizure of their son. Instead they argued that the City is liable for the Captain's single unconstitutional decision to order entry into the home. In order to succeed under that theory, the Valles had to show that the Captain had final policymaking authority and that his decision was the moving force behind the unconstitutional injury. The Court found that, although the Captain made the final decision in this situation, it did not mean that he was setting City policy regarding the making of arrests. Thus, his decision was not a decision by a final policymaker of the City.

The Valles also argued that the City was liable because it failed to adequately train its patrol supervisors in the use of CIT tactics. In order to succeed on that claim, the Valles had to show that (1) the municipality's training policy or procedure was inadequate; (2) the inadequate training policy was a "moving force" in causing violation of the plaintiff's rights; and (3) the municipality was deliberately indifferent in adopting its training policy. *Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir. 2010). The Fifth Circuit found that the Valles ultimately failed to provide sufficient evidence on the deliberate indifference element. The Valles had to show "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). Although the Valles provided some evidence that the City had made a decision to not implement a training proposal that could potentially lead to the deprivation of constitutional rights, the Valles failed to link this potential to a patter of actual violations sufficient to show deliberate indifference.

***Wilkins v. Gaddy*, 130 S.Ct. 1175 (2010)**

Wilkins, a North Carolina state prisoner, brought a *pro se* § 1983 excessive force claim against a corrections officer, claiming he was "maliciously and sadistically" assaulted without provocation, in violation of the Eighth Amendment prohibition on cruel and unusual punishment. Reiterating its 1992 holding in *Hudson v. McMillan*, 503 U.S. 1, 4, the Court held that "the use of excessive physical force against a prisoner may constitute cruel and unusual punishment [even] when the inmate does not suffer serious injury."

Wilkins claimed that as a result of an assault, he had suffered a bruised heel, lower back pain, increased blood pressure, migraine headaches and various psychological difficulties. Without waiting for Gaddy's response to the complaint, the district court dismissed the action for failure to state a claim, because Wilkins had not alleged that he had suffered more than *de minimis* injury as a result of the alleged attack. The Court of Appeals for the Fourth Circuit affirmed summarily.

The Supreme Court, in a unanimous per curiam opinion, reversed the Court of Appeals' judgment, holding that the lower courts had "strayed from the clear holding" of *Hudson.* That case, the Court reiterated, rejected the proposition that "significant injury" is a threshold requirement of a claim of excessive force in violation of the "cruel and unusual punishment" clause of the Eighth Amendment. Rather, the relevant question is "whether force

was applied in a good-faith effort to maintain or restore discipline, or maliciously or sadistically to cause harm." The extent of the injury suffered by the prisoner may be relevant in determining whether the use of force could reasonably have been thought to be necessary under the circumstances, and it may be evidence of the amount of force that was applied. However, "an inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury." That is, a claim of excessive force cannot be rejected solely because of the court's perception of the severity of the claimant's injuries.

Although the Court's decision to reverse the judgment in this case was unanimous, Justice Thomas (joined by Scalia) concurred only in the judgment, writing separately to reiterate his belief that *Hudson* had been wrongly decided.

***Lockett v. New Orleans*, 607 F.3d 992 (5th Cir. 2010)**

In July of 2008, Lockett was driving in his vehicle to a class at the Southern University of New Orleans (SUNO). At the same time, two military police officers, Jonathan Bieber and Brandt Arceneaux, were conducting patrol in the area as members of the National Guard Task Force assisting the New Orleans Police Department (NOPD) with law enforcement duties pursuant to an order issued by Governor Jindal after Hurricane Katrina. Bieber and Arceneaux observed Lockett's vehicle and believed it to be traveling over the speed limit. Based on this observation, the defendants effectuated a traffic stop of Lockett.

Lockett provided the documents requested by the officers; however, the insurance card in his possession had expired and he did not have proof of current insurance. Using his cell phone, Lockett called his insurance company in an unsuccessful attempt to prove to Bieber that he currently had the required insurance. Lockett also called the emergency number 911, reported that the military police officers had made racial slurs, and requested that NOPD officers be dispatched to the scene. He also called his wife Melanie and requested her assistance at the scene. At about this time, Arceneaux frisked Lockett.

In October of 2008, Shawn and Melanie Lockett filed a complaint asserting claims arising out of Lockett's arrest. The complaint alleged claims under as well as numerous supplemental state law claims including assault and battery, false arrest, false imprisonment, malicious abuse of power, intentional infliction of emotional distress.

The doctrine of qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court set forth a two-step inquiry for resolving government officials' qualified immunity claims: first, a court must decide whether the facts alleged or shown are sufficient to make out a violation of a constitutional right; second, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id.* at 201. If the official's conduct violated a clearly established constitutional right, then qualified immunity is not applicable. Additionally, in the recent *Pearson v. Callahan* decision, the Supreme Court had explained that "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory," and that judges "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 129 S.Ct. 808, 818 (2009).

Lockett conceded that "[a]t the moment of the traffic stop, [the officers] arguably had probable cause to stop [him] for careless driving." Nonetheless, he contended that because the officers have admitted that they did not believe that careless driving was an "arrestable offense," there was no probable

cause to arrest him. Lockett relied on the following language in *Resendiz v. Miller*: "Probable cause exists when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." 203 F.3d 902, 903 (5th Cir. 2000). Lockett misconstrued this precedent. That quoted language is referring to facts within the officer's knowledge-not whether the officer was aware of the legal consequences of the facts.

In his brief, Lockett did not challenge the probable cause the officers had to make the traffic stop based on his speeding. Instead, Lockett asserted that "probable cause for a traffic stop is separate and distinct from the probable cause necessary to affect an arrest when the initial probable cause for the traffic stop is insufficient for the arrest." The court held that Lockett was mistaken. "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Because the defendants had probable cause to believe that Lockett had been driving in violation of the speed limit, the arrest did not violate a clearly established constitutional right.

In sum, the district court properly found that the defendants were entitled to qualified immunity with respect to the claim of false arrest.

Lockett next contended that he has raised a fact issue with respect to his claim of excessive use of force, and thus, the district court erred in finding that the defendants were entitled to qualified immunity. To establish an excessive use of force claim, a plaintiff must demonstrate "(1) an injury (2) which resulted directly and only from the use of force that was excessive to the need and (3) the force used was objectively unreasonable." *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001). Further, the "injury must be more than a de minimis injury and must be evaluated in the context in which the force was deployed." *Id.*

Lockett asserts that he sustained an injury to his wrists when the defendants affixed the handcuffs too tightly, causing him pain. Lockett has admitted that he did not complain to the defendants about the pain while he was handcuffed, and the jail's medical intake screening form does not indicate that Lockett complained of pain. However, after being released from the jail, Lockett and his wife met with Major Douget of the Louisiana National Guard, and he complained that the handcuffs had hurt his wrist. Also, several days later, Lockett visited a physician, complaining of pain in his wrists. However, at his deposition, Lockett testified he was not currently under his physician's care for the wrist injury.

Lockett's claim boils down to an allegation that the handcuffs were too tight. Such a claim, without more, does not constitute excessive force: "This court finds that handcuffing too tightly, without more, does not amount to excessive force." *Glenn*, 242 F.3d at 314; accord *Freeman v. Gore*, 483 F.3d 404, 417 (5th Cir. 2007) (rejecting as *de minimis* plaintiff's claim "that the deputies twisted her arms behind her back while handcuffing her, 'jerked her all over the carport,' and applied the handcuffs too tightly, causing bruises and marks on her wrists and arms").

Lockett also contends that the defendants' multiple searches of his person constitute excessive use of force. Lockett failed to allege an injury resulting from the pat downs. Further, Lockett's deposition testimony completely undermines his claim that the searches constituted excessive use of force. When Lockett was asked "[d]o you think there was anything inappropriate in the way [Bieber] searched you?," he responded: "No. It seemed like a standard search to me."

Lockett has failed to make a claim of excessive use of force with respect to the pat downs. Thus, the defendants were properly accorded qualified immunity with respect to the claim of excessive use of force.

Lockett's final §1983 claim is that the district court erred in granting the defendants

qualified immunity because he raised a genuine issue of fact with respect to whether the defendants' conduct was objectively reasonable under the Fourth Amendment. He argues that the defendants' detention of him for approximately an hour and their multiple searches of his person were objectively unreasonable.

Here, the defendants had probable cause to stop Lockett based on their belief that he was speeding. As Lockett concedes, Bieber initially misunderstood Lockett to be stating that he was affiliated with the FBI. Lockett testified that Bieber's statement that Lockett "need[ed] to go to SUNO" disturbed him and that he asked Bieber "why [Bieber] would say such a thing?" Lockett concedes that he could not provide a current proof of insurance card and made a phone call to his insurance company in an attempt to obtain the required proof. Lockett admits that he called "911" and informed the operator that the military police were "making racial slurs" and requested NOPD officers "because the situation looks like it's getting out of hand." Lockett then called his wife and asked her to meet him at the scene. As requested, NOPD officers and Lockett's wife arrived on the scene. In view of the defendants' initial misunderstanding regarding Lockett's FBI affiliation and Lockett's multiple phone calls requesting assistance of his attorney-wife and the presence of law enforcement officers from the NOPD in addition to the Louisiana National Guard at the scene, this was an unusual traffic stop. "The reasonableness of a Fourth Amendment search depends on the circumstances under which the search was conducted." *United States v. Garcia-Garcia*, 319 F.3d 726, 731 (5th Cir. 2003).

The Supreme Court has held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States v. Robinson*, 414 U.S. 218, 235 (1973). We note that, like the instant case, *Robinson* involved an arrest based upon probable cause that a traffic violation had occurred. The Court made no attempt to set forth the state of the law in the Fifth Circuit regarding the limits on searching an arrestee's person during a traffic stop based on probable cause. The Fifth Circuit said it was not clearly established that the defendants' searches of Lockett's person were objectively unreasonable under the facts surrounding this arrest and affirmed the district court's grant of qualified immunity to the defendants as to this claim.

***Saenz v. Harlingen Medical Center, L.P.*, 613 F.3d 576 (5th Cir. 2010)**

Saenz was hired in 2003 and was diagnosed over two years later with partial complex epileptic seizures, which cause her to lose consciousness and become unable to perform her duties. Saenz requested intermittent FMLA leave for her seizure condition, which was granted with the condition that she contact her employer's TPA within two days after taking each leave.

In the first five months of the grant of intermittent leave, Saenz sought and obtained approval for nine instances of leave. Each time she was reminded of her notice obligations. After her tenth instance of leave (for which she also obtained approval), Saenz' condition worsened and she again missed work one week thereafter. Saenz' mother advised her supervisor, who recommended that she bring Saenz to the emergency room at the medical center. After evaluation, Saenz was transferred to the McAllen Behavioral Center for evaluation and treatment, and she was discharged three days later.

Saenz' mother advised her supervisor that Saenz needed to be taken off the work schedule indefinitely, and the supervisor reminded her of the obligation to contact the TPA. In the following weeks, Saenz continued to miss work and was eventually diagnosed with bipolar disorder and depression. She called the TPA regarding her absences and requested approval for intermittent FMLA leave for her newly diagnosed condition, but she did not stay in communication with her supervisor. A week later, Saenz was terminated for her non-FMLA approved absences (by virtue of failing to timely communicate with the TPA regarding her

absences), and Saenz did not follow up with the TPA's request for additional documents.

The Fifth Circuit held that Saenz was not required to comply with her employer's heightened FMLA procedures in this case. Despite the fact that she knew from her prior absences about the procedures, the court found that Saenz and her mother had conveyed enough information to the supervisor to know that Saenz' condition qualified for FMLA leave. Further, the court could not conclude on the record presented that Saenz affirmatively refused to comply with her employer's heightened procedures. Finally, the court determined that Saenz provided satisfactory notice to her employer, noting that the FMLA provides a low threshold of notice "as soon as practicable under the facts and circumstances of the particular case."

***Connick v. Thompson,* 131 S.Ct. 1350 (2011)**

Thompson elected to not testify in his own defense at his murder trial in fear that the prosecution would bring up a prior conviction for armed robbery to challenge his credibility. Thompson was convicted, sentenced to death, and served seventeen years in prison. A month before his execution, a crime lab report was discovered which would have exonerated Thompson in the armed robbery case; a subsequent trial resulted in Thompson's acquittal of the murder charges.

Thompson brought a § 1983 suit against the District Attorney's office, alleging that the prosecutors had failed to disclose the crime lab report in violation of *Brady v. Maryland*. Thompson contended that this violation was caused by the DA's deliberate indifference to an obvious need to train prosecutors to avoid such constitutional violations. The jury found the DA's office liable for failure to train and awarded damages to Thompson, and the Fifth Circuit affirmed.

The Supreme Court reversed in a 5-4 split. While the prosecutors should have given Thompson's attorneys the blood evidence, misconduct by prosecutors which leads to a wrongful conviction can lead to liability for the DA's office only if there is awareness of a pattern of similar bad behavior, but a training program for prosecutors addressing the problem is not put in place. The failure to train must constitute deliberate indifference to the rights of persons with whom the untrained prosecutors come into contact; without notice that a training program is deficient (*i.e.* that there is a pattern of similar constitutional violations), decision-makers cannot be said to have deliberately chosen a training program to cause violations of constitutional rights.

The dissent pointed to the fact that several prosecutors acted in concert to withhold the blood evidence, as well as four reversals for Brady violations in the ten years preceding Thompson's robbery trial; based on this, the District Attorney should have been able to see that his office's failure to train prosecutors could have led to this kind of failure to follow the law.

***Los Angeles County v. Humphries,* 131 S.Ct. 447 (2011)**

The California Child Abuse and Neglect Reporting Act requires law enforcement to investigate allegations of child abuse; agencies must report all instances of reported abuse that the agency finds "not unfounded," even if it is "inconclusive or unsubstantiated." The statute does not provide for review of reports or challenges to individuals' inclusion in a central index maintained by the State.

The Humphries were accused of child abuse but were later exonerated. However, they could not have their names removed from the central child abuse index as there was no proper mechanism for doing so, which effectively meant their names would remain available to various state agencies for at least ten years. The Humphries were awarded damages in a § 1983 action brought against the California Attorney General, the Los Angeles County sheriff, two detectives in the sheriff's office, and the County of Los Angeles. The County denied liability, arguing that as a municipality, it could only be liable under *Monell* for § 1983 claims if a

municipal policy or custom caused deprivation of a federal right. As it was a state—rather than county—policy that brought about any deprivation, the County contended it was entitled to the protection of *Monell*.

The Supreme Court agreed. *Monell* applies to § 1983 claims against municipalities for prospective relief as well as to claims for damages. Nothing in the text of § 1983 suggests that the causation requirement in the statute should change with the form of the relief sought. In the absence of a county policy or custom depriving people of their constutitional rights, the Humphries could not sue the County to recover damages.

V. MISCELLANEOUS CASES

***Hertz Corporation v. Friend*, 130 S. Ct. 1181 (2010)**

California citizens sued Hertz in a California state court. Hertz tried to remove the case to federal court based on diversity jurisdiction. Respondents argued that Hertz was a California citizen, not a New Jersey citizen. The District Court held that California was Hertz's principal place of business because a plurality of its relevant business activity takes place there. After the Ninth Circuit affirmed, the Supreme Court granted cert in order to give clarity to the jurisdictional question: Where is a corporation's principal place of business?

In reversing the Ninth Circuit, the Supreme Court unequivocally stated that the focus for determining federal diversity jurisdiction with respect to a corporation is the "nerve center." That is, a corporation's principal place of business is where its "high level officers direct, control, and coordinate the corporation's activities." In explaining its decision, Justice Breyer stated that although the nerve center is normally where corporate headquarters is located, the true test is where the "actual center of direction, control and coordination" lies. Thus, empty headquarter buildings will not suffice if the opposing party can show that decisions are made elsewhere.

***Carr v. United States*, 130 S.Ct. 2229 (2010)**

The Sex Offender Registration and Notification Act ("SORNA") includes one provision, 18 U.S.C. § 2250, subjecting sex offenders to up to 10 years in prison if three criteria are met: (1) registration is required under SORNA, (2) the offender travels in interstate or foreign commerce, and (3) knowingly fails to register or update a registration. In a 6-3 decision, the Supreme Court held that the second element applies only to travel that occurs after the 2006 enactment of SORNA.

All of the parties agreed that the three elements must occur in sequence: conviction, travel, and failure to register. Carr challenged the government's position that § 2250 is violated as long as the failure to register post-dates SORNA's enactment. In rejecting the government's suggestion, the Supreme Court emphasized that the first element can only be satisfied when a person is required to register under SORNA—that is, after conviction. As there is no requirement to register under SORNA before it was passed, pre-enactment travel cannot satisfy the second element of the provision.

Justice Scalia concurred in the judgment but disavowed the portion of the opinion discussing the legislative history of the statute. Justice Alito wrote a dissent—joined by Justices Ginsburg and Thomas—contending that there was no reason for Congress to treat two sex offenders who failed to register differently based on whether they moved in interstate commerce before or after the enactment of SORNA.

***Hui v. Castaneda*, 130 S.Ct. 1845 (2010)**

While he was detained by U.S. Immigration and Customs Enforcement, Castaneda complained to Public Health Service employees about a penile lesion. Several physicians recommended a biopsy; however, PHS repeatedly denied the requests, even as Castaneda's condition worsened, deeming a biopsy "elective." After his release, a biopsy

confirmed the existence of penile cancer which later metastasized. Castaneda died a year after his release, after undergoing an amputation and chemotherapy.

Castaneda's estate brought *Bivens* and Federal Tort Claims Act ("FTCA") claims against his PHS physician and the supervising PHS official, alleging that his rights were violated under the Fifth, Eighth and Fourteenth Amendments by their deliberate indifference to his serious medical needs. PHS filed a motion to dismiss, arguing that 42 USC § 233(a) provided its employees with absolute immunity from Bivens actions by making a FTCA suit against the United States Castaneda's exclusive remedy.

The Supreme Court, in a unanimous decision authored by Justice Sotomayor, found that Section 233(a) does, in fact, provide PHS officers with immunity from Bivens actions for constitutional harms committed in the line of duty, thus making the FTCA the sole remedy for Castaneda and other similarly situated. It should be noted that by contrast to Bivens actions, the FTCA does not permit a jury trial and strictly caps damages.

***Montoya v. FedEx Ground Package System, Inc.*, 614 F.3d 145 (5th Cir. 2010)**

Montoya was an independent contractor providing pick-up and delivery services for FedEx Ground from 1994 to 2006. Under his contract, he provided his own vehicles and employees, and served an area designated by FedEx Ground. He was compensated on the basis on the number of pick-ups and deliveries he made in his primary service area.

In 2002, Montoya was advised that part of his primary service area was being reassigned. Montoya complained and won reinstatement of part of his area. In 2004, Montoya filed suit in arising out of the reassignment. During the course of discovery, certain FedEx Ground managers learned of the litigation and allegedly developed a hostile animus toward Montoya, including withholding approval of employees, advising other contractors from helping Montoya, reducing and reassigning routes to other contractors, and similar actions to make Montoya's performance appear poor. One manager advised Montoya that he would receive no new routes during the pendency of the litigation. Eventually, Montoya's contract with FedEx Ground was terminated.

Montoya filed suit based on 42 U.S.C. § 1985(2), claiming that the actions of FedEx Ground and various managers constituted a conspiracy to intimidate a party to a federal lawsuit. Montoya alleged that the termination of the contract, as well as the other actions, were based in whole or in part on Montoya's maintenance of the litigation. Montoya eventually dismissed the individual managers from the suit but preserved his claims against FedEx Ground. The district court dismissed the suit on statute of limitations grounds. The Fifth Circuit did not reach the limitations issue, but in a *de novo* review found that the actions of FedEx and its managers did not constitute injury to Montoya in order to deter him from attending or testifying in federal court; as FedEx had removed the original case to federal court and obtained Montoya's deposition testimony, there was not (as required by the statute) any deterrence of Montoya's attendance or testimony in the underlying litigation. That is, the Fifth Circuit upheld the dismissal of the case, concluding that Montoya had not demonstrated that the alleged conspiracy had the unlawful effect proscribed by § 1985(2).

***Stop the Beach Renourishment, Inc. v. Florida Dept. of Environ. Protection*, 130 S.Ct. 2592 (2010)**

In an 8-0 vote, the Supreme Court upheld a Florida Supreme Court decision that the state's ownership of newly created land at the shoreline was not an unconstitutional taking. Florida law decrees that beachfront property seaward of the median high-water line belongs to the state, and the owners of beachfront property own the land between that line and their homes. Two cities looked to add new sand along the shoreline of their beaches, extending

the beaches seaward by 75 feet. The newly created land (and any subsequently added by gradual natural change) would belong to the state and the owners of adjacent property would be deprived of their exclusive access to the water.

Property owners claimed that the actions violated the Takings Cause of the Constitution, an argument rejected by the Supreme Court. Under Florida law, the property owners had no right to the filled-in land, as the state had the right to fill its own seabed. Any previously submerged land exposed by a sudden event belongs to the state, even if the state causes the exposure, and that event disrupts the contact with the water. With no rights to future accretions of land, and no rights to contact with the water superior to the state's right to fill its own seabed, there was no taking.

***A.A. by and through Betenbaugh v. Needville ISD*, 611 F.3d 248 (5th Cir. 2010)**

Needville ISD's grooming policy provides that boys' hair "shall not cover any part of the ear or touch the top of the standard collar in the back." The stated purposes for the policy are hygiene, discipline, safety, and "to assert authority." In accordance with his Native American (Lipan Apache) religious beliefs, A.A. has never cut his hair, which is sometimes braided and sometimes not. In preparation for their move to Needville, A.A.'s parents contacted the District about his hair and the grooming policy. In response, the District requested proof of the family's religious beliefs. The District denied A.A.'s exemption request, and the family appealed. The family rejected a compromise offer by the District to allow A.A. to wear his hair in a bun on the top of his head, and the District ultimately granted an exemption which would require A.A. to tuck a single tightly woven braid in the collar of his shirt.

When A.A. enrolled in school, he was placed in in-school suspension and not permitted to socialize with other children. The family filed suit and sought injunctive relief, claiming that the District's policy violated A.A.'s rights to free exercise of religion under the First and Fourteenth Amendments and similar rights under the Texas Religious Freedom Restoration Act ("TRFRA"), A.A.'s rights to free expression under the First and Fourteenth Amendments, and the family's due process right to raise A.A. according to their Native American heritage and religion. The district court found for the family and issued a permanent injunction against the District, preventing application of the grooming policy to A.A.

Avoiding the Constitutional questions presented, the Fifth Circuit addressed the case on TRFRA grounds. The TRFRA prevents any Texas government agency from substantially burdening a person's free exercise of religion unless it can demonstrate that the application of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. The Fifth Circuit engaged in a lengthy review of RLUIPA and its predecessor, RFRA, as well as Texas cases interpreting those statutes and the TRFRA. After a very fact-specific analysis of the family's claims and beliefs, and a strict scrutiny of the grooming policy, the Fifth Circuit found there was no compelling interest in the context of this case to permit the District's enforcement of this regulation: "A.A.'s long hair is conceded to be an exercise, not of rebellion, but of adherence to religious belief....it is an acknowledgment of piety to religion and fealty to an authority superior to individual whim." As the District could not sufficiently justify the stated reasons for its grooming policy, and as A.A. and his family had demonstrated a sincere religious belief in wearing his hair uncut and in plain view which would be burdened by the policy, the permanent injunction was affirmed.

***Thaler v. Haynes*, 130 S.Ct. 1171 (2010)**

Following his capital murder conviction for murder of a police officer and imposition of a death sentence, Haynes brought a *habeas* challenge to his conviction based on *voir dire*, which the Supreme Court rejected in a *per curiam* opinion.

Two different judges presided at different stages of *voir dire* in Haynes' murder trial. The first judge presided when the attorneys were questioning the panel members individually, but a second judge took over when peremptory challenges were exercised. The prosecutor struck an African-American juror, which resulted in a *Batson* challenge, to which the prosecutor offered a race-neutral explanation based on the prospective juror's demeanor and body language during individual questioning. Haynes' counsel did not dispute the characterization of the demeanor or body language but asserted that her questionnaire showed she was leaning toward the State's case. The second judge, after hearing the explanation and argument, denied the *Batson* challenge without further explanation. Haynes was convicted and sentenced to death, whereupon he brought two challenges to the proceedings.

Haynes argued that a judge who did not witness the *voir dire* proceedings could not fairly evaluate a *Batson* challenge. *Batson* requires that a judge ruling on an objection to a peremptory challenge "tak[e] into account all possible explanatory factors in the particular case." However, in reversing the Fifth Circuit, the Supreme Court rejected the notion that the same judge was required to observe the jury interviews as well as the prosecutor's explanation of the challenge. "*Batson* plainly did not…hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor."

***Florida v. Powell,* 130 S.Ct. 1195 (2010)**

In this case, the Supreme Court held that Tampa police officers adequately warned a criminal suspect (felon in possession of a handgun) of his *Miranda* rights when they advised him that he had "the right to talk to a lawyer before answering [any] questions" and that he could invoke that right "at any time." The Court, in a 7-2 decision, overturned the decision of the Florida Supreme Court, which had found those warnings to be constitutionally insufficient.

Justice Ginsburg first dismissed Powell's argument that the Court lacked jurisdiction to hear the case because the Florida court's decision rested on adequate and independent state grounds. Rather, the Court concluded, there was no clear statement that the Florida decision was grounded in any state doctrine separate from the federal constitutional precedent of *Miranda v. Arizona*.

As to the merits of the case, the Court emphasized that *Miranda* requires only that law enforcement officers "clearly inform" suspects of their legal rights, including the right to consult with counsel and to have counsel present during interrogations. The Tampa Police Department's warnings satisfied that standard because "[i]n combination, the two warnings reasonably conveyed the right to have an attorney present."

The Court acknowledged that more precise formulations of the warning are possible, and perhaps even preferable in some circumstances. In fact, the Court's opinion specifically lauded the standard FBI warnings as "exemplary" because they explicitly inform suspects of their right to an attorney's presence during questioning. But while such explicit warnings are "admirably informative," the Court ultimately concluded that they are not constitutionally required. Law enforcement officers thus enjoy some latitude to communicate *Miranda* rights to suspects using different language, so long as the essential message of the warnings remains intact.

Justice Stevens filed a dissenting opinion, which Justice Breyer joined in part. Stevens argued that under the adequate and independent state ground doctrine, the Court did not have the power to review the Florida state court's decision. Moreover, in the portion of the opinion joined by Justice Breyer, Justice Stevens concluded that the Tampa warnings were inadequate because they entirely failed to inform Powell of his right to an attorney's presence during interrogation, instead misleadingly suggesting that he could only consult with a lawyer before questioning began.

***Maryland v. Shatzer*, 130 S.Ct. 1213 (2010)**

In *Shatzer*, the Supreme Court again revisited *Miranda*, addressing the question of whether a detained criminal suspect who has asked to speak with a lawyer can ever be questioned again without a lawyer present. Justice Scalia, writing for the majority, announced a "fourteen day rule" to address the situation posed in this case, which was whether police have to honor a previous request for a lawyer once a suspect has been released from custody and is later rearrested.

Shatzer was incarcerated pursuant to a prior conviction when a police detective tried to question him in 2003 regarding separate allegations. Shatzer invoked *Miranda* and asked for counsel, whereupon he was returned to the general prison population and the interview was terminated. Another detective reopened the investigation in 2006 and interviewed Shatzer, who was still incarcerated; Shatzer waived his *Miranda* rights and made inculpatory statements. The trial court found that *Edwards v. Arizona*, 451 U.S. 477 (1981) did not apply as there was a break in custody prior to the 2006 interrogation, thus refusing to suppress the inculpatory statements. The appellate court reversed, holding that the mere passage of time does not end *Edwards'* protections, and if it did, the release back into the prison population did not constitute such a break.

Justice Scalia reiterated that there is no basis in the Constitution for *Miranda* and *Edwards*, but rather that it is "judicially prescribed prophylaxis." As this protection was created by the Supreme Court, it was incumbent on the Court to clarify when renewed interrogation is lawful. Justice Scalia wrote: "We think it appropriate to specify a period of time [at which time the clock is reset]. It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." Accordingly, the passage of more than two years between interviews satisfied the break in custody requirement.

Furthermore, the Court found that "lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*," and thus incarceration is distinguished from interrogative custody to which *Miranda* applies. Accordingly, the return of Shatzer to the general prison population constituted the break in custody required by this line of cases, and his inculpatory statements should not be suppressed.

***Gary G. v. El Paso Indep. Sch. Dist.*, 632 F.3d 201 (5th Cir. 2011)**

Gary G. hired an attorney when he felt like the EPISD was not providing his special needs son with the full amount of therapy he was entitled to. The EPISD admitted in a letter its failure to provide the full amount and offered, in settlement, compensatory hours of therapy but did not offer to pay Gary G.'s attorney's fees. Gary G. rejected the offer. The day after the EPISD made its offer and it had been rejected, the school again made the offer; it was again rejected. That same day, Gary G. filed a complaint with the Texas Education Agency, asserting that the EPISD had deprived his son of free appropriate public education and requesting a due process hearing. Gary G.'s attorney then notified the EPISD that he represented Gary G. Two weeks later, the parties held a resolution meeting wherein Gary G.'s attorney inquired as to his attorney's fees. The EPISD stated that the fees were not justified because the written offer had been made before both the due process hearing request and the EPISD being notified that Gary G. was represented by counsel. At the due process hearing, the special education hearing officer determined that limitations applied to part of Gary G.'s claim but that he was entitled to compensatory therapy for the other part. Gary G. filed with the district court to challenge the limitations ruling and to establish that he was a prevailing party and entitled to attorney's fees. The district court eventually ruled that Gary G. was a prevailing party but that he was not entitled to all of his attorney's fees.

On appeal, the Fifth Circuit addressed whether a party who rejects a settlement offer

and obtains from either an administration hearing officer or the district court no more educational relief than that offered by the settlement is an IDEA "prevailing party" for attorney's fees purposes; and, even if so, whether that prevailing party, if offered all requested educational relief, but not attorney's fees, is not substantially justified in rejecting that offer or unreasonably protracts final resolution of the controversy, requiring part, or all, of the requested fees to be denied.

To receive attorney's fees under the IDEA, the requesting party must be a "prevailing party." The Court concluded that a party who rejects a settlement offer and obtains from a hearing officer or the district court no more educational benefit than the settlement offer is technically a prevailing party under the IDEA. Thus, Gary G. was considered a prevailing party. However, prevailing parties are not automatically entitled to attorney's fees – they are only eligible. At issue is whether Gary G., who rejected a settlement offer that did not include attorney's fees, was substantially justified in, or unreasonably protracted the final resolution of the controversy by rejecting it. The Court found that Gary G. was not substantially justified in rejecting the offer – at the time of EPISD's first offer of settlement, Gary G.'s attorney had only performed 13.8 hours of work. Instead of accepting that offer and paying for minimal attorney's fees, Gary G. protracted the matter, causing it to last an additional three years. However, the Court did find that Gary G. was entitled to his attorney's fees up to the first offer of settlement (i.e., the 13.8 hours of work). Gary G. was not entitled to any fees that he incurred after the first settlement offer.

***Milner v. Dept. of the Navy*, 131 S.Ct. 1259 (2011)**

Milner, a resident of Puget Sound, submitted Freedom of Information Act ("FOIA") requests for the U.S. Navy's Explosive Safety Quantity Distance ("EQSD") information for the naval magazine at Indian Island. EQSD data includes maps calculating and visually portraying the magnitude of hypothetical detonations. The Navy refused to release the data, relying on Exemption 2 to FOIA, which protects from disclosure material "related solely to the internal personnel rules and practices of an agency." The District Court and Ninth Circuit supported the Navy's refusal, and the Supreme Court took up the case to resolve a circuit split on the issue.

The Supreme Court held that FOIA Exemption 2 only precludes the disclosure of certain records pertaining to human resources and employee relations issues. As EQSD data does not fall under the exception, the Navy's withholding of the maps was improper. The Court's analysis, in part, focused on statutory interpretation and consideration of Congressional intent in passing FOIA. The Court determined that the adjective "personnel" plainly refers to human beings; accordingly, the Navy erred in interpreting it more broadly. In addition, the Court noted that Congress wanted government to be transparent, a goal that was circumvented by interpreting Exemption 2 too broadly.

***FCC v. AT&T*, 131 S.Ct. 177 (2011)**

The Supreme Court unanimously held that corporations do not have a right of "personal privacy" under the Freedom of Information Act. The Court's analysis turned on the word "personal." Chief Justice Roberts rejected the contention that "personal" applied to a corporation—which is legally a person—as standard dictionary definitions do not ordinarily relate to artificial persons. Finding the plain meaning of the term to be clear, and observing that many adjectives do not reflect the meaning of corresponding nouns (corn and corny, crank and cranky, *et al.*), the Court held that AT&T could not hide behind the personal privacy exemption to FOIA. In closing, Chief Justice Roberts commented, "We trust that AT&T will not take it personally."

***Ortiz v. Jordan*, 131 S.Ct. 884 (2011)**

Ortiz brought a §1983 case alleging she was sexually assaulted by a corrections officer while incarcerated in the Ohio Reformatory for Women, that prison authorities did not act to

protect her against future assaults, and that she was retaliated against for her reporting of the assaults in violation of the Eighth and Fourteenth Amendments. Prison authorities moved for summary judgment on qualified immunity grounds, but the district court denied summary judgment, finding that the qualified immunity defense turned on material facts genuinely in dispute. The prison officials did not appeal the denial of summary judgment. The case proceeded to trial and Ortiz obtained favorable verdicts against the prison authorities. The prison officials did not file Rule 50(b) motions challenging the legal sufficiency of the evidence. The authorities appealed the denial of summary judgment to the Sixth Circuit, which reversed the jury verdict and held that qualified immunity sheltered the authorities from Ortiz' suit.

The Supreme Court reversed the Sixth Circuit, holding that a party in a federal civil case may not appeal a denial of a motion for summary judgment after a District Court has conducted a full trial on the merits. Rather than await a full trial, the prison officials should have filed an interlocutory appeal. However, once the case proceeded to trial, the trial record superseded the summary judgment record, and the qualified immunity defense must be evaluated in light of the evidence received by the trial court. As the law surrounding qualified immunity was not in dispute, but rather the facts giving rise to a potential qualified immunity claim, the Sixth Circuit should not have reconsidered the jury's decision on official liability.

***Sossamon v. Texas*, 131 S.Ct. 1651 (2011)**

Sossamon, an inmate in the Texas prison system, sued the State and various officials in their official and individual capacities under RLUIPA, arguing he was denied access to the chapel and religious services while he was on cell restriction for disciplinary infractions. The district court held that sovereign immunity barred Sossamon's claims for monetary relief. The Fifth Circuit affirmed, holding the officials could not be sued in their individual capacities under RLUIPA as the Act was passed pursuant to Congressional Spending Power and not under the Fourteenth Amendment.

The Supreme Court affirmed the holdings of the lower courts. In a 6-2 decision, Justice Thomas reasoned for the majority that the States, by accepting federal funds, "do not consent to waive their sovereign immunity to private suits for money damages under RLUIPA." Thus, sovereign immunity bars suits for damages because no statue expressly and unequivocally includes such a waiver.

***DeMoss v. Crain*, 636 F.3d 145 (5th Cir. 2011)**

DeMoss, a Muslim prison inmate, challenged various policies of the Texas Department of Criminal Justice as violating the RLUIPA. The Fifth Circuit rejected his challenges to the prison policies that required inmate-led religious services to be tape recorded when there is no staff member or outside volunteer present; barred inmates from carrying a pocket-sized Bible or Qur'an; required inmates to be clean-shaven; and did not permit inmates to stand for extended periods of time in prison dayrooms. Each of the policies was demonstrated to be the least restrictive means of serving compelling penological interests without imposing substantial burdens on the inmate's religious practices. DeMoss' challenge to a policy that prohibited inmates confined to their cells for disciplinary infractions from attending religious services was dismissed as moot since the policy had been changed.

***Kentucky v. King*, -- S.Ct. ---, 2011 WL 1832821 (May 16, 2011)**

In this opinion, the Supreme Court examined the application of the "exigent circumstances" exception to the Fourth Amendment. Lexington, KY police officers followed a suspected drug dealer to an apartment complex after an undercover drug bust. The suspect went into a breezeway and the officers heard a door shut, but the officers could not see which of two apartments the suspect entered. Smelling marijuana coming from one apartment,

the officers knocked on that door, assuming the suspect had entered that apartment. No one came to the door. Hearing noises they believed constituted destruction of evidence, the officers kicked down the door, finding King (who was not the suspected drug dealer) with marijuana and cocaine.

King argued that the exigent circumstances rule does not apply when—as here—the police effectively create the emergency justifying a warrantless search of a residence. In an 8-1 vote, the Supreme Court disagreed. Writing for the majority, Justice Alito held that unless the police threatened to do, or actually did, something that violated the Fourth Amendment, the "exigent circumstances" rule still applies. In reaching this decision, the Court pointed out that occupants of a residence have other protections against warrantless searches. If they fail to take advantage of those protections (for example, telling the police that they cannot enter), it is their own fault. This case is important as it helps resolve the varied and inconsistent manner in which different states have treated police-created emergencies differently for purposes of the exigent circumstances rule.

***Virginia Office for Protection and Advocacy v. Stewart,* 131 S.Ct. 1632 (2011)**

VOPA is an independent state agency created under federal statutes and dedicated to advocacy for persons with developmental disabilities or mental illnesses. VOPA sued state officials to obtain mental health records for persons committed to state mental facilities after two people died in the facilities and another was injured. VOPA sought to investigate allegations of wrongdoing in the facilities, but Virginia refused to voluntarily disclose the records. The Supreme Court's analysis revolved around *Ex parte Young*, 209 U.S. 123 (1908), in which the Court held that the Eleventh Amendment rule prohibiting lawsuits against the state did not extend to suits against state officials, at least not when the lawsuit is filed to stop the state from violating federal law. Based on *Ex parte Young*, the 6-2 majority held that the "identity of the plaintiff" is not important; that is, even though a state agency was suing a state official from the same state, such suits were permitted. This opinion extends the *Young* doctrine just enough to permit state agencies to make sure that same-state officials comply with federal law.

VI. CRIMINAL LAW

***United States v. Pack,* 612 F.3d 341 (5th Cir. 2010)**

Pack moved to suppress evidence of his possession of marijuana and a pistol discovered during a traffic stop and subsequent search of the vehicle in which he was a passenger. The district court denied the motion, finding he lacked standing to challenge the evidence. On appeal, Pack argued he had standing to challenge discovery of the evidence because he has standing to contest the seizure of his person, and further that the motion to suppress should have been granted because the search took place during an unconstitutional detention that violated his Fourth Amendment rights. The Fifth Circuit affirmed the district court.

Pack was a passenger in a speeding vehicle on I-30 in Hopkins County. The veteran DPS trooper making the stop became suspicious on noting Pack's nervous behavior and in uncovering inconsistent and conflicting responses to his inquiries about their travel plans. The driver refused consent to search the vehicle, so the trooper requested a canine search, which alerted the trooper to search the trunk, revealing nearly eighteen pounds of marijuana and a pistol. Pack was indicted in federal court for possession with intent to distribute, as well as possession of the pistol in furtherance of a drug trafficking crime.

On appeal, the government conceded that Pack had standing to challenge the evidence; however, the Fifth Circuit analyzed the standing issue at length as an issue of the merits of Pack's claim. In sum, the Fifth Circuit agreed with the magistrate judge who determined that there was "no factual nexus" between any alleged Fourth Amendment violation consisting of the continued detention

of Pack and the discovery of the drugs and firearm, because the discovery was inevitable given the continued detention of the driver. Further, as Fourth Amendment rights are personal in nature, Pack could not assert the driver's Fourth Amendment rights.

As to the merits of the Fourth Amendment claim, the Fifth Circuit reiterated the *Terry v. Ohio* rubric: whether the stop was justified at its inception, and whether the officer's subsequent actions were reasonably related in scope to the circumstances causing him to stop the vehicle in the first place. The subsequent actions are not reasonably related in scope if the officer detains the vehicle's occupants beyond the time needed to investigate the circumstances giving rise to the initial stop, unless the officer develops reasonable suspicion of additional criminal activity in the meantime, which permits further detention for a reasonable time to attempt to dispel this reasonable suspicion. Here, in light of the suspicious facts observed by the officer—including conflicting stories and extreme nervousness—the court found that the short delay caused by the investigation did not render the length of the entire detention unreasonable. Pack's Fourth Amendment rights were not violated by the trooper's decision to detain him beyond the brief time required to investigate the driver's speeding violation, in light of the facts observed.

***Magwood v. Patterson*, 130 S.Ct. 2788 (2010)**

Magwood was sentenced to death for murder in Alabama state court. After exhausting his state appeals, he sought federal *habeas* relief and was granted a new trial as to his sentence. The trial court sentenced him to death a second time. Magwood again sought *habeas* relief, challenging his sentence on the ground that he did not have fair warning at the time of his offense that he conduct would permit a death sentence under Alabama law. 42 U.S.C. § 2244(b) prohibits state prisoners seeking federal *habeas* relief from filing "second or successive" applications for relief, even if the claims in the subsequent applications are meritorious. The Supreme Court held in this case that when a state prisoner obtains federal *habeas* relief and is resentenced, a *habeas* application challenging the new judgment is not "second or successive," even if the petitioner could have challenged the original sentence on the same ground. Justice Thomas, writing for the majority, explained that the holding in this case was limited and declined to address whether Magwood's claim was procedurally defaulted.

***Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010)**

Thompkins was convicted of murder arising out of a drive-by shooting and sentenced to life in prison without parole. He brought this *Miranda* challenge to his arrest and interrogation, on which the Supreme Court sharply divided 5-4.

Thompkins was arrested in Ohio about a year after a drive-by shooting in Michigan that left one man dead. Two Michigan officers traveled to Ohio to interrogate Thompkins while he was awaiting transfer to Michigan. During the three hour interrogation, after being provided with his *Miranda* rights Thompkins remained largely silent for the first two hours and forty-five minutes but acknowledged he understood his rights. At no time did he express that he wanted to remain silent, that he did not want to talk to police, or that he wanted an attorney. Occasionally he gave limited verbal responses or nodded his head in response to questions. Near the end of the interrogation, one detective asked Thompkins whether he believed in God and whether he prayed for forgiveness for the murder. Thompkins responded "Yes" to both questions but refused to make a written confession.

At trial, Thompkins moved to suppress his statements, arguing he had invoked his Fifth Amendment right to remain silent, requiring the police to end the interrogation, and that any inculpatory statements were involuntary. The trial court denied his motion, and Thompkins was found guilty.

Justice Kennedy wrote for the majority, joined by the most conservative elements of the

Court: Roberts, Alito, Scalia and Thomas. The opinion reiterated a long established rule that a suspect must make clear without ambiguity when he wants to claim the right to counsel after receiving *Miranda* warnings and extended that to a suspect's intent to claim the right to silence. Here, the Court found it to be decisive that Thompkins never said that he wanted to remain silent of that he did not wish to speak to the police. Further, the majority concluded that the police need only give the *Miranda* warnings and satisfy themselves that the suspect understands his rights; the police are not required at any point to obtain an explicit waiver from the suspect. An interrogation can then go on unless the suspect explicitly and without ambiguity invokes his right to silence.

***United States v. Chavira*, 614 F.3d 127 (5th Cir. 2010)**

Chavira, a US citizen, attempted to enter the US through a Port of Entry located in El Paso. Chavira was accompanied by a teenage girl. Customs officers took the pair into a passport control secondary processing area, handcuffed Chavira to a chair, and questioned her for 30-45 minutes. During the questioning, Chavira stated that the minor was her daughter and a US citizen when the minor was neither. Chavira was convicted under 18 USC 1001(a) for knowingly and willfully making false statements to a Customs and Border Protection officer. Chavira appealed arguing that the district court erred in denying her motion to suppress statements made during secondary processing because she was not Mirandized.

The Fifth Circuit was presented with the issue whether Chavira's Fifth Amendment rights were violated when customs officers questioned her at secondary processing without giving her the warnings required under *Miranda*. *Miranda* warnings must be given before custodial interrogation which generally occurs when a person is taken into custody or otherwise deprived of his freedom in any significant way. The court examines how a reasonable man in the suspect's position would have understood the situation.

When Chavira was moved into secondary processing, the questioning turned from routine immigration questioning to custodial interrogation. The officers testified that, by this point, they already knew the minor was not Chavira's and was not a citizen. One of the officers further testified that they accused Chavira of not being truthful but did not advise of her rights because they wanted her to make a confession to the crime and make incriminating statements. The Fifth Circuit concluded that a reasonable person would have realized that the officers were asking something more than routine immigration questions. Moreover, Chavira was not free to leave: she was handcuffed to a chair in a small, windowless trailer, surrounded by officers. A reasonable person would associate this with an arrest. Thus, the Fifth Circuit found that Chavira should have been given her *Miranda* warnings and reversed Chavira's motion to suppress statements elicited without *Miranda* warnings.

***Bloate v. United States*, 130 S. Ct. 1345 (2010)**

In a 7-2 opinion written by Justice Thomas, the Supreme Court held that a delay resulting from time spent preparing pretrial motions cannot be automatically excluded under the Speedy Trial Act, which requires that a criminal defendant be brought to trial within seventy days of the later of being arraigned or indicted. This opinion rejected the interpretations of eight federal courts of appeals, finding instead that such time can only be excluded from the speedy trial calculation if the district court finds, on the record, that granting the extra time serves the end of justice.

In this case, Bloate was arrested after a traffic stop led to the discovery of cocaine, drug paraphernalia weapons and cash. After his indictment, Bloate sought an extension of the deadline to prepare and file pretrial motions, which was granted. Bloate then waived his right to file pretrial motions, trial was later delayed and ultimately rescheduled for four months later. Bloate moved to dismiss the indictment under the Speedy Trial Act, which was denied as the district court disregarded most of the time

between the indictment and the trial date. At issue, however, was the delay caused by Bloate's request to extend the time for preparing pretrial motions. The Eighth Circuit found that time to be automatically excluded as "other proceedings concerning the defendant."

Reversing, the Supreme Court refused to read the exclusions in the Speedy Trial Act broadly, requiring instead—based on language in the Act—that a trial court make a finding on the record that delay from trial resulting from continuances serve "the ends of justice" in order to be automatically excluded from calculation under the Speedy Trial Act. In essence, the Court sent a message to Congress through this case to write more clearly when drafting federal statutes.

***Presley v. Georgia*, 130 S.Ct.721 (2010)**

In this *per curiam*, 7-2 opinion, the Supreme Court held that a criminal defendant's Sixth Amendment right to a public trial was violated when the trial court excluded the defendant's uncle from the *voir dire* of prospective jurors.

Presley's uncle was a lone courtroom observer immediately before *voir dire* in Presley's cocaine trafficking trial. The trial court instructed the uncle to leave the courtroom, to which Presley's counsel objected. The trial judge explained that there was insufficient room for the observer, and that he could not be permitted to "intermingle" with the prospective jurors. Presley was convicted and unsuccessfully moved for a new trial based on the exclusion of the public from the jury selection proceedings.

The Supreme Court held that the Sixth Amendment protects a defendant's right to insist that *voir dire* remain public, with some very limited exceptions. Even if the trial court has an overriding interest in closing the proceedings, "[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*." That is, trial courts "are obligated to take every reasonable measure to accommodate public attendance at criminal trials," including *voir dire*. If the trial court does not consider all reasonable alternatives to closure, the proceedings are constitutionally infirm.

In dissent, Justices Thomas and Scalia contend that the majority did not meaningfully consider the important question of whether voir dire is a part of the "public trial" guaranteed by the Sixth Amendment. The dissenters further take issue with the majority's directive that a trial court must *sua sponte* consider reasonable alternatives to closure, as the issue presented by the parties was rather whether the opponent of closure must suggest alternatives to closure, or whether the proponent of closure must show that there is no available less intrusive alternative.

***Berghuis v. Smith*, 130 S.Ct. 1382 (2010)**

In 1993, Diapolis Smith was convicted of second-degree murder in Michigan by a jury composed of all white jurors. Smith and the thirty-six other witnesses to the shooting were African American. The venire panel from which the jury was drawn included no more than three African-Americans in its sixty to one hundred members. Smith appealed his conviction on the ground that he had been denied his Sixth Amendment right to a jury drawn from a fair cross-section of the community, in violation of *Taylor v. Lousiana* (U.S. 1975) and in *Duren v. Missouri* (U.S. 1979).

The Supreme Court, in a unanimous decision, held that Smith had failed to establish that the decision of the Michigan Supreme Court (in rejecting his claim that the jury was not drawn from a fair cross section of the community) "involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States" — the standard of review for *habeas* petitions after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996. Writing for the majority, Justice Ginsburg merely observed that each of the available tests for underrepresentation of a distinctive group "is imperfect." Instead, she based her opinion on the

"systematic exclusion" element of the *Duren* test.

Smith had argued that African-American jurors were systematically excluded by the county's practice of first assigning jurors to local district courts, and only then filling the jury pools of the county-wide courts where Smith and other alleged felons were tried. (A large majority of the African-American residents of Kent County live in Grand Rapids, home to a single local court.) As Justice Ginsburg wrote, "Evidence that African-Americans were underrepresented on the [county-wide] Circuit Court's venires in significantly higher percentages than on the Grand Rapids District Court's could have indicated that the assignment order made a critical difference. But…Smith adduced no evidence to that effect." Justice Ginsburg indicated that "Smith's best evidence of systematic exclusion was…a decline in comparative underrepresentation, from 18 to 15.1%, after Kent County reversed the assignment order," filling the county-wide jury pools first. But even Smith's lawyer had conceded that this was not "a big change."

Smith had also argued that Kent County's practice of excusing potential jurors who alleged hardship or failed to report for jury service, its reliance on notices of jury duty mailed to addresses at least fifteen months old and its decision not to follow up on non-responses, along with the refusal of Kent County police to enforce court orders for the appearance of prospective jurors, collectively amounted to systematic exclusion because each practice was likely to have a disproportionately large impact on African-American potential jurors. Justice Ginsburg rejected these arguments, explaining that "[n]o 'clearly established' precedent of this Court supports Smith's claim that he can make out a *prima facie* case merely by pointing to a host of factors that, individually or in combination, might contribute to a group's underrepresentation." She went on to note that "furthermore, [the Court] has never 'clearly established' that jury-selection-process features of the kind on Smith's list can give rise to a fair-cross-section claim." Quite the opposite: "in *Duren*, the Court understood that hardship exemptions resembling those that Smith assails might well 'survive a fair cross-section challenge.'"

Justice Clarence Thomas concurred. Agreeing that Smith had not shown any violation of clearly established law, Justice Thomas stated that he would be willing in a future case to reconsider the "fair cross-section" precedents, on the grounds that because "[h]istorically, juries did not include a sampling of persons from all levels of society or even from both sexes," the requirement therefore "seems difficult to square with the Sixth Amendment's text and history."

***Skinner v. Switzer*, 131 S.Ct. 1289 (2011)**

Skinner's trial attorney did not seek to have all available evidence tested prior to his capital murder trial. Six years after his conviction and death row sentence, Texas enacted Article 64, which permits prisoners to gain postconviction DNA testing in limited circumstances. Skinner twice moved for such testing, which was denied. Skinner then filed a § 1983 action claiming that the prosecutor's refusal to allow him access to biological crime scene evidence violated his right to due process. The District Court adopted the Magistrate Judge's recommendation that the case be dismissed for failure to state a claim, based on the rationale that postconviction requests for DNA evidence fall under habeas corpus rather than § 1983, and the Fifth Circuit affirmed.

The Supreme Court reversed. Prisoners need not rely on federal habeas proceedings (which may be more restrictive); rather, federal civil rights laws (such as § 1983) may be used to file suits to have DNA evidence tested. As Skinner was challenging the postconviction DNA testing statute "as construed" by Texas courts, not the prosecutor's conduct or the decisions of the Texas courts, the statute or rule governing the decision may be challenged in a federal action, but not the decision itself. The Court emphasized that Skinner would not necessarily win the suit to have the DNA tests

run; the decision is limited to Skinner's ability to bring the claim in the manner in which he did.

***Michigan v. Bryant,* 131 S.Ct. 1143 (2011)**

This is a Confrontation Clause case. Michigan police found Covington mortally wounded. Covington told the police he had been shot by "Rick" (referring to Bryant) outside Bryant's house and had then driven himself away. At Bryant's trial, the officers testified to Covington's statements. Bryant was convicted of second-degree murder. The Michigan Supreme Court reversed the conviction under the Sixth Amendment's Confrontation Clause, holding the statements to be inadmissible testimonial hearsay.

The Supreme Court, much to Justice Scalia's dismay, reversed, holding that Covington's statements (identifying Bryant and the location of the shooting) made during an emergency are admissible not as testimonial statements, but because they had a primary purpose to enable police assistance to meet an ongoing emergency. Therefore, admission of the statements did not violate the Confrontation Clause.

Justice Scalia's dissent follows his rationale in *Crawford v. Washington*, the Court's 2004 landmark case, and its progeny, in which Justice Scalia held that the Confrontation Clause cases makes clear that the Constitution prohibits such out-of-court statements, even though evidentiary rules allowed juries to hear them under some circumstances. Covington's statements should not have been admissible, because the police were investigating a crime when the victim said that Bryant had shot him. Because they were in the course of an investigation, the intent of the police in eliciting the accusation was "testimonial," or intended for use at a future trial. Justice Sotomayor considered that the informality of Covington's interrogation, while awaiting the arrival of emergency medical services, was "fluid and somewhat confused," given the uncertainties of the situation and what officers perceived to be an ongoing emergency with a shooter whose whereabouts were unknown.