RECENT FEDERAL CASES OF INTEREST TO CITIES

TEXAS CITY ATTORNEYS ASSOCIATION
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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 through his mom's school computer and causing the computer system to go down. Harris denied any wrongdoing though 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, 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.

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.

***McKinley v. Abbott,* 643 F.3d 403 (5th Cir. 2011)**

The Fifth Circuit upheld the constitutionality of §§38.12(d)(2)(A) and 38.12(d)(2)(C) of the Texas Penal Code, which limit attorneys, chiropractors, and other professionals from solicitation of employment during the first 30 days following an accident, holding that the provisions do not violate the free speech portions of the Texas and United States Constitutions. In so holding, the Fifth Circuit found that the State has a substantial interest in protecting the privacy of accident victims. In addition, the 30 day period addresses a real harm and does so in a manner which materially alleviates the harm. Finally, the 30 day period is both reasonable and in proportion to the interests served. It should be noted that this case addresses the statute after the 2009 amendments, which include solicitations by telephone and in person, in addition to written solicitations.

***United States v. Cardenas-Guillen v. Hearst Newspapers, LLC,* 641 F.3d 168 (5th Cir. 2011)**

In this case involving the sentencing of a notorious Mexican drug kingpin, the Fifth Circuit determined that the First Amendment requires that the media and public have access to sentencing hearings. Cardenas-Guillen led a drug cartel known as the Gulf Cartel and was charged with involvement in conspiracies to distribute huge amounts of marijuana and cocaine, violation of the "drug kingpin statute," and threatening federal officers. Almost all of the filings in the case were made under seal. The Houston Chronicle intervened in the case, requesting that documents be unsealed and that the district court provide notice and an opportunity to be heard before proceedings were closed. Ultimately, Cardenas-Guillen pled guilty to the charges, but this fact was not made public.

Citing public safety concerns, the prosecution moved to close the sentencing hearing to the public, and the United States District Court for the Southern District of Texas granted the motion under a sealed order. Houston Chronicle staffers discovered the closed hearing and filed a motion requesting the district court to open the hearing and give the Chronicle an opportunity to be heard on the closure. The district court declined to hear the motion, continued the closed hearing, and sentenced Cardenas-Guillen, later denying the Chronicle's motion as moot. Shortly thereafter, a record of the hearing was publicly docketed, and a recording and transcript made available to the public.

The Chronicle again moved to intervene. The district court granted the motion to intervene and denied the Chronicle's request for public notice of all future hearings and for an opportunity to be heard if closure was being

contemplated. On appeal, the Fifth Circuit reversed, holding that the press and the public have a First Amendment right of access to sentencing proceedings and that the Chronicle's right of access was denied without due process when the district court refused to give notice and an opportunity to be heard before it closed the sentencing hearing.

EQUAL PROTECTION AND DUE PROCESS

***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.

EMPLOYMENT LAW

***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.

***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.

***Frame v. City of Arlington* ___ F.3d ___ (5th Cir. Sept. 15, 2011)**

Plaintiffs, who are disabled persons, sued the City of Arlington, alleging that the City violated the ADA by failing to make certain public sidewalks accessible. The District Court originally dismissed the complaint, holding that the cause of action accrued from the date of the City's construction or alteration of the subject sidewalks; accordingly, the complaint was time-barred under Texas's two-year personal-injury statute of limitations. The Fifth Circuit held that sidewalks are "services, programs, or activities" under the ADA, and that the District Court erred by requiring plaintiffs to plead dates of construction. The court concluded that, although the ADA does not require accessibility "at any cost," individuals are granted private rights of action to ensure ADA compliance so long as the accommodations they seek are reasonable. Further, plaintiffs' cause of action did not accrue until the plaintiffs knew, or should have known, of the inaccessible sidewalks, not the moment the non-compliant sidewalk was built or altered.

***Hale v. King,* 642 F.3d 492 (5th Cir. 2011)**

Hale brought claims against his prison superintendent and various other state officials, alleging they had discriminated against him because of his physical and mental disabilities, including chronic Hepatitis C, chronic back problems, and psychiatric conditions (including PTSD). The Court concluded that Hale's complaint adequately pleaded two of the three elements necessary for relief under Title II of the Americans with Disabilities Act; the Court's analysis focused on whether he sufficiently stated a claim that he had a qualifying disability.

Under the ADA, the conditions in question must limit one or more major life activities. The complaint stated that plaintiff needed certain medical treatment for his conditions, or else he would suffer pain, anxiety, and potentially life-threatening complications. The complaint also alleged that plaintiff had lost thirty-six pounds since coming to prison, that he suffered panic attacks, and that his liver was being destroyed. The Court held that these allegations and the medical files that accompanied them were sufficient only to show that plaintiff had the specified conditions—not that they impaired any major life activity.

Title II also allows for relief if Plaintiff could show he was discriminated against because the discriminators believed (mistakenly) that his disabilities limited one or more of his major life activities. The Court determined that the complaint established only that Defendants denied Plaintiff access to prison facilities and programs because of his disability and the facilities' inability to treat him, not because they believed his disability limited his major life functions. The Court acknowledged that "it is possible that the Appellees denied Hale access to these facilities because they mistakenly perceived Hale's impairments as substantially limiting his ability to go to school or work in the prison kitchen, but we cannot say that such a conclusion would be plausible on these facts." Thus the complaint failed to meet the pleading standard articulated by the Supreme Court in *Twombly* and *Iqbal*. However, the Fifth Circuit remanded the case to the District Court to allow Hale to amend his Title II allegations.

***Black v. Pan American Laboratories, LLC,* 646 F.3d 254 (5th Cir. 2011)**

Black alleged various sex discrimination claims and a Title VII retaliatory termination claim against her former employer, complaining that she was subjected to a discriminatory sales quota, compared to a similar male employee. Black contended that her complaints regarding the quota were met with a vice president's reply that the quota shouldn't matter to her, because "you're not the breadwinner anyway." Black also complained about sexually explicit remarks made by management personnel about her body. Some of these same executives eventually decided to terminate Black, allegedly because

she failed to attend sessions at a National Sales Meeting.

At trial, the jury returned a verdict for Black on all three of her discrimination claims (discriminatory sales quota, termination, and retaliation), awarding her in excess of $3 million. The District Court reduced the award to compensate for double recovery of back pay on overlapping claims and to comport with the damages cap under Title VII.

On appeal, the Fifth Circuit found that there was ample evidence to support the jury's finding of sex discrimination, based on comments made by various management employees' sexist comments and sexually inappropriate comments regarding Black's body, as well as one executive's propositioning Black. Furthermore, the Court found that there was sufficient evidence to support the jury's quota discrimination verdict, given the evidence that permitted the jury to conclude that Black's higher sales quota than a similarly situated male employee was motivated, at least in part, by her gender. However, the back pay award on the quota claim was reversed and remanded to the District Court for calculation based on what Black's commission should have been had she had the similarly situated male employee's quota. Finally, the Fifth Circuit found that the District Court correctly applied the § 1981a(b) and Texas law compensatory and punitive damage caps to the total of Black's claims rather than to each claim. Consistent with the D.C., Sixth, Seventh and Tenth Circuits, the Fifth Circuit concluded "that the plain language of § 1981a(b)'s cap applies to each party in an action."

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.

II. SECTION 1983

Fox v. Vice, 563 U.S. __ (June 6, 2011)

In this unanimous opinion written by Justice Kagan, the Supreme Court held that when a Section 1983 suit includes both frivolous and non-frivolous claims, a court may award reasonable attorneys' fees to a defendant that the defendant would not have incurred, but for the frivolous claims.

Vice was the incumbent police chief in Vinton, Louisiana. Fox successfully challenged him, overcoming what he called "dirty tricks" by Vice's campaign. Vice was later convicted of extortion for his conduct in the campaign; nevertheless, Fox sued him in Louisiana state court for state law claims such as defamation as well as federal civil rights claims. Vice removed the case to federal court. After some discovery, Vice filed a motion for summary judgment on the federal claims, which Fox ultimately agreed were not valid. The district court granted the motion and remanded the state law claims to state court.

Vice filed a motion seeking attorneys' fees under 42 U.S.C. § 1988, which the district court granted, awarding Vice fees for all of the work his attorneys had done in the case, even though the state law claims remained pending in state court. On appeal, the Fifth Circuit affirmed, agreeing that the litigation had focused on the frivolous state law claims.

The Supreme Court vacated the Fifth Circuit, remanding the case for consideration of what fees Section 1988 permits: "if the defendant would have incurred [attorneys' fees] anyway, to defend against non-frivolous claims, then a court has no basis for transferring the expense to the plaintiff." That is, a prevailing defendant can receive only that portion of fees that he would not have paid but for the frivolous claim. The Court clarified that no costs related to non-frivolous claims would be recoverable; rather, in some circumstances prevailing defendants could recover fees arising from work relating to both frivolous and non-frivolous claims, for example when a defendant demonstrated that "a frivolous claim involved a specialized area that reasonably caused him to hire more expensive counsel for the entire case." The Court gave district courts significant discretion to achieve what it described as "the essential goal in shifting fees:" "to do rough justice."

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.

***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.

***Enochs v. Lampasas County,* 641 F.3d 155 (5th Cir. 2011)**

Enochs filed Section 1983 and 1985 federal law claims in state court against Lampasas County. In addition, Enochs brought state law violations, including the Texas whistleblower statute. The County removed the case to federal district court. The District Court found removal was proper and that the District Court could exercise supplemental jurisdiction over the state law claims. Enochs then moved to amend his complaint to delete his federal law claims and to remand the case to state court for decision on the remaining pendent state law claims. The District Ccourt granted Enochs' motion to drop his federal claims, but denied the motion to remand the case to state court.

Summary judgment was granted to the County, whereupon Enochs appealed the decision to retain the case in federal court. The Fifth Circuit reversed the denial of Enochs' request to remand the case to state court and ordered the District Court to remand the state law claims to the state district court where they were originally filed. The Court identified four factors set forth in 28 U.S.C. § 1367(a): (1) whether the state claims raise novel or complex issues of state law; (2) whether the state claims substantially predominate over the federal claims; (3) whether the federal claims have been dismissed; or (4) whether exceptional circumstances or other compelling reasons exist to decline jurisdiction. Additionally, courts must consider other common law factors,

including judicial economy, convenience, fairness, and comity. The Fifth Circuit panel found that all of these factors weighed, at least to some degree, in favor of remand to state court. The Court also considered whether the possibility of forum manipulation on Enochs' part militated against remand, but concluded that the possibility of forum manipulation did not outweigh other factors that supported remand to state court.

***Lampton v. Diaz*, 639 F.3d 223 (5th Cir. 2011)**

A federal prosecutor (Lampton) prosecuted Diaz, a Mississippi Supreme Court justice, and his wife for fraud, bribery and tax evasion. The justice was acquitted but his wife pleaded guilty to tax evasion. Lampton then filed a complaint with the Mississippi Commission on Judicial Performance regarding Diaz' conduct, including copies of tax records obtained during the criminal investigation. That complaint was later dismissed.

The Diazes brought a § 1983 suit against Lampton, complaining of the release of the tax records (under various federal statutes that prohibit the release of tax returns obtained by public officials in the course of their duties) and also incorporating state law claims. Lampton filed a Rule 12(b)(6) motion to dismiss the § 1983 claim under absolute prosecutorial immunity. The District Court denied the motion, and Lampton appealed.

The Fifth Circuit affirmed the District Court's decision, explaining that at the time of the enactment of §1983, common-law prosecutorial immunity extended only to "conduct that is intimately associated with the judicial phase of the criminal process." Lampton's conduct took place after the prosecution was over and was thus not part of the "judicial phase;" furthermore, the state ethics proceeding was not part of the "criminal process." The Court also rejected Lampton's contention that his ethical duty to report the alleged misconduct under the Mississippi Rules of Professional Conduct should have allowed him to invoke absolute immunity. The Fifth Circuit noted that Lampton could have satisfied his ethical duty and reported the Diazes' misconduct to the Commission without releasing their tax records. Finally, the Court explained that the various policy concerns underlying prosecutorial immunity, including the goal of protecting prosecutors from liability on the basis of their independence and judgment, did not justify immunity in this context.

***Greater Houston Small Taxicab Company Owners Association v. City of Houston,* 550 F.3d 235 (2011)**

On December 12, 2007, the Houston City Council (the "City") passed an ordinance authorizing 211 additional taxicab permits to be allocated over the next four-year period. Permits were to be allocated based on the size of the taxi company, whereby smaller companies would far fewer new permits than larger companies.

The Greater Houston Small Taxicab Company Owners Association (the "Association") represents approximately 60 of the 117 small taxi companies that each hold one to three taxi permits. The Association filed an action under 42 U.S.C. §1983 against the City in May 2008, arguing that the distribution proposal in the Ordinance violated the Fourteenth Amendment's Equal Protection Clause. The Association obtained a temporary restraining order and then sought declaratory and injunctive relief. The City Moved to dismiss. The court converted the motion to dismiss into a motion for summary judgment and held for the City. The Association timely appealed.

On appeal, the Association contends the Ordinance violates equal protection by drawing impermissible distinctions between taxi companies based on their size. Such a scheme would prevent the growth of small companies.

In affirming the district court, the Fifth Circuit reiterated the standard of review in this constitutional challenge is the rationale basis test, whereby the Ordinance need only "find some footing in the realities of the subject addressed by the legislation." (citation omitted).

In failing to show the Ordinance had no legitimate purpose, the Association failed to show how the Ordinance harmed consumers or fostered economic protectionism.

***United States v. Macias*, 658 F.3d 509 (2011)**

On November 22, 2009, Trooper Juan Barragan stopped Robert Macias, Jr. for failure to wear his seatbelt. Upon stopping the defendant, Trooper Barragan started asking him questions. His initial questions dealt with common issues such as the defendant's purpose for traveling and the defendant's lack of insurance. As time went on Trooper Barragan began asking more and more questions unrelated to the reasons he stopped the defendant in the first place. After his initial questions, the trooper asked the defendant about his employment and the specific reason he was traveling to see a doctor. The trooper also repeated questions that the defendant had already been asked and had answered. The initial exchange between the two took approximately two minutes.

After the initial exchange, the trooper asked the defendant to come back to his patrol car with him. The trooper then began to ask the defendant another series of questions. Trooper Barragan asked if the defendant had his "own little company" and if he had ever "been in trouble before." This second series of questions lasted approximately one minute. The trooper then went back to the defendant's vehicle (it was actually the defendant's sister's vehicle) and asked the defendant's passenger a series of questions regarding her relationship with the defendant and the purpose of their trip. Two more minutes elapsed during this series of questions. The trooper then went back to the defendant and asked him more questions at which point he elicited from the defendant that he had been previously imprisoned for an attempted murder conviction. The trooper then told the defendant that he was going to go back to his patrol vehicle and write him a citation for failure to wear his seatbelt. Eleven minutes elapsed from the time that the defendant had been pulled over to the time that he received the citation.

Ten minutes after returning to his patrol car, the trooper returned to the defendant and gave him the citation. The defendant signed the citations. Then, just as the trooper was about to leave, he asked the defendant for consent to search his vehicle. The defendant protested that there was nothing in the vehicle, but he ultimately gave consent to search the truck after his protestations were met by the trooper noting that the defendant has a "shady" background. Seventeen minutes after he began the search of the truck, and forty-seven minutes after initiating the stop, Trooper Barragan found an unloaded firearm and ammunition in a closed bag belonging to the defendant.

A grand jury indicted Macias for being a felon in possession of a firearm. Macias moved to suppress the firearm as fruits of an unconstitutional detention. The district court denied Macias's motion to suppress and Macias entered a conditional plea of guilty with the option to appeal the district court's denial.

The Fifth Circuit analyzed the legality of the stop based on the traditional *Terry v. Ohio* analysis. 392 U.S. 1 (1968). The Court first looked to whether the stop of the vehicle was justified at its inception and then whether the officer's subsequent actions were reasonably related in scope to the circumstances that justified the stop of the vehicle in the first place. Macias conceded that the stop was valid, but that the Trooper exceeded the scope of the stop when he asked questions unrelated to the purpose and itinerary of the trip. Macias argued that these questions impermissibly extended the duration of the stop without developing reasonable suspicion of additional criminal activity.

The Court cited various cases including *United States v. Pack*, 612 F.3d 341 (5th Cir.), which held that an officer may ask questions on subjects unrelated to the circumstances that caused the stop, so long as these unrelated questions do not extend the duration of the stop. Macias's argument was that the Trooper's actions after the stop unconstitutionally extended

the duration of that stop. Macias specifically noted that the trooper ran computer checks, engaged in detailed questioning about matters unrelated to Macias's driver's license, his proof of insurance, the vehicle registration, or the purpose of the itinerary of his trip that unreasonably prolonged the detention without developing reasonable suspicion of additional criminal activity. The Fifth Circuit agreed.

The Fifth Circuit noted that the only evidence that the trooper could point to that might lead to reasonable suspicion of additional criminal activity was Macias's extreme nervousness. It held that extreme nervousness in and of itself was not sufficient to support the extended detention.

The Fifth Circuit ultimately concluded that the search of the truck violated the Fourth Amendment and that all evidence resulting from that search should have been suppressed. Macias's judgment of conviction was reversed and vacated and the case was remanded for entry of judgment of acquittal.

***Short v. West*, 662 F.3d 320 (2011)**

Plaintiff Michael Short ("Short") is an officer in the El Paso Police Department ("EPPD"). He was assigned to a narcotics task force, and was cross-deputized by the District Attorney, Jaime Esparza, to be a narcotics task force officer for the 34th Judicial District. The 34th Judicial District includes both El Paso and Hudspeth counties.

On December 4, 2008, members of the task force, including Officer Short, went to Hudspeth County after hearing a tip that narcotics would be traveling from Hudspeth County to El Paso County. Short wore his uniform and was in a marked EPPD vehicle. In Hudspeth County, Short stopped a car matching the description of the suspected vehicle. During the traffic stop, a Hudspeth County Sheriff Department ("HCSD") deputy, Laura Galvan ("Galvan"), arrived on the scene. After the traffic stop was completed, Galvan asked Short about his purpose in Hudspeth County, and Short explained the nature of his assignment. Satisfied with his identification, Galvan offered to assist Short if needed, and returned to her unit. Galvan then notified HCSD dispatch about the presence of EPPD officers in Hudspeth County and the purpose of their assignment.

HCSD dispatch contacted Sheriff West at home to inform him of the EPPD officers' presence and that they were performing traffic stops in Hudspeth County. Sheriff West is the top law enforcement officer in Hudspeth County. He knew that cloned police cars had been used by criminals in the area, so he decided to investigate the EPPD officers' presence personally. Sheriff West instructed dispatch to contact his deputies and find out whether the EPPD officers were in fact law enforcement personnel. Further, Sheriff West ordered the deputies to round up the task force officers and escort them to his office in Sierra Blanca. HCSD dispatch then notified the HCSD deputies of Sheriff West's orders.

HCSD Lieutenant Robert Wilson ("Wilson"), responding to Sheriff West's orders, located Short's operational supervisor, EPPD Sergeant Steven Lopez ("Lopez"), and asked to see Sergeant Lopez's identification. Sergeant Lopez produced identification showing him to be an officer with the EPPD and the task force, and as a cross-deputized agent of Immigration and Customs Enforcement. Lieutenant Wilson returned Lopez's identification without examining it. Wilson instructed Lopez to round up the task force members and follow him to the HCSD office in Sierra Blanca. Sergeant Lopez refused and indicated the task force would return to El Paso County. Lieutenant Wilson reiterated his instructions, and, upon Lopez's further refusal to follow him, contacted Sheriff West to apprise him of the situation. Sheriff West instructed Lieutenant Wilson to escort the officers to the Fort Hancock Substation in lieu of the Sierra Blanca HCSD office.

In the meantime, Sergeant Lopez contacted EPPD Lieutenant Fernando Yañez ("Yañez") via cell phone. Yañez asked to speak to Lieutenant Wilson, and, Lopez having passed the phone to Wilson, asked Wilson what charges were being brought against the task force

officers. Wilson indicated that no charges existed, but stated Sheriff West had ordered that he round up the task force. Lieutenant Yañez stated that such an order violated the constitutional rights of the task force officers. Wilson handed the phone back to Sergeant Lopez and reiterated his order three times that Lopez round up the task force and accompany Wilson to Fort Hancock, raising his voice each time. Finally, Sergeant Lopez contacted the task force members and ordered them to return to El Paso County, as he prepared to follow Lieutenant Wilson to Fort Hancock.

On Sergeant Lopez's command, Officer Short drove toward the location of EPPD Officer Mike Tevis ("Tevis") to inform him of Lopez's order, leaving the company of EPPD Officer Herman Joe Hicks ("Hicks"), as Hicks began to return to El Paso County. Having located Tevis, both Tevis and Short then caravanned toward Interstate 10 West ("I-10"), but were delayed as a crossing train blocked their route. While waiting for the train, they received a radio communication from Officer Hicks indicating he was surrounded by five to seven HCSD deputies just over the I-10 overpass. Hicks stated he had been ordered to return to the Fort Hancock substation with the HCSD deputies.

Once the train passed, Officers Tevis and Short traveled to Hicks' location and observed the HCSD blockade. Tevis and Short stopped, and, at that point, an HCSD deputy drove his car to block the officers' path forward, and another HCSD officer pulled behind Tevis to block their retreat, surrounding Officers Tevis and Short. An HCSD deputy then approached Short's vehicle and, standing with his belt buckle to Short's driver's side window, ordered Short and Tevis to return to the Fort Hancock substation. The HCSD deputy further informed Short that he would be arrested if he failed to comply. Short contacted Sergeant Lopez via radio to inform him of his situation. Sergeant Lopez ordered Short to comply and not to resist.

Officers Tevis, Hicks, and Short were then escorted by the HCSD officers to the Fort Hancock substation, where they met Sergeant Lopez. Each officer drove his own vehicle and remained in possession of his service weapon. Sheriff West, arriving shortly thereafter, spoke with the officers for between twenty to thirty minutes. Specifically, West stated that he had not been notified of the task force's operation within his jurisdiction, and that he would receive future notice of any such activity. None of the task force officers were asked to produce identification, nor were they taken inside the Substation. Sheriff West concluded the meeting by stating that whatever the task force was working on "is f***** up now." He then informed the task force officers that they were free to leave.

Short thereupon sued Hudspeth County and Sheriff West under 42 U.S.C. § 1983 for violation of his rights under the Fourth Amendment. Both Hudspeth County and Sheriff West filed for summary judgment. The district court granted summary judgment for Hudspeth County, but not for West, finding that genuine disputes of material fact precluded a determination of the application of qualified immunity. In particular, the district court found genuine disputes existed as to West's knowledge of Short's status as an EPPD officer and Short's authority to operate in Hudspeth County as part of the 34th Judicial District task force.

On appeal, Sheriff West's challenged whether the facts on record create a genuine dispute as to whether Short was detained without reasonable suspicion and arrested without probable cause, and whether West acted reasonably in light of clearly established law. However, the district court found the record supported an inference that West, despite this knowledge, ordered the arrest of Officer Short, as well as the other task force members. Sheriff West's argument that the evidence shows he merely requested to meet with the task force officers, and that he did not know of the task force's existence or the authenticity of the EPPD officers, clearly indicates a genuine dispute of material fact, as the district court found, but does not show a legal error in the district court's judgment. Instead, the district court found that the record, when viewed as a whole and in the light most favorable to Short, supported a finding that Short was seized for Fourth

Amendment purposes. In particular, the district court found the HCSD deputies' surrounding of the EPPD officers' vehicles, preventing either their continued path to I-10 or retreat, the menacing behavior and tone of the HCSD officer who approached Short's vehicle, and the threat of arrest if Short did not comply constituted a sufficient show of force that a reasonable person in such a situation would not feel free to leave. Finding no error in the district court's analysis, the Fifth Circuit affirmed the district court and dismissed the appeal.

***Brown v. Strain*, 663 F.3d 245 (2011)**

Deputy Bryan Steinert stopped a vehicle driven by Anthony Brown. During the course of the stop, Steinert searched the vehicle and discovered an empty pill bottle and a plastic bag containing cocaine residue. Steinert proceed to arrest Brown and his two passengers, Billy Smith and Casey Lane. Placing them in the back of the patrol car, Steinert also began digitally recording the suspect's conversation.

While in the back of the patrol car, Brown moved his handcuffed hands from behind his back and reached into Lane's underwear, retrieving a plastic bag containing up to nine grams of cocaine and one Soma pill. He proceeded to swallow the bag.

After the tow truck took away the suspect's car, Steinert drove to the sheriff's annex in Slidell, Louisiana where he listened to the audio conversation of the suspect's conversation. Steinert then first learned that one of the suspects had swallowed something, but claims he was unable to determine who or what. Steinert, however, did not ask if the suspects had swallowed anything or if they needed medical attention; nor did the suspects volunteer such information.

About two hours after arriving at the annex, Steinert drove the suspects to the jail in Covington, Louisiana. Lane asserts that during this trip that she told Steinert that Brown had swallowed a bag containing cocaine and that he was "acting funny." Smith similarly claims he told Steinert that Brown was sick. In contrast, Steinert asserts he did not hear Lane or Smith's statements regarding Brown needing medical attention; rather he first learned Brown had swallowed a bag of cocaine when they arrived at the jail.

After arriving at the jail, Brown collapsed on the floor. None of the jail personnel, however, proffered medical attention while the ambulance was being called. In the ambulance, Brown suffered two heart attacks and a severe shortage of oxygen to the brain, leading to permanent brain damage. Consequently, in February 2009, Brown filed suit against Steinert, among others, for negligence and for deliberate indifference based on the Eighth and Fourteenth Amendments under 42 U.S.C. §1983. Defendants moved for summary judgment on all claims, which the district court partly granted and partly denied. Only two of the §1983 claims were appealed to the Fifth Circuit, regarding the qualified immunity defense.

Whenever a "district court denies an official's motion for summary judgment predicated upon qualified immunity, the district court can be thought of as making two distinct determinations, even if only implicitly…. First, the district court decides that a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law…. Second, the court decides that a genuine issue of fact exists regarding whether the defendant(s) did, in fact, engage in such conduct." (Citations omitted). Regarding the first element, the district court found that if Steinert knew Brown needed immediate medical attention, his refusal would be objectively unreasonable. Steinert, however, did not appeal this determination. Rather, Steinert only appealed the district court's second determination that the evidence Plaintiffs provided established at least a genuine issue of material fact as to whether Steinert was aware Brown had swallowed the bag of cocaine. However, an appellate court lacks jurisdiction to review factual conclusions of the second type on interlocutory appeal. An appellate court only has jurisdiction "to decide whether the district court erred in concluding as a matter of law that

officials are not entitled to qualified immunity on a given set of facts." (Citations omitted). Accordingly, Steinert's appeal was dismissed for lack of jurisdiction.

***Rockwell v. Brown*, 664 F.3d 985 (2011)**

In February 2006, six police officers breached the locked door of Scott Rockwell's private bedroom. Scott was a 27-year old, who lived with his parents. Scott suffered from schizophrenia and suicidal tendencies, which were exacerbated due to the fact he had stopped taking his medication. On the given evening, Scott was in his room hitting the walls and cursing. At one point he came out of this bedroom and raised his fist to his mother. Shortly afterwards, Scott's parents called 911, fearing he had become a danger to himself and others. Officers Ohlde, Raley, and Burleson responded to the call. Scott's mother told the officers of Scott's medical condition and that he might be taking illegal substances.

The officers attempted to communicate with Scott through his bedroom door. Scott began threatening the officers. At this point, Lieutenant Brown and two more officers, Garcia and Scicluna, were called to the scene. When Lt. Brown arrived, a decision was made to arrest Scott, based on the assault by threat made earlier in the evening and the concern he might harm his parents if the officers left without Scott in custody.

After several attempts to convince Scott to come out of his room failed, the officers decided to breach the door, which Scott had barricaded. As soon as the officer's breached the bedroom door, Scott rushed towards the officers holding two eight-inch knives, one in each hand. During the scuffle, Lt. Brown was pushed into the bathroom, breaking the commode, and Scicluna was injured by one of Scott's knives. Quickly thereafter, the officers shot at Scott. Four shots hit Scott and one hit Officer Raley. Scott died from the gunshot wounds.

In February 2008, Scott's parents sued the officers for excessive force, assault and battery, and unlawful entry. In June 2008, the magistrate judge recommended to the district court that the officer's motion for summary judgment be granted. The district court adopted the magistrate judge's recommendation and entered summary judgment in favor of the officers in August 2008. The Rockwells appealed.

In affirming the district court's grant of summary judgment on all claims, the Fifth Circuit reiterated the law on qualified immunity and found that under the totality of the circumstances, it was objectively reasonable for the officers to believe that Scott posed a significant and imminent threat of serious physical harm to one or more of the officers. Consequently, the Court found the officer's use of deadly force was justified.

On the issue of whether the officers violated Scott's Fourth Amendment right against a warrantless intrusion, the Court found that no reasonable officer could have believed Scott gave consent merely by saying "come on in," when coupled with expletives, threats, and violent behavior. Therefore, unless there was probable cause or exigent circumstances, the officers' acted without authority. On that issue, the Court addressed whether a threat a suspect poses to himself may constitute an exigent circumstance. Despite the dearth of binding Supreme Court or Fifth Circuit case law on point, the Court concluded "that, at the time of the incident in this case, it was not clearly established that it was unreasonable for the officers to believe that the threat Scott posed to himself constituted an exigent circumstance." Thus, the Court held that the officers were entitled to qualified immunity on the Rockwell's claim for warrantless entry.

***Cantrell v. City of Murphy,* 666 F.3d 911 (2012)**

In Cantrell, the Fifth Circuit again addressed an interlocutory appeal from the denial of qualified immunity. In October 2007, Ave Cantrell was at home with her two young

sons, Creighton and Matthew. While they were watching a movie, Matthew wandered off to the backyard. Discovering him missing, Cantrell searched frantically, finally discovering Matthew strangled in an outdoor soccer net. Before carrying her son back into the house, Cantrell called 911 hysterically. Officers Dacey and McGee responded to the 911 dispatcher's call to the house. Lieutenant Barber joined them later. When entering the home, the officer's heard Cantrell screaming. After moving Cantrell into an adjacent room, Dacey noticed the strangulation marks around Mathew's neck and concluded that "foul play" may have been involved. Accordingly, Dacey designated the home a crime scene. Upon making this designation, the officers kept Cantrell in the master bedroom. Cantrell soon after began making suicidal threats and cursed at the officers.

Soon after the paramedics' arrival, the officers advised that the home was a crime scene and that Matthew appeared to be deceased. While Matthew had no signs of life or spontaneous respiration, his head and torso were very warm. The paramedics therefore concluded that Matthew was still a viable patient. Despite their life-saving efforts, Matthew remained pulseless when he arrived at the emergency room.

After the paramedics left, the officers detained Cantrell in her home and later at the Murphy police station in an attempt to interview her and determine whether the home was in fact a crime scene. Due to her repeated suicidal statements, Cantrell was transferred to a mental facility later that same night. Cantrell was released the next day. Tragically, Matthew died several days later.

In May 2009, Cantrell filed suit under 42 U.S.C. §1983 alleging the officers violated her Fourth, Fifth, and Fourteenth Amendment rights. Cantrell also averred several state law claims. In November 2009, the officers moved for summary judgment on qualified immunity on all the constitutional claims. The district court granted the summary judgment on all grounds, except as to Cantrell's "special relationship" theory of relief under the Due Process Clause and her assertion that her Fourth Amendment rights.

On appeal, the officers contend that the district court erred in not granting them qualified immunity on Cantrell's due process and Fourth Amendment claims. Cantrell's Fourth Amendment argument hinged on the creation of "special relationship" between the officers and Matthew, after the officers removed Cantrell from Matthew's side and failed to provide ongoing medical treatment.

In reversing the district court, the Fifth Circuit reiterated that generally the Due Process Clause confers no affirmative right to governmental aid, even when necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. However, a special relationship exception does exist for a certain class of people in the custody of the state (e.g., foster care). However, Cantrell failed to satisfy her burden of demonstrating the inapplicability of the officers' qualified immunity defense. Since the line of foster care cases Cantrell relied upon was factually distinguishable, they could not have provided the officers notice of an affirmative constitutional duty to provide medical care to Matthew. Because this putative right was not clearly established, the officers are entitled to qualified immunity.

***United States of America v. Cavazos*, 668 F.3d 190 (2012)**

Early one morning in September 2010, Cavazos woke to banging on his front door. Officers of the U.S. Immigration and Custom Enforcement ("ICE"), U.S. Marshalls, Texas Department of Public Safety, and local Sherriff's department were executing a search warrant, based on the belief that Cavazos had been sending sexually explicit texts to an underage female. Approximately, fourteen law enforcement personnel entered Cavazos' home.

Cavazos was removed from the master bedroom, handcuffed, and later detained in his son's room for questioning by two officers. He

was told that this was a "non-custodial interview" and that he was free to get something to eat and drink or use the restroom. The officers began questioning Cavazos without reading him his Miranda rights. When asked to use the restroom, Cavazos was followed and observed. When asked whether Cavazos could call his supervisor at work, the officers angled the phone in such a manner to listen to the conversation.

Cavazos eventually admitted to "sexting" several minor females and wrote out a statement. Thereafter, Cavazos was arrested and read his Miranda rights for the first time. While the interrogation of Cavazos lasted for more than one hour, the officers were always amiable and nonthreatening.

Subsequently, Cavazos was indicted for coercion and enticement of a child. In November 2010, Cavazos moved to suppress the statements he made before he was read his Miranda rights. At the suppression hearing, the judge granted Cavazos' motion. Thereafter, the Government filed this interlocutory appeal.

In affirming the district court, the Fifth Circuit found that under the totality of circumstances, Cavazos was in custody for Miranda right purposes. Despite being interrogated in his home, the officers constantly maintained physical dominion over Cavazos, including handcuffing him, following him to the rest room, and eavesdropping on his private phone calls. The fact that the officers informed Cavazos that the interview was "non-custodial" was not a "talismanic factor." In short, no single circumstance is determinative in the inquiry required by Miranda and the court will make no categorical determination. In totality of the circumstances presented in this case, and in the light most favorable to Cavazos, the Court found no reasonable person in Cavazos' position would feel "he or she was a liberty to terminate the interrogation and leave."

***Elizondo v. Green and City of Garland*, 671 F.3d 506 (2012)**

In March 2009, 17 year-old Ruddy came home late at night and was found by his mother holding a knife to his abdomen. Ruddy's sister called 911, afraid Ruddy might hurt their mother, who was attempting to take the knife away from Ruddy. Officer Green responded to the 911 call. When Green arrived at the scene, he was directed to Ruddy's room. Ruddy was unhurt, but still holding the knife to his abdomen. Refusing to put down the knife, Ruddy shouted at Green to "shoot me." Despite Green's warning to stay away, Ruddy came closer to Green and raised the knife. Green shot Ruddy in the chest, shoulder, and abdomen. Ruddy died from his wounds.

Ruddy's parents filed suit against Green and the City of Garland, asserting excessive force under §1983. Green moved for summary judgment on his qualified immunity defense, which the district court granted. On appeal, the Fifth Circuit agreed with the district court's finding that Green's use of deadly force was not clearly unreasonable. Ruddy ignored repeated instructions to put down the knife he was holding and seemed intent on provoking Green. Ruddy was hostile, armed with a knife, in close proximity to Green, and moving closer. Considering the totality of the circumstances in which Green found himself, it was reasonable for him to conclude Ruddy posed a threat of serious harm.

***Lindquist v. City of Pasadena, Texas*, 669 F.3d 225 (2012)**

The Lindquists, long-term operators of use-car dealerships, bought claims for violation of their due process and equal protection against the City of Pasadena. In 2003, the City enacted an ordinance adopting standards for used-car dealers. The ordinance criminalizes the sale of used cars without a license and imposes a number of set-back rules for new licenses. The 1000' Rule requires new license locations to be 1000' from the nearest existing licensed location. The 150' Rule requires that a new license be 150' from the lot lines of a residential area. The ordinance also contained a grandfather clause.

After this ordinance was enacted, the Lindquists wished to purchase two lots to expand their used-car dealership. The officials, however, informed them that the lots violated either one or both of the 1000' and 150' rules. Nevertheless, the Lindquists purchased one of these lots, previously used as a gas-station, and applied for a used-car dealership license.

Subsequently, the Lindquists discovered their competitors, the Nielsens, had purchased the other lot. The City similarly denied the license based on a violation of the 1000' rule. The Nielsens appealed, arguing their location was grandfathered because it still had an active used-car dealership license. After deliberations, the City ultimately granted the Nielsens a license.

The day after the Nielsens' hearing, the Lindquists again applied for a used-car dealership license and were denied. The Lindquists appealed and were again denied.

Two years after the City denied the Lindquists' appeal, the City addressed another appeal for a different lot owned by Chambers. That lot was also previously used as a car-dealership, but violated the 150' rule. Chambers submitted letters from the near-by residents stating they did not object to having a car dealership on the property. Accordingly, the City granted Chambers a license.

In 2006, the Lindquists filed suit, asserting (1) unbridled discretion by the City in violation of the Due Process Clause and Equal Protection Clause; (2) that the City grants licenses to similarly situated dealers with no rational basis in violation of the Lindquists' right to equal protection; and (3) that the City's denial of the Lindquists' license application violated due process. The City filed a motion to dismiss, which the district court granted. After several rounds of appeals, remands, and further appeals, the only issues remaining were the Lindquists' equal protection and "unbridled discretion" claims.

Regarding their equal protection claim, Lindquists argue that the City treated them differently than others similarly situated in violation of their constitutional right to equal protection. In order to be similarly situation, however, comparators must be *prima facie* identical in all relevant aspects. Finding that the Lindquists failed to meet their burden, the Fifth Circuit found that the Lindquists' comparators, the Nielsens and Chambers, were not similarly situated. First, the 1000' requirement the Lindquists failed to satisfy was not at issue in the Chambers' appeal. Rather, Chambers not only appealed a different requirement in the ordinance (the 150' rule), they also showed the residents supported their appeal by signing letters. Second, the Nielsens' property had previously been used as a used-car dealership.

In addressing the Lindquists' unbridled discretion claim, the Fifth Circuit agreed with the district court when it pointed out that while a government actor's actions might be illegal under state or local law does not mean they are irrational for purposes of the Equal Protection Clause. The Court refused to bootstrap state law to the Fourteenth Amendment, as it would serve no legitimate purpose.

***Bishop v. Arcuri and City of San Antonio*, 674 F.3d 456 (2012)**

In this no-knock search case, Detective Arcuri received an informant's tip that a home was being used to "cook methamphetamine." Arcuri then obtained a warrant to search for methamphetamine from a magistrate judge.

After conducting a cursory visual inspection of the home, Arcuri decided to execute the warrant without knocking or announcing his team's identity and purpose. His supervising sergeant approved the no-knock. Arcuri's team comprised of eight officers then forcibly entered the house by battering down the front door. Both female occupants, in various states of undress, were handcuffed and detained. The officers' search failed to produce any evidence of drugs, even with a narcotics dog. After approximately one hour and 45 minutes, the officers left and dropped the investigation.

Bishop filed suit alleging excessive force, false arrest, and unreasonable search pursuant to 42 U.S.C. §1983. The district court dismissed all of Bishop's claims. Bishop appealed.

Reviewing the district court's grant of qualified immunity de novo, the Fifth Circuit considered whether Arcuri violated any "clearly established statutory or constitutional rights of which a reasonable person would have known." The specific question before the Court, however, was whether exigent circumstances justified Arcuri's decision to enter the home without knocking and announcing.

Arcuri argued two exigent circumstances justified his actions, namely evidence destruction and officer safety. However, because Arcuri relied almost exclusively on generalizations that are legally inadequate to create exigent circumstances, the Court concluded that the no-knock entry was unreasonable under the Fourth Amendment. For example, nothing in Arcuri's briefing or deposition testimony suggests that he had any reason to believe that evidence was in danger of being destroyed before the inhabitants knew the police were on the premises. Thus, nothing in the record indicates that the risk of evidence destruction had ripened into "exigent circumstances" sufficient to justify a no-knock entry at the time before Arcuri's team entered. For similar reasons, the Court rejected Arcuri's argument that the officers' safety rose to an exigent circumstance.

***Florence v. Board of Chosen Freeholders of the County of Burlington,* 132 S.Ct. 1510 (2012).**

Albert Florence was arrested by a New Jersey state highway patrolman on March 5, 2005. The officer had stopped the vehicle in which Florence was riding; his wife, April, was driving. The state trooper checked official records, and found that there was an outstanding warrant for Florence's arrest. The warrant, from Essex County, had been issued on the premise that Florence had not paid a fine. However, Florence had with him in the car a copy of a court record showing that, in fact, he had paid that fine. The officer would not accept the document; Florence was handcuffed, and taken to a state police barracks. The officer issued no traffic citation, either to Florence or to his wife. Florence was then taken to the Burlington County jail.

His lawyers have told the Supreme Court that he was then held for six days, that no effort was made to check whether he had paid the fine, and that he was not taken before a judge even though New Jersey law required that such an encounter occur for a jailed person after 72 hours. Mrs. Florence, after visiting several courthouses, finally obtained a document to prove that the fine had been paid, but that did not lead to her husband's immediate release. Over the course of six days, he was strip-searched twice, once in each county's jail. After the second strip-search, he was taken before a judge the next day; the judge said he was "appalled," and ordered Florence's immediate release.

Florence turned the episode into a lawsuit against the two counties' governments, their jails, police officers, an unnamed ("John Doe") state trooper, and jail employees. He claimed his Fourth Amendment rights had been violated by strip-searches done without any suspicion that he posed a threat to jail security. A federal District judge upheld his constitutional claim, and the case went to the Third Circuit Court before a trial on the merits of Florence's claim. The Circuit Court treated Florence's claim as one of first impression. Applying *Bell v. Wolfish*, the appeals court found no violation of Florence's rights. The vote was 2-1.

Florence's lawyers took the case to the Supreme Court. The question presented was whether the Fourth Amendment permits a jail to conduct a suspicion-less strip search whenever an individual is arrested, including minor offenses? Justice Anthony M. Kennedy, writing for the 5 to 4 majority, affirmed the lower court, holding that the strip searches for inmates entering the general population of a prison do not violate the Fourth Amendment. The Court concluded that a prisoner's likelihood of

possessing contraband based on the severity of the current offense or an arrestee's criminal history is too difficult to determine effectively. The Court pointed out instances, such as the arrest of Ted Kaczynski, in which an individual who commits a minor traffic offense is capable of extreme violence. Correctional facilities have a strong interest in keeping their employees and inmates safe. A general strip search policy adequately and effectively protects that interest. The Court did note that there may be an exception to this rule when the arrestees are not entering the general population and will not have substantial contact with other inmates.

***Filarsky v. Delia,* 132 S.Ct. 1657 (2012).**

One issue that the Court confronts on a fairly regular basis is that of immunity from lawsuits – whether and when government officials can be sued for their conduct on the job. In *Filarsky v. Delia*, the Court considered this question: can a private person hired by the government to provide services be sued for the things that he does while working for the government? In an opinion by the Chief Justice, the Court unanimously agreed that he cannot.

The events that led to the case before the Court began when respondent Nicholas Delia, a firefighter, was injured on the job. While Delia was on leave to recover, city officials began to suspect that perhaps he was not so sick after all. Those suspicions were only heightened when the private investigator who the city hired to follow Delia saw him buy building supplies at a local store.

The city's next step was to hire petitioner Steve Filarsky, a private attorney, to head a formal investigation. During an interview with Filarsky, Delia admitted that he had purchased the supplies, but he maintained that he had not used them yet, and he refused to show them to Filarsky and city officials until he was eventually ordered to do so.

Delia then filed a lawsuit against city officials and Filarsky under 42 U.S.C. § 1983, against the City of Rialto, the City of Rialto Fire Department, and Filarsky. Delia contended that the order to produce the building materials violated his Fourth Amendment right to be free from unreasonable searches and seizures. The court granted summary judgment in favor of the City on grounds that Delia failed to establish municipal liability against the City and that the individuals were entitled to qualified immunity. Delia appealed the decision, and the U.S. Court of Appeals for the Ninth Circuit reversed the district court as to Filarsky only. Filarsky appealed.

Chief Justice John G. Roberts, writing for a unanimous court, reversed the Ninth Circuit's decision as to Filarsky. When determining whether an individual can be sued under the civil rights laws, one important factor that the Court considers is whether the person who is trying to avoid liability could have been sued when the civil rights laws were enacted in 1871. The Court's opinion begins with this point, as well as a lengthy history lesson which emphasizes that in the nineteenth century government as we know it was much smaller, and many important government activities were carried out by private individuals: for example, before becoming president, Abraham Lincoln would occasionally prosecute criminal cases, even though he was a lawyer in private practice. Because these individuals had been entitled to immunity for their work in government, the Court reasoned, an individual like Filarsky should as well. Indeed, the Court continued, providing private individuals with immunity from suit for their work on behalf of the government would be consistent with the rationale behind providing immunity in the first place. For example, it will allow private individuals to make decisions without having to worry about being sued, and it will allow the government to attract top talent – particularly in situations like this one, where the city needed to hire an employment law specialist like Filarsky to conduct the investigation. All of these concerns are magnified, the Court noted, when private individuals like Filarsky are working closely with government employees who do have immunity; the private employee should not be the one "left holding the bag" for the actions of the whole group.

Justice Ginsburg agreed with the rest of the Court that Filarsky should be eligible for immunity. However, she wrote a separate opinion in which she emphasized that Filarsky could still be held liable if he should have known that his order to Delia to show him the building supplies clearly violated the Constitution – a question that the lower court did not address.

Justice Sotomayor also wrote a separate opinion. She too agreed with the Court that Filarsky was entitled to qualified immunity, but she suggested that not all private individuals working for the government would be. Instead, a court should make its immunity decision based on the facts of each case.

***Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012).**

The case arose from a search warrant police obtained after Jerry Ray Bowen shot at his ex-girlfriend with a sawed-off shotgun. Detective Curt Messerschmidt searched various public records and prepared an affidavit and warrants to arrest Bowen and search the home of his former foster mother, Augusta Millender, where the ex-girlfriend said he might be hiding. The affidavit sought all working firearms and ammunition, along with items showing Bowen's gang membership or affiliation. Both the affidavit and the warrant were reviewed by Messerschmidt's superiors and a deputy district attorney, and then approved by a magistrate. A sheriff's SWAT team executed the warrant but found neither Bowen nor his gun; instead they seized Ms. Millender's shotgun and a box of ammunition, both of which she lawfully possessed. Bowen later was arrested elsewhere.

In the resulting Section 1983 action brought by Ms. Millender and other family members, the en banc Ninth Circuit denied qualified immunity to the officers, finding that under *Malley v. Briggs* (1986), a reasonably well-trained officer would have known that the affidavit and warrant failed to establish probable cause.

In reversing the Ninth Circuit, Chief Justice Roberts, in an opinion joined by five other Justices (Scalia, Kennedy, Thomas, Alito, and Breyer, who wrote a short concurrence), held that the officers were entitled to qualified immunity as to both the firearms and gang-related materials sought in the warrant. Regarding the former, the Chief Justice rejected the notion that the officers were limited to seeking only the sawed-off shotgun because it was known to be the one used in the crime. Given all the facts set out in the warrant – including Bowen's gang membership and his attempted murder in public of someone because she had called the police on him – an officer would not be unreasonable in concluding that the sawed-off shotgun was not the only firearm Bowen owned. Additionally, the fact that California law allows a warrant to be issued for items possessed with the intent to commit a public offense further supported the search for all firearms and firearm-related materials. The Court's conclusion regarding the firearms was joined by seven Justices, with only Justices Sotomayor and Ginsburg dissenting.

The majority opinion went on to hold the officers were also entitled to immunity for the search for gang-related material, though on that point Justice Kagan parted ways and joined the other two dissenters. Chief Justice Roberts first rejected the notion that the officers were unreasonable in believing that Bowen's gang membership had anything to do with the crime, dismissing the dissenters' reliance on the officers' later deposition testimony as both subjective and beyond the scope of the affidavit and warrant. Notably, in the point Professor Kerr has discussed, the Court held that an officer would not be unreasonable in thinking that evidence of gang affiliation would "prove helpful in prosecuting him for the attack" on his ex-girlfriend – not only to prove motive in the government's case-in-chief, but possibly to impeach Bowen or rebut any defenses he might raise, as well. The Court found compelling the fact that the officers sought and obtained approval from a police superior and deputy district attorney, and that a magistrate had approved the warrant. It criticized the Ninth Circuit's refusal to credit that conduct, and the

lower court's imposition on the officers of an independent duty to ensure at least a colorable basis for probable cause, as a misreading of *Malley*.

The Court also distinguished this case from, and arguably limited, its 2004 decision in *Groh v. Ramirez*, in which a "nonsensical" warrant was so plainly deficient that even a cursory reading would have shown that it failed the Fourth Amendment's particularity requirement, rendering the cases "not remotely similar." Summarizing the issue as whether the magistrate here so obviously erred in approving the warrant that the officers should have recognized the error, Chief Justice Roberts affirmed that such situations are "rare," and that this was not one of them.

Justice Breyer wrote a one-paragraph concurrence elaborating on why he viewed the firearms search as reasonable. Justice Kagan also concurred in that aspect of the Court's ruling, but dissented from its conclusion regarding gang-related materials, which she criticized as being based on "elaborate theory-spinning" to tie the attack to Bowen's gang membership.

In a caustic dissent, Justice Sotomayor (joined by Justice Ginsburg) complained that the warrant was much closer to the general warrants that led to the Fourth Amendment than the Court was acknowledging. Relying heavily on the officers' deposition testimony – a practice the majority criticized – the dissent depicted the warrant as a "fishing expedition" and suggested that the opinion undercuts *Malley*, encourages "sloppy police work" and will turn the Fourth Amendment on its head by immunizing "plainly incompetent police work" merely because others have approved it. "Under the majority's test," Justice Sotomayor wrote, "four wrongs apparently make a right."

In largely sidestepping the second, broader question on which certiorari was granted – whether *Malley* and its exclusionary-rule corollary, *United States v. Leon* (1984), should be revised – the Court focused on correcting the Ninth Circuit's erroneous application of its existing case law. That outcome largely tracks the position the United States advanced as *amicus curiae*, and does not constitute a sweeping revision of the standards for qualified immunity, or application of the exclusionary rule, when officers execute a warrant that lacks probable cause.

***Rehberg v. Paulk,* 132 S.Ct. 1497 (2012).**

Charles Rehberg sued James Paulk under Section1983, alleging that Paulk, a law enforcement officer, had committed perjury at various grand jury proceedings which had led to Rehberg being indicted several times, only to have the criminal prosecutions subsequently dismissed. Paulk asserted that just as a witness at trial is entitled to absolute immunity under *Briscoe v. LaHue*, so too would he as a grand jury witness be shielded by absolute immunity. The district court rejected the contention, agreeing with Rehberg that a grand jury witness was more akin to an affiant testifying in support of a search warrant or criminal complaint, and hence entitled to only qualified immunity under the Court's decisions in *Malley v. Briggs* and *Kalina v. Fletcher*. The Eleventh Circuit, however, agreed with Paulk, holding that grand jury witnesses are entitled to absolute immunity.

A unanimous Court, in an opinion authored by Justice Alito, affirmed the Eleventh Circuit, holding that grand jury witnesses, like trial witnesses, are entitled to absolute immunity from any liability under Section 1983 arising from their testimony. Like all of the Court's opinions on absolute immunity, Justice Alito's opinion recites the incantation that Section 1983 admits of no immunities on its face, and that the Court is not free to simply create immunity for policy reasons; rather, it may only recognize immunities that existed at common law when Section 1983 was enacted in 1871. However, in a nice bit of understatement, Justice Alito notes that "the Court's precedents have not mechanically duplicated the precise scope of the absolute immunity that the common law provided to protect" various governmental functions. This is a diplomatic way of saying that the Court has occasionally recognized

absolute immunity under circumstances where, strictly speaking, there might not have been immunity at common law.

In a passage that is concise and candid about the Court's sometimes seemingly inconsistent approach to absolute immunity, Justice Alito provides both an explanation for the Court's prior decisions as well as a template for analyzing absolute immunity questions in the future. While the Court is not free to create immunities that did not exist at common law, nonetheless the reality is that modern criminal prosecutions are very different than their common law counterparts. Thus, the Court looks to the nature of the function that was protected at common law, rather than at the identity of the particular person who may have performed the function.

Applying that approach in this case, Justice Alito notes that while it is true that at common law a complaining witness was not immune from civil liability, such witnesses were typically private parties responsible for initiating the prosecution and would not necessarily testify at a subsequent trial. In contrast, modern cases are brought by a public prosecutor, and hence witnesses like Paulk who testify in grand jury proceedings are not truly "complaining" witnesses in the sense the term was used at common law.

Justice Alito concludes that absolute immunity for grand jury testimony is necessary in order to safeguard the vital function that grand juries play in modern criminal procedure, by assuring that witnesses may provide candid testimony without fear of a retaliatory suit, and guarding the sacrosanct secrecy of grand jury proceedings. Moreover, the absolute immunity cannot be circumvented by simply claiming that a grand jury witness conspired to present false testimony or by using the testimony to support any other claim—any claim arising from testimony before a grand jury is shielded by absolute immunity. The fact that grand jury witnesses, like trial witnesses, may be subject to prosecution for perjury is a sufficient deterrent to knowingly providing false testimony.

***Ryburn v. Huff,* 132 S.Ct. 987 (2012).**

Darin Ryburn and Edmundo Zepeda were Burbank Police Officers. Vincent Huff was a student at Bellarmine-Jefferson High School, who was rumored to be intending to "shoot-up" the school. Ryburn, Zepeda, and other officers arrived at the school to investigate the rumors. After conducting some interviews, the officers went to Huff's home. The officers attempted to speak with Huff and his parents. Eventually, Mrs. Huff came out of the house, but she refused to let the officers to enter her home. After the police asked if there were any weapons in the house, Mrs. Huff ran back into the house. Officer Ryburn followed Mrs. Huff in the house, because he believed Mrs. Huff's behavior was unusual and further believed that the officers were in danger. Officer Zepeda and the other officers followed Officer Ryburn into the house. The officers briefly questioned the Huffs and left after concluding that Vincent Huff did not actually pose any danger.

The Huffs brought an action against the officers. The Huffs claimed that the officers entered their home without a warrant and thereby violate the Huff's Fourth Amendment rights. The district court entered a judgment in favor of the officers, concluding that the officers had qualified immunity because Mrs. Huff's odd behavior made it reasonable for the police to believe that they were in imminent danger. The U.S. Court of Appeals for the Ninth Circuit partially reversed the district court's ruling. The court acknowledged that the police officers could enter a home without a warrant if they reasonably believed that immediate entry was necessary to protect themselves or others from imminent serious harm, but the court concluded that the officer's belief they were in serious immediate danger was objectively unreasonable. The officers appealed to the Supreme Court.

In an unsigned, per curiam opinion, the Court disagreed with the lower's court's decision and held there was no Fourth Amendment violation on the facts presented. The Court stated that the Fourth Amendment permits the police to enter a residence if an officer has a reasonable basis for concluding

there is an imminent threat of danger. The Court determined reasonable police officers could have come to the conclusion that violence was imminent and they were therefore permitted to enter the Huff's home without a warrant.

III. AMERICANS WITH DISABILITIES ACT

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S.Ct. 694 (2012).

Cheryl Perich filed a lawsuit against the Hosanna-Tabor Evangelical Lutheran Church and School in Redford, Michigan, for allegedly violating the Americans with Disabilities Act when they fired her after she became sick in 2004. After several months on disability, Perich was diagnosed and treated for narcolepsy and was able to return to work without restrictions; however, she said the school at that point urged her to resign and, when she refused, fired her.

Perich filed a complaint with the Equal Employment Opportunity Commission, which ruled in her favor and authorized a lawsuit against the school. Hosanna-Tabor Evangelical Lutheran Church and School argued that the "ministerial exception" under the First Amendment should apply in its case. The exception gives religious institutions certain rights to control employment matters without interference from the courts. The district court granted summary judgment in favor of the school, but the United States Court of Appeals for the Sixth Circuit overturned that ruling and remanded the case back to the lower court for a full trial on the merits. The court held that Perich's role at the school was not religious in nature, and therefore the ministerial exception did not apply. Hosanna-Tabor Evangelical Lutheran Church and School appealed this decision to the Supreme Court.

Chief Justice John Roberts wrote the unanimous decision, holding that Perich was a minister for the purposes of the Civil Rights Act's ministerial exception. Chief Justice Roberts described the history of the "ministerial exception," established by courts to prevent state interference with the governance of churches, a violation of the First Amendment's establishment and free exercise clauses. He rejected the EEOC and Perich's argument that these clauses of the First Amendment are irrelevant to the Hosanna-Tabor's right to choose its ministers.

Chief Justice Roberts concluded that Perich indeed functioned as a minister in her role at Hosanna-Tabor, in part because Hosanna-Tabor held her out as a minister with a role distinct from that of its lay teachers. He also noted that Perich held herself to be a minister by accepting the formal call to religious service required for position. Chief Justice Roberts acknowledged that Perich performed secular duties in her position and that lay teachers performed the same religious duties as Perich, but reasoned that Perich's status as the commissioned minister outweighed these secular aspects of her job. He also rejected the EEOC and Perich's suggestion that Hosanna-Tabor's religious reason for firing Perich was pretextual, explaining that the purpose of the ministerial exception is not limited to hiring and firing decisions made for religious reasons.

Alief Independent School District v. C.C. by next friend Kenneth, 655 F.3d 412 (5th Cir. 2011).

Alief Independent School District (**"**AISD") is a public school district in Texas. CC is a ten-year old student attending AISD. This action initially arose when CC asserted a violation of the Individuals with Disabilities Education Act ("IDEA") by AISD. In February 2007, AISD requested permission from the Texas Education Agency ("TEA") to re-evaluate CC with regard to his educational needs. This permission was eventually granted despite CC's parent's refusal to consent. Pursuant to this permission, AISD re-evaluated CC's educational needs. Subsequently, CC requested a Special Education Due Process Hearing before the TEA, alleging the AISD did not evaluate CC in all required areas, among other concerns. AISD counterclaimed seeking, among other things, a declaratory judgment that the complaint "was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to

needlessly increase the cost of litigation," entitling it to attorneys' fees under 20 U.S.C. § 1415(i)(3)(B(i)(III).

In October 2007, CC requested dismissal of both his and AISD's claims. While CC's claims were dismissed, AISD refused and eventually had its claims heard by the TEA, which granted all requested relief, except for a determination that CC's complaint was filed for an improper purpose. AISD then appealed to the District Court seeking to vacate that portion of the TEA's decision and declare that CC pursued his claims for an improper purpose and order CC to pay AISD's attorney fees under 20 U.S.C. § 1415(i)(3)(B(i)(III).

The district court dismissed the school district's suit as failing to state a claim upon which relief can be granted, because the administrative proceeding used by the school district to seek a declaratory ruling from the hearing officer was not an "action or proceeding" as required by the IDEA's provision governing award for attorneys' fees. AISD again appealed.

The Court of Appeals reversed and remanded to the district court, holding that under the plain meaning of the IDEA and its implementing regulations, the administrative proceeding through which AISD sought a declaratory ruling was a proceeding under §1415. Moreover, the school district was a prevailing party in that proceeding because the declaratory ruling favorably altered the school district's legal relationship with the parents. For these reasons, the court reversed the district court's judgment dismissing the school district's civil action and remanded the case for determination of whether the parents' administrative complaint "was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation," and if so, whether the district court should, within its discretion, award attorneys' fees to AISD.

***Frame v. City of Arlington*, 657 F.3d 215 (2011)**

In 2005, a group of disabled individuals filed suit under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, and the Rehabilitation Act, 29 U.S.C. § 794, claiming that curbs, sidewalks, and parking lots in the city made transportation by wheelchair impossible or unsafe. The plaintiffs were not seeking monetary damages but rather, were seeking an injunction which would require the city to fix the curbs, sidewalks and parking lots in question. The trial court dismissed stating that the two year statute of limitations had run. The ADA provides that no disabled individual "shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities . . . of a public entity." The plaintiffs, who are disabled persons, alleged that the City of Arlington violated the ADA by failing to make certain sidewalks, curbs and parking lots ADA-compliant.

In its initial opinion, a three-judge panel comprised of Judges Jolly, Southwick and Prado held that the plaintiffs' claims were actionable because sidewalks, curbs and parking lots were "services" provided by the city.

The Plaintiffs' petition for rehearing en banc was granted on January 26, 2011. On rehearing, the 5th Circuit Court of Appeals held that the plaintiffs have a private right of action under the ADA to the extent that the sidewalks, curbs, and parking lots effectively deny them meaningful access to a "service, program, or activity" covered by the ADA. Claims that plaintiffs cannot access parks, public schools, or polling stations may meet the standard, but inadequate sidewalks, curbs, and parking lots are not in themselves violations of the Act because the Act suggests that the two categories are distinct from each other. In short, the ADA only protects access to services, programs, and activities, mere "facilities" are not required to be comply with the ADA unless the non-compliant facilities impair access to other city programs. The court further held that the two-year state limitations period for personal injury claims applies to claims under both statutes and began to run when the plaintiffs knew, or should have known, they were denied access to covered services, programs, or activities.

In making the distinction between "services" and "facilities," the panel looked to the ordinary, everyday definition of "services" and to an agency regulation promulgated by the Department of Justice, which defined sidewalks, curbs and parking lots as "facilities." Under this interpretation, the majority concluded that plaintiffs only had a private right of action under the ADA where the non-compliant facilities denied plaintiffs access to actual services, programs or activities.

In dissent, Judge Prado asserted that "there is no precedent to support the majority's distinction and the new standard is unworkable." Judge Prado also expressed concern that the majority opinion created a split with the Ninth Circuit and was "unsupported by any of our sister circuits."

***Griffin v. United Parcel Service, Inc*., 661 F.3d 216 (2011).**

Griffin, an insulin-dependent Type-II diabetic, was an employee of UPS for nearly twenty-eight years, from March 1978 until he retired on December 1, 2006. For most of his career at UPS, Griffin worked in a supervisory or managerial capacity. Griffin's most recent position at UPS was twilight hub manager of the Morrison Road Center in New Orleans, Louisiana. The "twilight" position required Griffin to work from approximately 2:00 p.m. until 10:00 p.m. five days per week. Following Hurricane Katrina, Griffin began to experience unusual numbness and pain, which his doctor attributed to stress. In March 2006, Griffin took a medical leave of absence from UPS and attended an outpatient counseling program at the West Jefferson Behavioral Medicine Center. During this period, Griffin received the same salary and benefits that he had received prior to his leave of absence. As a result of the counseling program, Griffin was able to better manage his stress, and his stress-related symptoms improved.

Griffin was released to return to work on June 21, 2006. By way of a letter, the Behavioral Medicine Center recommended that Griffin be acclimated back to work on a part-time schedule and resume a full-time schedule on the third week following his return to work. Upon his return to UPS, Griffin was informed that his former position of twilight hub manager had been filled. Gerald Barnes, then the employee relations manager, told Griffin that he had requested a transfer to Atlanta, and suggested that Griffin apply for his job. In late June, Griffin approached Roman Williams, the district human resource manager, about the employee relations manager position, but was informed that the position had been filled. In August 2006, Williams recommended to Griffin the position of training manager, a newly-created position then under consideration. Griffin and Williams then met with Alan Rundle, the operations manager, who informed them that the proposed training manager position was not in the cost budget. Rundle then assigned Griffin to the available midnight hub manager position. This position would have required Griffin to work overnight hours.

On August 24, 2006, Griffin delivered a letter, which included "Accommodation Request" in the subject line, to Williams and Geraldine L. Haydon, health management manager, stating that his doctors required that his schedule be adjusted to daytime working hours in order to accommodate his diabetes. On September 20, 2006, Sherry A. Anderson, district workforce planning manager, notified Griffin by letter that he and his physician must complete medical forms within four weeks so that UPS could assess his accommodation request.

On November 13, 2006, Plaintiff wrote a letter to Haydon, which stated, in part, "My diabetes is a condition that does not have to be a disability if I manage it properly, but to do so I will need UPS to make the accommodation to permit me to work days." Attached to this letter were reports and forms from his doctors. Dr. R. Fridge Cameron's plan notes regarding Griffin's discharge from the Behavioral Medicine Center, dated June 20, 2006, stated that Griffin would be best served by working day hours, as this would help him control his diabetes. However, Dr. Cameron, in his completed medical form, dated November 6, 2006, answered "No" to a question

asking whether Griffin's impairments substantially limited his ability to perform any major life activities other than working. A note from Dr. Tina K. Thethi, dated November 7, 2006, stated that Griffin would be in a better position to follow his therapeutic diabetes regimen if he worked morning hours. Thereafter, by way of a letter dated November 16, 2006, Anderson notified Griffin that his accommodation request was being denied because, based upon the information provided, UPS was unable to conclude that he was eligible for a reasonable accommodation under the Americans with Disabilities Act.

Subsequently, Griffin replied to Anderson, via a letter dated December 1, 2006, and announced his retirement from UPS. Griffin never made any complaints to the regional human resources department, and did not participate in the formal employee dispute resolution program.

On or about May 22, 2007, Griffin filed a charge of discrimination with the Equal Employment Opportunity Commission. The EEOC failed to timely investigate the charge, and issued Griffin a Notice of the Right to Sue. On April 28, 2008, Griffin filed his complaint, asserting a claim that UPS failed to provide a reasonable accommodation as required by the ADA, as well as claims for age and race discrimination which were disposed of separately and are not at issue in this appeal. On August 5, 2010, the district court granted summary judgment in favor of UPS on the ADA claim, having determined, *inter alia*, that Griffin was not disabled within the meaning of the ADA. Griffin appealed.

In affirming the district court, the Fifth Circuit reiterated "[N]either the Supreme Court nor this court has recognized the concept of a *per se* disability under the ADA, no matter how serious the impairment; the plaintiff still must adduce evidence of an impairment that has actually and substantially limited the major life activity on which he relies." (citation omitted). Griffin's restrictions on what and how much to eat are at the moderate end of the diabetes spectrum and do not amount to a significant restriction on his eating. Citing to sister circuits, the Fifth Circuit concluded that modest dietary restrictions concomitant with an employee's diabetic condition do not amount to substantial limitations under the ADA. As Griffin's diabetes treatment regimen requires only modest dietary and lifestyle changes, no genuine issue exists as to whether his impairment substantially limits his eating. Accordingly, the district court properly concluded that Griffin is not disabled within the meaning of the ADA.

IV. MISCELLANEOUS CASES

***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*, 563 U.S. __ (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.

***The Elijah Group, Inc. v. City of Leon Valley,* 643 F.3d 419 (5th Cir. 2011)**

The City of Leon Valley is landlocked by the City of San Antonio. It maintained a zoning code allowing churches to obtain Special Use Permits in certain business zones until 2007, when the City amended its zoning code for the announced purpose of stimulating local economy along the Bandera Road retail corridor. SUPs were no longer available for church use in those zones. The Elijah Group ("Church") sought to purchase property and conduct religious activities in one such zone, but the City denied the rezoning request, permitting the Church to offer day care services on the property, but specifically disallowing "any church use."

The Church nevertheless began to hold religious services on the property, at which time the City obtained a temporary restraining order against the Church. The Church sued the City, claiming that the zoning restriction on religious use violated RLUIPA, as well as the U.S. Constitution and state law. The District Court granted summary judgment for the City and dismissed the Church's claims. On appeal, the Fifth Circuit reversed on the RLUIPA claim, finding that the imposition of the ordinance violated that statute's "Equal Terms Clause."

The Fifth Circuit focused on the Equal Terms Clause in RLUIPA, which provides that "no government shall impose a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." By its nature, this clause requires that the religious institution's treatment be compared to that of a nonreligious counterpart, or "comparator." The Court noted that different circuits have adopted different tests for deciding who/what the

comparator should be in a given case. For example, the Second, Third and Seventh Circuits use the same comparator for all ordinances – similarly situated non-religious institutions – although there are slight differences in how each of these circuits defines who is similarly situated. By contrast, the Eleventh Circuit approach looks at the nature of the zoning ordinance – whether it is facially neutral or facially discriminatory – and uses a different comparator for each.

Ultimately, the Fifth Circuit chose not to adopt another circuit's approach. Instead, it concluded that because the ordinance on its face completely prohibited the Church from applying for an SUP while allowing certain nonreligious and nonretail uses to apply for an SUP, it did not treat the Church on equal terms with nonreligious organizations. While the Equal Terms Clause requires a church to show more than that its religious use was forbidden while some non-religious uses were allowed, it does not allow a City to prohibit a church from applying for an SUP when that option is available to non-religious groups whose uses are also inconsistent with the zoning ordinance. The Fifth Circuit concluded, "At bottom, the ordinance treats the Church on terms that are less than equal to the terms on which it treats similarly situated nonreligious institutions." The District Court's summary judgment was reversed, and the case remanded for further proceedings.

V. CRIMINAL LAW

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.

***United States v. Aguilar,* 645 F.3d 319 (5th Cir. 2011)**

Aguilar, an ambulance driver and EMT, was arrested at a border checkpoint with 388 pounds of marijuana hidden in his ambulance. He was tried and convicted for conspiracy to possess with intent to distribute and possession with intent to distribute over 100 kilograms of marijuana. In this direct appeal, the Fifth Circuit concluded that the prosecutor's improper closing argument deprived Aguilar of a fair trial, vacating the conviction and remanding the case for a new trial.

Aguilar's interview by DEA agents wherein he allegedly confessed was neither recorded nor reduced to a written statement. At trial, two agents testified to their recollections of Aguilar's confession. The Fifth Circuit found that after the defense attorney suggested that the agents might lie, the prosecution was entitled to show—during the direct examination of the agents—that they had no motive to lie. Accordingly, as the prosecutor did not give a personal opinion regarding the agents' veracity but rather only elicited testimony from an agent that a conviction would not benefit him or his career, and that he could be prosecuted for perjury if he lied in court, this testimony was proper to respond to the defense's suggestions about the agents' motive.

However, the Fifth Circuit took issue with the prosecutor's closing argument that the agents were "getting a sad deal" when they were called liars in the courtroom, as that was an "improper emotional appeal that transmitted the message that the agents' testimony should be believed because they were [government] agents." The Court further found that this error was clear and obvious, and that such improper bolstering of the credibility of the government agents could not be excused as mere rebuttal. As the Court found that the outcome of the trial depended on whether the jury believed Aguilar or the DEA agents, the erroneous bolstering affected Aguilar's substantial rights, requiring vacation of the conviction and remand for a new trial.

***United States v. Potts,* 644 F.3d 233 (5th Cir. 2011)**

Potts appealed his conviction for being a felon in possession of a firearm. During a traffic stop, Potts did not immediately comply with the police officer's instructions to show his hands, and the officer ordered Potts to exit the car, at which point a firearm was visible under the seat. Potts was handcuffed and asked whether the gun belonged to him, to which Potts did not respond. A search was conducted, yielding additional firearms and ammunition. Potts was then arrested.

At trial, the prosecution asked the arresting officer about Potts' silence, to which Potts objected. Rather than ruling on the objection, the trial court suggested that it could make a curative instruction that Potts had no obligation to answer the officer's question, and that it was not against the law to do so. Potts agreed to the instruction (without reasserting his objection, objecting to the instruction, or moving for a mistrial), which the trial court then gave. During closing argument, the prosecutor again brought up Potts' silence; Potts objected, not on Fifth Amendment grounds but arguing that the

prosecution was attempting to shift the burden of proof. Potts was convicted.

The Fifth Circuit conducted a plain error review—rather than *de novo*—of Potts' constitutional objection to the officer's testimony on his silence because Potts had not properly preserved his claim. In short, in order to preserve his claim, Potts should have continued his objections to the testimony and moved for a mistrial rather than agreeing to the curative instruction. The Fifth Circuit determined that there was no plain error in the trial court's proceedings, as the Fifth Circuit had not yet conclusively addressed whether the use of pre-*Miranda* silence as substantive evidence of guilt is a Fifth Amendment violation.

***United States v. Hernandez*, 647 F.3d 216 (5th Cir. 2011)**

The Fifth Circuit upheld the warrantless GPS tracking of a vehicle, holding that the Fourth Amendment was not violated when law enforcement officers placed a GPS tracking device on the vehicle and used it to track a suspect's movements.

The DEA placed a GPS device on the car of Angel Hernandez without a warrant. Angel's brother, the defendant Jose Hernandez, drove the vehicle while it was being tracked and was eventually caught using the vehicle to transport twenty pounds of methamphetamine. Jose moved to suppress evidence of the drugs, arguing that the Fourth Amendment prohibited the placement of the GPS device on Angel's car without a warrant, as well as its later use to track Jose. The Fifth Circuit upheld the District Court's denial of the motion to suppress. As to the "placement" claim, the Fifth Circuit held that Jose lacked standing to challenge the placement of the device on Angel's vehicle, as Jose lacked a sufficient possessory interest in the vehicle. On the "tracking" claim, while Jose had standing to challenge the use of the GPS to track his location, the Fifth Circuit found that the government's actions did not violate the Fourth Amendment. Specifically, the GPS device was not intrusive, and it was part of a permissible surveillance scheme (incidentally initiated on Angel, and only later expanded to include Jose). Further, the tracking was not "extensive" as Jose was tracked on only one trip and with only occasional location updates.

***Wilson v. Cain*, 641 F.3d 96 (5th Cir. 2011)**

Wilson, a Louisiana state prisoner, appealed the dismissal of his federal habeas corpus (28 U.S.C. §2254) petition. During his imprisonment, Wilson was interviewed at the prison without being given *Miranda* warnings after a fight with a fellow inmate. The questioning was conducted by members of the prison staff, using the prison's routine immediate "post-fight" procedure (including handcuffing and isolating him from other inmates for the interview) to ensure the safety of the general prison population. The Fifth Circuit found that it was not objectively unreasonable for the state court to conclude that this was more like general "on-the-scene" questioning rather than a custodial interrogation of the type addressed by the Supreme Court in *Mathis v. United States* and *Maryland v. Shatzer*. The state court's determination that *Miranda* warnings were not required for admission of Wilson's incriminating statements as evidence at his trial did not constitute an unreasonable application of clearly established federal law. The Fifth Circuit affirmed the state court's judgment dismissing the petition.

***Dediol v. Best Chevrolet, Inc.*, ___ F.3d ___ (5th Cir. Sept. 12, 2011)**

In this case, the Fifth Circuit extended the Title VII framework for hostile work environment claims to actions arising under the Age Discrimination in Employment Act (ADEA). Dediol, a car salesman, sued his former employer, alleging he was a victim of a hostile work environment based on his age and religion. He also alleged constructive discharge. Dediol identified a pattern of verbal insults related to his age and religion, as well as physical threats and intimidation, leading to his resignation. The Fifth Circuit reversed the District Court's summary judgment in favor of the employer, determining that a hostile work

environment can serve as the basis for an ADEA claim, and further that there existed genuine issues of material fact on Dediol's discrimination and constructive discharge claims.

Coming into line with the Sixth, Seventh, and Ninth Circuits, the Fifth Circuit for the first time formally extended Title VII's hostile work environment analysis to claims of age-based discrimination. The Court recognized a common purpose in "the elimination of discrimination in the workplace" in both Title VII actions and ADEA actions, noting the common substantive features shared by the two statutes. Applying longstanding Title VII hostile work environment precedent to Dediol's case, the court focused on the requirement that the harassment be objectively offensive. Reviewing Dediol's claims in the light most favorable to him, the court identified genuine issues of material fact on the question of the objective offensiveness of the conduct and accordingly reversed the district court's grant of summary judgment on the age discrimination claim. The Court also reversed summary judgment on the religious discrimination and constructive discharge claims, finding that Dediol had pled enough facts to create genuine issues of material fact related to those claims.

***Hernandez v. Yellow Transportation, Inc.*, 641 F.3d 118 (5th Cir. 2011)**

In this case, the Fifth Circuit considered whether harassment of employees of one race supports a harassment claim by employees of another race. Plaintiffs, two Hispanic employees, experienced acts of racial harassment that, standing alone, were not so "severe or pervasive" as to create an abusive working environment. However, they also offered evidence of harassment of black employees, which the District Court rejected on the ground that a hostile environment claim requires proof that Plaintiffs personally experienced harassment because of their race. On appeal,

the Fifth Circuit declined to decide whether, categorically, harassment toward one racial group could support a hostile environment claim by another racial group. Cross-category harassment evidence might be persuasive depending on the nature of the evidence, but the evidence was not probative in this case; to wit, the hostility allegedly directed at black employees neither physically threatened nor unreasonably interfered with the Hispanic employees' (Plaintiffs') work performance.

***United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011)**

18 U.S.C. §922(g)(5) forbids illegal aliens from possessing firearms. Portillo-Munoz, a citizen of Mexico, illegally entered the U.S. was working as a ranch hand when he was arrested after local police investigating a disturbance found a .22 caliber handgun in his car. Portillo pled guilty to violating the statute; however, he reserved his right to appeal the conviction on the grounds that the statute violated the Second Amendment.

In a split decision, the Fifth Circuit affirmed the conviction, holding that the law prohibiting an illegal alien from possessing a firearm did not conflict with the Second Amendment. The Court's analysis centered on whether Portillo-Munoz was one of "the people" allowed to "keep and bear Arms" under the Second Amendment and found guidance in the Supreme Court's 2008 decision in District of Columbia v. Heller. Though Heller did not address the question of whether an alien has the right to bear arms, it stated that the Second Amendment involves the rights of "law-abiding responsible citizens," "members of the political community" and "all Americans." Noting that illegal aliens are neither "law-abiding citizens," "members of the political community," nor "Americans," the Fifth Circuit held that illegal aliens are not protected by the Second Amendment.

The Court rejected Portillo-Munoz' argument that he had sufficient connections with the United States to be included in the definition of "the people," finding a distinction between the rights offered by the Second and Fourth Amendments: because the Fourth Amendment is

at core a protective right, whereas the Second Amendment grants an affirmative right, the Court found it reasonable to think that fewer groups would be extended the Second Amendment right. The Fifth Circuit also observed that Congress has greater leeway to regulate the activities of illegal aliens than it does to regulate its citizens, and that Congress often makes laws that distinguish between citizens and aliens and between lawful and illegal aliens. In sum, the Fifth Circuit resolved that "the phrase 'the people' in the Second Amendment of the Constitution does not include aliens illegally in the United States."