RECENT FEDERAL CASES OF INTEREST TO CITIES

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I. FOURTH AMENDMENT

Bailey v. United States, 133 S.Ct. 1031 (2013)

On July 28, 2005, an informant told Officer Richard Sneider of the Suffolk County Police Department that he had purchased six grams of crack cocaine at 103 Lake Drive, Wyandanch, New York, from an individual named "Polo." Officer Sneider obtained a warrant to search the basement apartment at that address. The warrant provided that the apartment was occupied by a heavy set black male with short hair, known as "Polo." That evening during surveillance, officers observed two men—later identified as Chunon L. Bailey and Bryant Middleton—exiting the gate that led to the basement apartment at 103 Lake Drive. The officers followed Bailey and Middleton as they left the premises in a black Lexus, and pulled the Lexus over about one mile from the apartment.

The officers patted down Bailey and Middleton, finding keys in Bailey's front left pocket. They placed both men in handcuffs and informed them that they were being detained, not arrested. Bailey insisted that he did not live in the basement apartment at 103 Lake Drive, but his driver's license address in Bay Shore was consistent with the informant's description of Polo. The police searched the apartment while Bailey and Middleton were in detention. They found a gun and drugs in plain view. The police arrested Bailey, and seized his house keys and car key incident to his arrest; later, an officer discovered that one of the house keys opened the door to the basement apartment.

On appeal to the Supreme Court, the issue was whether the police officers lawfully detained Bailey incident to the execution of a search warrant when the officers saw Bailey leaving the immediate vicinity of his apartment before they executed the warrant. Finding the police officers were not within the scope of their warrant, Justice Anthony M. Kennedy wrote the 6-3 majority opinion, reversing and remanding. The Supreme Court held that the rule from *Michigan v. Summers* did not apply because Bailey was not in or immediately outside the residence being searched when he was detained. Also, none of the law enforcement interests mentioned in *Summers* were served by detaining Bailey. Arrests incident to the execution of a search warrant are lawful under the Fourth Amendment, but once an individual leaves the premises being searched, any detention must be justified by another means. On remand, the Second Circuit should consider whether stopping Bailey was proper under *Terry v. Ohio*.

Justice Antonin Scalia concurred, emphasizing that *Summers* provides a bright line rule for law enforcement to follow. The Second Circuit's balancing test was an improper and would make it harder for officers to decide whether a seizure is constitutionally permissible before carrying it out. Justice Ruth Bader Ginsburg and Justice Elena Kagan joined in the concurrence.

Justice Stephen G. Breyer dissented, arguing that the majority applied an arbitrary geographical line instead of weighing actual Fourth Amendment concerns. Justice Clarence Thomas and Justice Samuel A. Alito, Jr. joined in the dissent.

Florida v. Harris, 133 S.Ct. 1050 (2013)

The State of Florida charged Clayton Harris with possession of pseudoephedrine with intent to manufacture methamphetamine. At trial, Harris moved to suppress evidence obtained during a warrantless search of his car. Police searched the car during a traffic stop for expired registration when a drug detection dog alerted the officer. This dog was trained to detect several types of illegal substances, but not pseudoephedrine. During the search, the officer found over 200 loose pills and other supplies for making methamphetamine. Harris argued that the dog's alert was false and did not provide probable cause for the search. The trial court denied Harris motion, holding that the totality of the circumstances indicated that there was probable cause to conduct the search. The First District Court of Appeal affirmed, but the

Florida Supreme Court reversed, holding that the State did not prove the dog's reliability in drug detection sufficiently to show probable cause.

On appeal to the Supreme Court, Justice Elena Kagan wrote the unanimous opinion holding that a drug-detection dog's alert to the exterior of a vehicle does provide an officer with probable cause to conduct a warrantless search of the interior of the vehicle, reversing the Florida Supreme Court. The U.S. Supreme Court rejected the lower court's rigid requirement that police officers show evidence of a dog's reliability in the field to prove probable cause. Probable cause is a flexible common sense test that takes the totality of the circumstances into account. A probable cause hearing for a dog alert should proceed like any other, allowing each side to make their best case with all evidence available. The record in this case supported the trial court's determination that police had probable cause to search Harris' car.

***Florida v. Jardines*, 133 S.Ct. 1409 (2013).**

On November 3, 2006, the Miami-Dade Police Department received an unverified ""crime stoppers"" tip that the home of Joelis Jardines was being used to grow marijuana. On December 6, 2006, two detectives, along with a trained drug detection dog, approached the residence. The dog handler accompanied the dog to the front door of the home. The dog signaled that it detected the scent of narcotics. The detective also personally smelled marijuana.

The detective prepared an affidavit and applied for a search warrant, which was issued. A search confirmed that marijuana was being grown inside the home. Jardines was arrested and charged with trafficking cannabis. Jardines moved to suppress the evidence seized at his home on the theory that the drug dog's sniff was an impermissible search under the Fourth Amendment and that all subsequent evidence was fruit of the poisonous tree.

The trial court conducted an evidentiary hearing and subsequently ruled to suppress the evidence. The state appealed the suppression ruling and the state appellate court reversed, concluding that no illegal search had occurred since the officer had the right to go up to the defendant's front door and that a warrant was not necessary for the drug dog's sniff. The Florida Supreme Court reversed the appellate court's decision and concluded that the dog's sniff was a substantial government intrusion into the sanctity of the home and constituted a search within the meaning of the Fourth Amendment. The state of Florida appealed the Florida Supreme Court's decision.

Justice Antonin Scalia delivered a 5-4 opinion affirming the Florida Supreme Court's decision. The Court held that the front porch of a home is part of the home itself for Fourth Amendment purposes. Typically, ordinary citizens are invited to enter onto the porch, either explicitly or implicitly, to communicate with the house's occupants. Police officers, however, cannot go beyond the scope of that invitation. Entering a person's porch for the purposes of conducting a search requires a broader license than the one commonly given to the general public. Without such a license, the police officers were conducting an unlawful search in violation of the Fourth Amendment.

Justice Samuel A. Alito dissented, arguing that the majority's interpretation of the public license to approach a person's front door is too narrow and should extend even to police officers collecting evidence against an occupant. The dissent argued that the common law of trespass does not limit the public license to a particular category of visitors approaching the door for a specific purpose. Chief Justice John G. Roberts, Justice Anthony M. Kennedy, and Justice Stephen G. Breyer joined in the dissent.

***Camreta v. Greene*, 563 U.S. ——, —— –, 131 S.Ct. 2020, 2029, 179 L.Ed.2d 1118. P. 1024.**

On May 26, 2011, the Supreme Court handed down *Camreta v. Greene*, which involved the question whether the Fourth Amendment was violated in connection with the temporary seizure and interview in a public

school of a child who authorities suspected was being sexually assaulted by her father. Here, the district court ruled that the individual defendants did not violate the child's Fourth Amendment rights but, even if they did, they were protected by qualified immunity. On plaintiff's appeal, the Ninth Circuit affirmed on qualified immunity but also found, contrary to the district court, that the individual defendants violated the plaintiff's constitutional rights. In so doing, the Ninth Circuit made new Fourth Amendment law.

The individual defendants thereafter petitioned for certiorari on the Fourth Amendment issue, which was granted by the Supreme Court. The plaintiff's brief to the Court addressed the important Fourth Amendment merits, as did the individual defendants' brief and a number of amici briefs. But the plaintiff also argued that the Court did not have appellate jurisdiction because (1) the defendants had prevailed in the Ninth Circuit; (2) the determination by the Ninth Circuit that the individual defendants violated the Fourth Amendment was not part of its judgment; and (3) the case between the plaintiff and the individual defendants was moot.

In an opinion by Justice Kagan, the Supreme Court vacated the Ninth Circuit's decision in part and remanded. The Court first determined that it could review the Ninth Circuit's decision under the relevant federal statute, 28 U.S.C. § 1254(1), which conferred power on it to grant certiorari "upon the petition of any party," which included petitions brought by *prevailing* litigants in the court below, not only losing litigants. Next, the Court rejected the plaintiff's argument that the petition submitted by the prevailing defendants did not present an Article III case or controversy. The defendants had a personal stake in the case because the Ninth Circuit had ruled that the defendants violated the plaintiff's Fourth Amendment rights and this judgment had a prospective effect on the parties: these defendants, and other defendants in this situation, either have to change the way they perform their jobs or risk future damages liability. Similarly, in most such cases plaintiffs will ordinarily retain a stake in the outcome (although, as it turned out here, the plaintiff did not retain a personal stake).

In addition, sound judicial policy warranted Supreme Court review here because the Ninth Circuit's Fourth Amendment ruling was not mere dictum but rather one that had "a significant future effect on the conduct of public officials—both the prevailing parties and their co-workers—and the policies of the government units to which they belong." Indeed, this ruling was intended to establish clearly settled Fourth Amendment law. These considerations, together with the "features of the qualified immunity world and why they came to be … support bending our usual rule to permit consideration of immunized officials' petitions." Otherwise, the defendants will either have to be governed by a Fourth Amendment ruling they cannot contest in the Supreme Court or defy the ruling and risk damages.

Significantly, the Court then went on to emphasize that in *Camreta* it was addressing only *its own authority* to review such cases, and not that of Circuit Courts of Appeals. In this case, after all, the Ninth Circuit had reviewed the *losing* plaintiff's appeal. "We therefore need not and do not decide if an appellate court, too, can entertain an appeal from a party who has prevailed on immunity grounds." In a potentially important footnote 7, the Court observed that different considerations may apply in such cases, particularly since district court decisions, which are not binding precedent, did not necessarily settle constitutional law. The Court also noted that its decision about reviewability dealt only with what it *could* review, not with what it *would necessarily* review.

Nevertheless, after determining that the immunized defendants' case was properly before the Court even though the defendants had prevailed in the Ninth Circuit, the Court concluded that the case was moot. This was *not* because of the defendants, who retained a personal stake in it, but because the plaintiff no longer did. She had moved to another state and had no intention of relocating to Oregon (where the events occurred). In addition, she was almost 18 years old and would therefore not face "the

slightest possibility of being seized in the Ninth Circuit's jurisdiction as part of a child abuse investigation." While the plaintiff argued that she did indeed have a personal stake because of a municipal liability claim (dismissed by the district court and not appealed) she was seeking to reinstate, "we do not think [plaintiff's] *dismissed* claim against a *different* defendant involving a *separate* legal theory can save this case from mootness."

Consequently, the Court vacated the part of the Ninth Circuit's opinion that addressed the Fourth Amendment issue (but *not* the qualified immunity part) and remanded.

Justice Scalia concurred. He pointed out only that the approach suggested by Justice Kennedy in his dissent—"to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity"– had not been advocated by any of the parties. Justice Sotomayor, joined by Justice Breyer, concurred in the judgment. She argued that because the case was moot, the Court should not have discussed the question whether the prevailing defendants in *Camreta* should be able to obtain review of the Ninth Circuit's Fourth Amendment ruling.

Justice Kennedy, joined by Justice Thomas, dissented. He agreed that clarification of this qualified immunity-related appealability issue was required. Nevertheless: "In my view … the correct solution is not to override jurisdictional rules that are basic to the functioning of the Court and to the necessity of avoiding advisory opinions [under Article III]. Dictum, though not precedent, may have its utility; but it ought not to be treated as a judgment standing on its own."

United States v. Jones, **132 S.Ct. 945 (2012)**

In this Fourth Amendment case, the Supreme Court decided whether the attachment of a GPS device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure. The facts of this case are as follows. Antoine Jones came under suspicion of trafficking narcotics in 2004. He became the target of a joint FBI and D.C. Metropolitan Police Department task force. Based on information obtained via conventional surveillance techniques, the Government applied for a warrant authorizing the use of the GPS device. The warrant was granted. The agents then installed the device in Maryland, not in D.C. where the warrant issued. Before trial, Jones filed a motion to suppress the evidence obtained through the GPS device. The district court held the evidence was admissible in substantial part. After a jury trial, Jones was sentenced to life imprisonment. The United States Court of Appeals of the District of Columbia reversed the conviction because of the admission of the evidence obtained by the GPS device. The Supreme Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" Accordingly, the judgment of the Court of Appeals for the D.C. Circuit was affirmed.

II. SECTION 1983

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.

***Khan v. Normand*, 683 F.3d 192 (5th Cir. 2012)**

Parents of a mental disturbed man, Nayeem Khan, brought this lawsuit under 42 USC §1983 for claims arising out of their son's death. Late one evening, Nayeem began running through a Winn-Dixie store, screaming people were trying to kill him. After refusing to stop, the store's employees called the police. Upon arrival, the police escorted Nayeem out of the store and hand-cuffed him. Nayeem forcefully resisted, kicking, biting, and reaching for one of the officer's gun belt. Eventually, the officer's

hobbled Nayeem's legs and linked the leg irons and handcuffs in what is colloquially known as "hog-tying." Almost immediately thereafter, the officers noticed that Nayeem stopped breathing. The officers removed all restraints and administered CPR. Nayeem later died at the hospital.

Nayeem's parents sued the officers, alleging constitutional claims for excessive force and state tort claims. The district court granted the officer's summary judgment on qualified immunity.

On de nova review, the Fifth Circuit recognized that a four-point restraint may constitute excessive force in a limited set of circumstances. However, in this case the officers' treatment of Nayeem did not violate a clearly established right. Although the court recognized the tragedy of this incident, police officers must be allowed to make split-second decisions without second guessing themselves, unless their conduct was objectively unreasonable under clearly established law. Finding no such violations here, the court upheld the district court's finding of qualified immunity even if the officers' conduct constituted excessive force.

***Bowlby v. City of Aberdeen,* 681 F.3d 215 (5th Cir. 2012)**

Debra Bowlby, an independent business person, appeared before the Aberdeen Planning and Zoning Board, seeking permission to operate a "Sno Cone" hut on the corner of a busy intersection. Only one board member voiced an opposition, based on the size and location of Bowlby's business. Nevertheless, the board granted Bowlby the requested permits and told her to proceed with her business plans. She proceeded to open her business later that same month.

Approximately two months later, the board met again to discuss Bowlby's business and decided to revoke the permits. Bowlby was not given notice of these proceedings.

Bowlby filed suit in district court under 42 USC §1983, alleging that her business was taken without just compensation in violation of the Due Process Clause, among other claims. The district court granted the defendant's 12(b)(6) motion and dismissed all claims.

On appeal, the Fifth Circuit reversed the on the due process issue. Although the zoning board has broad discretion to determine the appropriate locations for certain types of businesses within the city, the Fifth Circuit held that once the Board issued permits for Bowlby to operate her business at a designated intersection, she had a property interest in those permits, and by extension in operating at the location it identified. Given Bowlby had a property interest, the Board violated her due process rights in revoking her permits without giving fair notice. Accordingly, the Fifth Circuit reversed the district court on those grounds.

***Jones v. Lowndes County,* 678 F.3d 344 (5th Cir. 2012)**

Clifton Jones and Jerry Nance brought filed suit under 42 USC §1983, complaining they were detained for more than 48 hours without a determination of probable cause by a magistrate in violation of the Fourth, Fifth, Eighth, and Fourteenth Amendments. Jones and Nance were arrested after the police received a 911 call reporting a suspicious person purchasing precursors to the manufacture of methamphetamine. Officer Bryan responded to the call and arrested both Jones and Nance on a Friday evening. No Justice Court judge was on-duty that weekend nor on the following Monday to determine probable cause. Not until the Tuesday after the arrest did Bryan appear before a justice court judge who determined the arrests were justified by probable cause. After Jones and Nance were indicted, they filed suit against the county, the sheriff, and Officer Bryan individually. The district court dismissed the case.

Jones and Nance appealed, but only on their Fourth Amendment claims. In affirming the district court's ruling, the Fifth Circuit relied on *Gerstein v. Pugh*, wherein the Supreme Court

held that a warrantless arrest supported by probable cause is constitutionally permissible so long as a fair and reliable determination of probable cause by a neutral magistrate is made promptly after arrest. Forty-eight hours or less after arrest has been found reasonable. Anything over 48 hours, the burden shifts to the defendants to show "extraordinary circumstances." However, a Section 1983 claimant in this regard must establish that the defendant was either personally involved in the deprivation or that his wrongful actions were causally connected to the deprivation. The Fifth Circuit held that Jones and Nance failed to meet this burden by not showing that any of the defendants caused the delay. To the contrary, the judge's actions caused the complained of delay. There was no policy or custom by any defendant that caused the deprivation of a probable cause hearing within 48 hours. Accordingly, the Fifth Circuit affirmed the district court's dismissal of Jones' and Nance's Fourth Amendment claims.

***Lefemine v. Wideman*, 133 S.Ct. 9 (2012) (per curiam)**

The plaintiff, an anti-abortion demonstrator who displayed signs with graphic pictures of aborted fetuses, sued county law enforcement officers under § 1983 and the First Amendment for nominal damages and declaratory and injunctive relief in connection with past and planned future demonstrations. The district court found that the defendants had previously violated the plaintiff's First Amendment rights. The district court also permanently enjoined the defendants from engaging in content-based discrimination based on the signs with the pictures. But the district court denied nominal damages on the ground that the defendants were protected by qualified immunity. The district court further denied the plaintiff attorney's fees based on "the totality of the facts."

On appeal, the Fourth Circuit affirmed, holding that "a plaintiff who secured a permanent injunction but no monetary damages was not a 'prevailing party' under 42 U.S.C. § 1988, and so could not receive fees." The Fourth Circuit reasoned that the injunction did not alter the relationship between the parties, as required for prevailing party status. The plaintiff sought certiorari in the Supreme Court.

The Supreme Court granted certiorari, vacated the Fourth Circuit's judgment and remanded, all without merits briefs and oral argument. Reversing, the Supreme Court declared in it's per curiam opinion: "That was error [b]ecause the injunction ordered the defendant officials to change their behavior in a way that directly benefited the plaintiff." The plaintiff was clearly a prevailing party because he wanted to conduct demonstrations with signs that the defendants had told him he could not carry. He had sued in order to protect himself from the defendants' threats against him, and he was successful. "[T]hat ruling worked the requisite material alteration in the parties' relationship. … [A]fter the ruling, the police could not prevent him from demonstrating in that manner."

***Curtis v. Anthony*, 710 F.3d 587 (5th Cir. 2013)**

Appellants, Ronald Curtis, Cedric Johnson, and Curvis Bickham, appealed the district court's grant of summary judgment on their claims under 42 U.S.C. §1983 in favor of Defendants-Appellees, including the Houston Police Department, their arresting officers, and Keith Pickett, a former deputy. Pickett conducted the "dog-scent" line-up used to arrest, charge, and hold Appellants. At the time of the events of this case in approximately 2007 to 2009, the Texas courts uniformly accepted Pickett as an expert in dog-scent lineups, accepting the results of his lineups as inculpatory evidence in criminal proceedings.

Pickett conducted the dog-scent lineup on Appellants after the Houston Police Department responded to a burglary call at a T-Mobile store. The perpetrator had pried open the store's back door and left mud at the store's entrance. Upon arriving at the scene, the officers spotted Curtis, who had a lengthy criminal record, and a passenger in a car parked near the store. In the car, the officers noticed a

crowbar, a sledge hammer, a bolt cutter, and two tire irons. Both Curtis and the passenger were wearing muddy shoes. The officers also spotted T-Mobile merchandise in the car. Having providing conflicting accounts, the officers arrested Curtis and the passenger. However, they were both released upon a Magistrate's finding of lack of probable cause.

In another string of T-Mobile thefts, Curtis' photo matched surveillance video; however, a wallet, fingerprints, and blood left at one of these burglaries did not match Curtis. Thereafter, Pickett conducted his dog-scent line-up to compare Curtis' subpoenaed scent sample to those from the three burglarized stores. The dogs alerted to a match between each store's scent sample and Curtis' scent. Accordingly, Curtis was again arrested this time with a finding of probably cause by the Magistrate. However, the string of burglaries continued after his arrest, which led to Curtis' release 8 months later with all charges dropped. Appellant Johnson and Bickham had similar tales.

Appellants then brought action against the defendants alleging that Pickett had manipulated the results of the lineups to manufacture fraudulent evidence in violation of Brady v. Marland, among other claims. In affirming the district court, the Fifth Circuit found that all the defendants were correctly granted summary judgment based on their qualified immunity defense.

***Duvall v. Dallas County Texas*, 631 F.3d 203 (5th Cir. 2011) (per curiam)**

Mark Duvall brought action against the County for personal injuries stemming from a staph infection he contracted while incarcerated at the County's jail pursuant to 42 U.S.C. §1983. The infection was serious enough to cause him to lose an eye. At jury trial, Duvall prevailed. The County timely appealed. In this per curiam decision, the Fifth Circuit affirmed.

Duvall advanced a "conditions of confinement" claim under the Due Process Clause of the Fourteenth Amendment. To establish his claim, Duvall had to show "that such a condition, which is alleged to be the cause of a constitutional violation, has no reasonable relationship to a legitimate governmental interest." The reasonable relationship test is "functionally equivalent to the deliberate indifference standard." Thus, to prevail on his underlying claim, Duvall had to prove (1) "a rule or restriction or … the existence of an identifiable intended condition or practice … [or] that the jail official's acts or omissions were sufficiently extended or pervasive;" (2) which was not reasonably related to a legitimate governmental objective; and (3) which caused the violation of Duvall's constitutional rights.

The County knew of the conditions complained of, yet continued to house inmates in those conditions. The jury heard evidence that the jail experienced around 200 infections per month and that there had been serious outbreaks of the penicillin resistant staph infection for at least three years before Duvall's arrival. Both County officials and outside experts stated the County failed to take the well-known steps needed to control the infection. Accordingly, the Court affirmed the district court.

***Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012)**

In August 2007, Officer Jason Torres pulled Willie Cole, Derrick Newman, and Mario Cole over for failing to yield to oncoming traffic. After checking identification, Torres discovered Mario had outstanding warrants for traffic tickets. Torres and another officer, John Brown, proceeded to arrest Mario, who was struggling. Newman and Willie then stepped out of the car to urge Mario to calm down. Newman refused to get back in the car as instructed. Officers Charles Duchamp and James Guedry then arrived on scene. Guedry immediately performed a protective pat-down search of Newman. Although disputed, Newman claims that Guedry's hand remained on his crotch for an extended period of time, stating, "Ain't nothing there but nuts. You acting like you trying to get them." Guedry likewise contends that Newman then grabbed his

hand, placed it on his privates, and said "Get you some of that." The videotapes neither contradict or confirm either account. Another officer, Burke, then pushed Newman forward onto the car and proceeded to strike Newman's arm with his baton. After five strikes at his upper right arm, Newman stepped back, after which Burke struck Newman five more times on the arm. Newman's shorts fell down, prompting Burke to strike Newman three more times on his exposed right thigh. Burke hit Newman a total of thirteen times in about nine seconds, during which Newman alleges neither office gave him a command with which he failed to comply. Guedry then tased Newman. Thereafter, Guedry dragged Newman to the curb with his shorts around his ankles, awaiting emergency personnel to remove the taser barbs from his skin.

Newman filed suit in state court, alleging state-law claims against all five officers. He also added claims against each officer for use of excessive force in violation of the federal constitution under 42 U.S.C. §1983. Defendants removed to federal court and soon filed summary judgment motions on all state-law claims on the ground of official immunity and on the §1983 claim on the basis of qualified immunity. The district court granted summary judgment to all defendants, except Guedry and Burke. Regarding Guedry and Burke, the district court concluded that there were issues of material fact as to whether the force used by these officers was clearly excessive and objectively unreasonable.

On appeal to the Fifth Circuit, Officers Guedry and Burke are entitled to qualified immunity on Newman's §1983 excessive-force claim unless (1) Newman has "adduced sufficient evidence to raise a genuine issue of material fact suggesting [their] conduct violated an actual constitutional right," and (2) the officers' "actions were objectively unreasonable in light of clearly established law at the time of the conduct in question." (Citations omitted). Under these criteria, the Court concluded, based only on the evidence in the summary judgment record, that the use of force was objectively unreasonable.

***Ramirez v. Jose "Taser Joe" Martinez"*--- F.3d ----, 2013 WL 2096364, C.A.5 (Tex.), May 15, 2013 (NO. 11-41109)**

While searching for a wanted suspect, Deputy Martinez arrived at a business owned by Reynoaldo Ramirez. Upon arriving to work, Ramirez claims the officers had their guns drawn and his employees on the ground. A news crew was filming the scene. After Ramirez approached Martinez, the pair exchanged profanities. Martinez then grabbed Ramirez's arm, telling him to turn around and put his hands behind his back. Ramierez later testified he refused and pulled his arm away. Martinez then tased Ramirez in the chest. Martinez then forced Ramirez to the ground, restraining him with handcuffs. After Ramirez was handcuffed, Martinez tased him again while lying face down in handcuffs. The disorderly conduct charge was later dropped against Ramirez.

Ramirez filed §1983 claims for excessive force, false arrest, and malicious prosecution. He also filed Texas state law claims for assault and battery and false arrest and imprisonment. Martinez moved for summary judgment based on qualified immunity on the §1983 claims and official immunity on the state law claims. The district court granted summary judgment only as to Ramirez's malicious prosecution claim and denied the remainder. Martinez appealed.

Regarding the false arrest claim, the court relied on Ramirez pulling his arm away from Martinez as sufficient grounds for Martinez believing he had probable cause to arrest Ramirez. Texas law is clearly established that "pulling out of an officer's grasp is sufficient to constitute resisting arrest." (citation omitted). Thus the district court erred by denying qualified immunity on Ramirez's false arrest claim.

Martinez was not so successful on the rest of Ramirez's claims, however. Regarding his excessive force claim, the court reviewed the record in the summary judgment context as to

whether Martinez's use of excessive force was clearly excessive to the need and objectively unreasonable (the "Graham Factors"). Viewing the facts of this record in light most favorable to Ramirez, the court concluded that any reasonable officer would have recognized Martinez's conduct was objectively unreasonable under the circumstances. Merely pulling one's arm out of an officer's grasp without more is insufficient grounds to use excessive force—in this case tasing Ramirez on the ground and after he had already been handcuffed.

The court ruled simarily on Martinez's official immunity defense against Ramirez's state law claims of assault and battery and false arrest and imprisonment claims. In summary, the court held Martinez was entitled to qualified immunity on Ramirez's false arrest claim, but not Ramirez's excessive force claim. In addition, Martinez was entiled to official immunity on Ramirez's state law false arrest and imprisonment claim, but not his assault and battery claim. Reversed in part and dismissed in part (Martinez is excepted to file a motion for en banc review).

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.

***Darin Duncan v. University of Texas Health Science Center at Houston,* 469 Fed.Appx. 364 (5th Cir. 2012)**

Darin Duncan was a medical student at the University of Texas Health Science Center. After three appearances before the UT Health's Student Evaluation and Promotion Committee (SEPC), the school told Duncan to leave and not return. Duncan sued UT Health after his dismissal, claiming violations of Rehabilitation Act and the Americans with Disabilities Act (ADA). He also alleged due process and First Amendment violations, and brought state-law claims for mental anguish and breach of contract.

The district court determined that most of Duncan's claims, except for a claim under the Rehabilitation Act, were barred by state sovereign immunity. The court later granted summary judgment in the school's favor on the remaining claim. In an unpublished opinion, the Fifth Circuit Court of Appeals affirmed the district court.

As a public university, UT Health enjoys Texas's sovereign immunity. Thus, Duncan could not sue the school unless his claims fit within one of three recognized exceptions to sovereign immunity: (1) the suit seeks injunctive or declaratory relief against state officials; (2) the state waived immunity; or (3) Congress abrogated the state's immunity under Section 5 of the Fourteenth Amendment. Finding Duncan's claim did not fall under one of these exceptions; the Fifth Circuit affirmed the school's sovereign immunity protection.

Regarding Duncan's Rehabilitation Act claim, the Fifth Circuit reminded him that the Rehabilitation Act protects individuals from exclusion from schools receiving federal funds, such as UT Health, based on their disability. To establish discrimination, a plaintiff must show that he was disabled within the meaning of the Rehabilitation Act, subjected to an adverse action "solely by reason of her or his disability," and otherwise qualified for the program. However, Duncan claimed "treatable," "major depression" as his disability. In essence, he claimed that depression affected his ability to learn or work at medical school, but he was still qualified to be a doctor because it was treatable. Accordingly, the Fifth Circuit concluded that Duncan did not have a qualifying disability under the Rehabilitation Act because he admitted there were available treatments.

***Tina Milton v. TDCJ*, 707 F.3d 570 (5th Cir. 2013)**

Tina Milton was a clerical employee with the Texas Department of Criminal Justice (TDCJ) from November 1990 until April 19, 2007. She was responsible for looking for coded gang messages in inmate mail. She was terminated, administratively, after failing to provide medical documentation verifying FMLA leave. Milton then sued, arguing that she suffered from a disability, namely sensitivity to scented candles and wall plug-ins.

Milton first alerted TDCJ of her problem with the use of scented products in the workplace in 2006, following her return to work from sinus surgery. She addressed the issue informally with her TDCJ supervisors, asking that the scented products be removed. Then she filed a formal ADA accommodation request, simply asking for "No plug in or candles. Strong odors." Her request was denied, and she was given 90 days to find another TDCJ position that could accommodate her respiratory sensitivity.

When she brought other positions to the ADA coordinator's attention, the coordinator decided that they were equally unsuitable due to dust. Apparently, the coordinator mistakenly viewed Milton as being allergic to everything airborne. After Milton was terminated for failure to timely submit her FMLA documentation, she alleged that TDCJ had violated her rights under the ADA.

The Fifth Circuit disagreed, noting the recognized differences between a simple "impairment" and an ADA-recognized "disability." To qualify as the latter, the impairment must "substantially limit the individual." Although there was ample evidence that Milton's condition affects her life activities,

the Fifth Circuit generally has not recognized disabilities based on conditions that the individual can effectively mitigate. Milton's sensitivity to perfumed odors certainly caused her discomfort and inconvenience, but this condition was narrowly restricted in time and place and could be avoided in the larger context outside of the particular workplace at a particular employer. She regularly mitigated her side effects by self-segregating in public and social settings in an attempt to avoid exposure to scented products. Thus, the Fifth Circuit reasoned that Milton's sensitivity could not, in totality, be called severe; it simply did not rise to the level of a substantial impairment of the major life activity—that is, the ability to engage in productive and compensable work for which she was qualified by virtue of her experience and training.

***Stewart v. Waco ISD,* 711 F.3d 513 (5th Cir. 2013)**

Andricka Stewart suffers from mental retardation, speech impairment, and hearing impairment, qualifying as a special-education student. After an incident involving sexual contact between Stewart and another student, the School District modified her Individualized Education Program ("IEP") to provide that she be separated from male students and remain under supervision while at school. Despite this precaution, Stewart was involved in three other instances of sexual conduct over the next two years. Two of those instances resulted in Stewart being suspended due to her complicity in the acts. However, the District took no further action to limit Stewarts contact with male students.

Stewart sued under the Rehabilitation Act for the District's alleged "gross mismanagement" of her IEP and failure to reasonably accommodate her disabilities. The district court dismissed her action in its entirety, concluding that Stewart's claims under §504, the ADA, and Title IX failed because they attempted to hold the District liable for "the actions of a private actor." Stewart appealed.

Section 504 and the ADA focus on discrimination. Students with disabilities may use them to supplement avenues of recovery available under the Individuals with Disabilities in Education Act ("IDEA"). To establish a claim for disability discrimination in the educational context, a plaintiff must allege that a school district has refused to provide reasonable accommodations for the handicapped plaintiff to receive full benefits of the school program. However, mistaken professional judgments do not suffice unless they depart grossly from accepted standards among education professionals. In other words, a school district's response to harassment or lack thereof must be clearly unreasonable in light of the known circumstances to be actionable.

Stewart's complaint fell short of this stringent standard for her student-on-student harassment claim. The complaint lacked sufficient factual allegations to determine whether the District's responses were clearly unreasonable. In addition to the paucity of the necessary factual allegations, the mere "fact that measures designed to stop harassment prove later to be ineffective does not establish that the steps taken were clearly unreasonable in light of the circumstances known by the district at the time." Citation omitted.

However, Stewart may bring a §504 claim based on the District's alleged refusal to make reasonable accommodations for her disabilities. The Court began by clarifying that bad faith or gross misjudgment are just alternative ways to plead the refusal to provide reasonable accommodations, an ambiguity left open by previous precedent. Accordingly, it is immaterial whether the District explicitly refused to make reasonable accommodations—professionally unjustifiable conduct suffices. In sum, a school district refuses reasonable accommodations under §504 when it fails to exercise professional judgment in response to changing circumstances or new information, even if the district has already provided an accommodation based on an initial exercise of such judgment. Thus, on the record, the Court concluded that Steward plausibly stated a claim that the District committed gross misjudgment in

failing to implement an alternative approach once her IEP modifications' shortcomings became apparent.

The Court cautioned that its opinion should not be read to make school districts insurers of the safety of special-needs students. Rather, the Court emphasized that courts generally should give deference to the judgments of educational professionals in the operation of their schools.

IV. FIFTH AMENDMENT – TAKINGS CLAUSE

USA v. 0.73 Acres of Land, 705 F.3d 540 (5th Cir. 2013)

In this case of first impression, the Fifth Circuit Court of Appeals decided whether the loss of an association's right to collect assessments on condemned properties requires just compensation under the Takings Clause of the Fifth Amendment.

The assessments at the center of this dispute were connected with the Mariner's Cove Development, a 58-townhome residential community near Lake Pontchartrain and the 17th Street Canal. The Mariner's Cove Townhomes Association (MCTA)—a homeowner's association and non-profit corporation—periodically collects assessments from each of the townhome owners. The development's "declarations" or by-laws state that each lot owner pays a proportionate 1/58 share of the expense of maintenance, repair, replacement, administration, and operation of the properties.

After Hurricane Katrina, the United States Army Corps of Engineers began to repair and rehabilitate the levee adjacent to the development, and began to construct an improved pumping station at the 17th Street Canal. The Corps later determined that it needed to acquire 14 of the 58 units in Mariner's Cove to facilitate its access to the pumping station.

While the government was negotiating the acquisition of those properties with their owners, MCTA claimed that it was entitled to just compensation for the loss of its right to collect the association fees from the 14 properties in question. The government reached agreements with each of the landowners for the purchase of the properties, but it did not resolve MCTA's claim.

According to the Fifth Circuit Court of Appeals, compensating for these types of assessments "would allow parties to recover from the government for condemnations that eliminate interests that do not stem from the physical substance of the land" and "unjustifiably burden the government's eminent domain power." Under Louisiana law, the right to collect assessments is a building restriction, and by extension, an intangible (incorporeal) right. Louisiana case law recognizes the right to collect assessment fees as a covenant that runs with the land. Thus, the Fifth Circuit reasoned that MCTA's right is best understood as a building restriction, but more generally may be viewed as a real covenant.

Even though the appellate court agreed that an assessment would qualify as a property interest, it held that the assessment base was incidental to the condemnation, and thus barred by the consequential loss rule. The court explains that MCTA's right to collect assessments is a real covenant that functions like a contract and is not "directly connected with the physical substance" of the land. As a result, the loss of assessments is not a compensable taking.

RBIII, L.P. v. City of San Antonio, 2013 WL 1748056 (5. Cir, 2013)

In January 2008, the City of San Antonio (the "City") demolished a dilapidated building. It was undisputed that the City did not provide notice to the owner, RBIII, before razing the building. The district court granted summary judgment for the City on all claims except a Fourteenth Amendment procedural due process claim and a Fourth Amendment unreasonable search and seizure claim. Those claims were tried to a jury, which returned a verdict in favor of the owner.

On appeal, it was apparent from the record that a City code enforcement officer visited the building on several occasions before it was demolished. Following internal procedure, the building was found to be an "imminent threat to life, safety, and/or property," requiring immediate demolition. The day after the building was demolished, the City sent notice to the owner, informing it that the City had demolished the building as an "Emergency Case."

The City argued that the verdict in favor of the owner was due to the district court's faulty jury instructions that did not accurately reflect the applicable law and that under the correct legal standards it was entitled to judgment as a matter of law. The appellate court agreed finding pre-deprivation notice is not always required. Where the State acts to abate an emergent threat to public safety, post-deprivation notice satisfies the Constitution's procedural due process requirement.

Determining whether a pre-notice deprivation of property comports with procedural due process requires an evaluation of (1) the State's determination that there existed an emergency situation necessitating quick action and (2) the adequacy of post-deprivation process. How the fact-finder approaches the first issue depends on whether the State acted pursuant to a valid summary-action ordinance. If it did, then the State's determination that it was faced with an emergency requiring a summary abatement is entitled to deference. In such cases, the relevant inquiry is not whether an emergency actually existed, but whether the State acted arbitrarily or otherwise abused its discretion in concluding that there was an emergency requiring summary action.

Here, the owner did not plead that the post-deprivation remedies available to it were procedurally inadequate, making the only issue before the court whether the City's determination that the building presented a public emergency requiring summary abatement. Finding that the City acted accordingly, the court vacated the district court's judgment on RBIII's claims.

V. MISCELLANEOUS CASES

Bevis v. City of New Orleans, 686 F.3d 277 (5th Cir. 2012)

The plaintiffs sued to challenge New Orleans' Automated Traffic Enforcement System Ordinance, which permits the city to use automated cameras to detect speeding violations and cars entering an intersection against a red light. A district court concluded that the ordinance affords constitutionally-adequate due process, and the Fifth Circuit Court of Appeals agreed.

New Orleans engaged American Traffic Solutions (ATS), a private contractor, to install and maintain the cameras traffic cameras in the Crescent City. ATS staff reviews the footage and forward potential violations to the New Orleans Police Department, where officers then decide whether to issue a citation to the vehicle's owner.

When police decide to cite a vehicle owner, the owner receives a notice detailing the amount of the fine, as well as the date, time, and location of the violation. The notice also includes images from the video recording of the violation, and a website address where the full video can be viewed. The notice also explains procedures for contesting the fine, and procedures for payment by mail, telephone, or through the website. The owner may contest the violation by appearing before an administrative officer on or before a hearing date stated in the notice.

An administrative officer employed by the city presides at the hearing, where the vehicle owner may "respond and present evidence on all issues of fact involved and argument on all issues of law involved." The owner can filed for judicial review of an adverse decision in the Orleans Parish Civil District Court within 30 days.

The Fifth Circuit concluded that the ordinance does not subject plaintiffs to the "risk of an erroneous deprivation" of due process. Though the plaintiffs claimed that the hearing

officers who preside over traffic camera challenges are not neutral, the Fifth Circuit noted a presiding official's being an employee of the municipal executive does not alone offend due process

***Doe v. Covington County School District,* 675 F.3d 278 (5th Cir. 2012)**

The school in this case released a nine-year-old girl to Tommy Keyes — who was not authorized to sign her out from school — at least six times. Keyes took the girl from the school, raped her, and returned her to school. The girl's family sued the school district, alleging that the Covington County School District violated the girl's substantive due process rights through deliberate indifference to her safety. The student, (called "Jane Doe" in the lawsuit), claimed that school officials never consulted her "Permission to Check Out" form, nor requested identification from Keyes, before letting him take her from the school.

U.S. District Judge Keith Starrett dismissed the complaint, finding that a student has no constitutional guarantee of protection at school under the circumstances in the case, and that individually-named school officials were entitled to qualified immunity. A three-judge appellate panel later reinstated the case against the school district. However, the Fifth Circuit Court of Appeals, sitting en banc, dismissed the case once again.

Fifth Circuit Judge Carolyn Dineen King, writing for the majority, said, "Public schools do not take students into custody and hold them there against their will in the same way that a state takes prisoners, involuntarily committed mental health patients and foster children into its custody. Without a special relationship, a public school has no constitutional duty to ensure that its students are safe from private violence." While the Fifth Circuit was outraged by the school's role in the case, outrage alone does not establish the basis for constitutional violation. Here, the court found that Doe had not established the requisite "special relationship" to bring her claim.

The two judges who originally voted to reinstate the case against the school district -- Judges Jacques Wiener and James Dennis -- dissented from the majority, reasoning, "To contend that it is primarily up to parents to prevent public schools from handing off their nine-year-old girls to unknown men during the course of the school day would be outrageous." The dissenters also criticized that "the majority never addresses just what it is that Jane's parents conceivably could have done, or should have done, to safeguard her in this situation."

***Bellard v. Gautreaux,* 675 F.3d 454 (5th Cir. 2012)**

Shane Bellard was employed by the East Baton Rouge Sheriff's Office as a deputy sheriff and was enrolled as a cadet in the Capital Area Regional Training Academy (CARTA). During training, Bellard allegedly showed up late and fell asleep in class on multiple occasions. He was also sent home from the firing range for taking the prescription medication Ambien while operating firearms. After three violations for tardiness, intoxication at the range, and sleeping in class, the head of CARTA recommended that Bellard be excused from the academy. In addition, after two female students complained about Bellard's inappropriate comments and behavior, Bellard was terminated for sexual harassment.

Bellard and his father, a retired cop, began calling law enforcement friends to ask Sheriff Gautreaux let Bellard resign instead of being fired. Bellard later sued Gautreaux, individually and personally, claiming that the EBR Sheriff's office deprived him of a federal liberty interest when he was denied a name-clearing hearing after being terminated. The district court dismissed the claims. The Fifth Circuit Court of Appeals affirmed.

The Fifth Circuit evaluates a federal liberty interest claim using a seven-element stigma-plus-infringement test to determine whether the plaintiff was entitled to notice or a name-clearing hearing before dismissal. To prevail, a plaintiff must show: (1) he was discharged; (2) stigmatizing charges were made

against him in connection with the discharge; (3) the charges were false; (4) he was not provided notice or an opportunity to be heard prior to the discharge; (5) the charges were made public; (6) he requested a hearing to clear his name; and (7) the employer denied the request.

Bellard's claims against the Sheriff in his individual capacity failed because Bellard had no evidence that the Gautreaux personally publicized defamatory statements. Bellard's only evidence was his own statement about a conversation he had with the Baton Rouge Police Chief, who purportedly said that he had already heard about Bellard's termination from the Sheriff. Accordingly, the Fifth Circuit concluded that the alleged statement was hearsay and not proper evidence to overcome the Sheriff's motion for summary judgment.

***Villas at Parkside Partners, et al v. City of Farmers Branch,* 688 F.3d 801 (5th Cir. 2012)**

Farmers Branch adopted Ordinance 2952 in January 2008. The ordinance required every adult wishing to rent or lease any single family residence or apartment within Farmers Branch to apply for a residential occupancy license from the city's Building Inspector. A non-citizen prospective occupant had to provide an identification number establishing his or her lawful presence in the U.S. in order to get an occupancy license. The Building Inspector was required to verify each non-citizen's lawful presence with the federal government.

The housing ordinance also criminalized making false statements on an occupancy license application, occupying rental housing with a license, and knowingly permitting a person to occupy a rental unit without a valid license.

Holding that immigration regulation is a "national problem that needs a national solution," the Fifth Circuit ruled that the Farmers Branch housing ordinance is unconstitutional. Farmers Branch is asking the Fifth Circuit Court of Appeals for an en banc rehearing on its "occupancy license" housing ordinance. The Fifth Circuit announced that a majority of the court had voted in favor of rehearing. The oral argument date and briefing schedule have not yet been assigned.

***Opulent Life Church v. City of Holly Springs, Mississippi,* 697 F.3d 279 (5th Cir. 2012)**

Opulent Life Church is a small Christian congregation in need of a larger meeting place. After an extensive search, the Church located a suitable building in Holly Springs' central business district, on the courthouse square. In August 2011, the Church entered into a lease agreement for the space. Less than a month after signing the lease, the Church applied for a renovation permit and submitted a comprehensive building plan to the Holly Springs City Planning Commission. The Commission tabled the request at a meeting held a few days later, because the Church allegedly failed to meet the (now-repealed) requirements of Holly Springs' zoning ordinance that apply only to churches.

The Church then filed suit, seeking a declaration that portions of the zoning ordinance violated the Religious Land Use and Institutionalized Persons Act (RLUIPA). The complaint also sought injunctive relief to prevent Holly Springs from enforcing the zoning ordinance as applied to Churches. The night before oral argument, Holly Springs amended its zoning ordinance, categorically banning all religious facilities from the newly created "Business Courthouse Square District," which includes the property leased by the Church. The District Court denied the Church's request for preliminary injunction, finding it had not shown a substantial threat of irreparable harm. The Church timely appealed this decision.

Rejecting Holly Spring's mootness and unripe arguments, the Court turned to the merits of the district court's denial of the Church's preliminary injunction application. After giving a lengthy recitation of RLUIPA's history, the Court focused on its Equal Terms Clause, which provides: "No government shall impose or implement 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." (Citation omitted). Thus, the dispositive issue is whether the ordinance facially treats Opulent Life "on less that equal terms with a nonreligious assembly or institution." (Citation omitted).

After reviewing the other circuits' case law, the Court stated, "[t]he 'less than equal terms' must be measured by the ordinance itself and the criteria by which it treats institutions differently." (Citation omitted).

With this understanding, the Court reviewed the new ordinance, which drew an express distinction between religious and nonreligious institutions for purposes of designating permitted and non-permitted uses in the Courthouse Square. Thus, the Church has established a prima facie Equal Terms Clause violation. Under the new test the Court adopted, the burden now shifts to the governmental unit to show the regulatory purpose or zoning criterion behind the regulation at issue, as stated explicitly in the text of the ordinance or regulation, treats the religious assembly or institution as well as every other nonreligious assembly or institution that is "similarly situation" with respect to the stated purpose or criterion. The Court rejected Holly Springs' purported purpose in creating a commercial district, because other noncommercial uses are permitted under the express terms of the ordinance, such as museums. The Court also found the Church would suffer irreparable harm due to its loss of First Amendment and RLUIPA rights, as well as the potential loss of its lease if not allowed to occupy the space. Accordingly, the Court vacated the district court's order denying the Church's motion for a preliminary injunction and remanded for further proceedings.

***Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012)**

Phillip Cannata brought suit against the Diocese, alleging that the church terminated him in violation of the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA"). The district court dismissed the suit based on the ministerial exception, which bars employment-discrimination suits by ministers against their churches. Cannata appealed.

This appeal presented the first opportunity for the Fifth Circuit to address the ministerial exception in light of the Supreme Court's decision in Hosanna-Tabor, which held the ministerial exception operates as an affirmative defense. The Supreme Court also eschewed a rigid formula in determining when an employee is a minister within the meaning of the exception, preferring a totality-of-the-circumstances test. Thus, even though Cannata merely played the piano at Mass, ran the sound system, performed some custodial work, and had other book keeping responsibilities, the performance of such secular duties may not be overemphasized in the context of the ministerial exception. The Diocese in turn emphasized the importance music plays in religious celebration, and hence the importance of the music director in performing such music. Therefore, because Cannata made unilateral, important decisions regarding the musical direction at Mass and played piano during the same, the Court affirmed the lower court's finding that the ministerial exception barred Cannata's suit.

***Genesis HealthCare Corp. v. Symczyk*, 133 S.Ct. 1523 (2012)**

Plaintiff sued under the Fair Labor Standards Act of 1938 (FLSA) on behalf of herself and "other employees similarly situated," 29 U. S. C. 216(b). She ignored an offer of judgment under Federal Rule of Civil Procedure 68. The district court, finding that no other individuals had joined her suit and that the Rule 68 offer fully satisfied her claim, dismissed for lack of subject-matter jurisdiction. The Third Circuit reversed, reasoning that allowing defendants to "pick off" named plaintiffs before certification with calculated Rule 68 offers would frustrate the goals of collective actions. The Supreme Court reversed. Because plaintiff had no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness, her suit was appropriately dismissed.

The Court assumed, without deciding, that the offer mooted her individual claim. Plaintiff had not yet moved for "conditional certification" when her claim became moot, nor had the court anticipatorily ruled on any such request. The Court noted that a putative class acquires an independent legal status once it is certified under Rule 23, but, under the FLSA, "conditional certification" does not produce a class with an independent legal status, or join additional parties to the action.

***Hollingsworth v. Perry* (pending before the Supreme Court)**

In 2000, the citizens of California passed Proposition 22, which affirmed a legal understanding that marriage was a union between one man and one woman. In 2008, the California Supreme Court held that the California Constitution required the term "marriage" to include the union of same-sex couples and invalidated Proposition 22. Later in 2008, California citizens passed Proposition 8, which amended the California Constitution to provide that "only marriage between a man and a woman is valid or recognized by California."

The respondents, a gay couple and a lesbian couple, sued the state officials responsible for the enforcement of California's marriage laws and claimed that Proposition 8 violated their Fourteenth Amendment right to equal protection of the law. When the state officials originally named in the suit informed the district court that they could not defend Proposition 8, the petitioners, official proponents of the measure, intervened to defend it. The district court held that Proposition 8 violated the Constitution, and the U.S. Court of Appeals for the Ninth Circuit affirmed.

The issues before the court are (1) whether the petitioners have standing under Article III of the Constitution to argue this case and (2) whether the Equal Protection Clause of the Fourteenth Amendment prohibits the state of California from defining marriage as the union of one man and one woman.

***United States v. Windsor* (pending before the Supreme Court)**

The Defense of Marriage Act (DOMA), enacted in 1996, states that, for the purposes of federal law, the words "marriage" and "spouse" refer to legal unions between one man and one woman. Since that time, some states have authorized same-sex marriage. In other cases regarding the DOMA, federal courts have ruled it unconstitutional under the Fifth Amendment, but the courts have disagreed on the rationale.

Edith Windsor is the widow and sole executor of the estate of her late spouse, Thea Clara Spyer, who died in 2009. The two were married in Toronto, Canada, in 2007, and their marriage was recognized by New York state law. Thea Syper left her estate to her spouse, and because their marriage was not recognized by federal law, the government imposed $363,000 in taxes. Had their marriage been recognized, the estate would have qualified for a marital exemption, and no taxes would have been imposed.

On November 9, 2010 Windsor filed suit in district court seeking a declaration that the Defense of Marriage Act was unconstitutional. At the time the suit was filed, the government's position was that DOMA must be defended. On February 23, 2011, the President and the Attorney General announced that they would not defend DOMA. On April 18, 2011, the Bipartisan Legal Advisory Group of the House of Representatives filed a petition to intervene in defense of DOMA and motioned to dismiss the case. The district court denied the motion, and later held that DOMA was unconstitutional. The U.S. Court of Appeals for the Second Circuit affirmed.

The issues before the court are (1) whether the executive branch's agreement with the lower court that the act is unconstitutional deprive the Supreme Court of jurisdiction to decide the case; (2) whether the Bipartisan Legal Advisory Group of the House of Representatives have standing in the case; and (3) whether the Defense of Marriage Act, which defines the term

"marriage" under federal law as a "legal union between one man and one woman" deprives same-sex couples who are legally married under state laws of their Fifth Amendment rights to equal protection under federal law.

Fisher v. University of Texas* (pending before the Supreme Court*)

In 1997, the Texas legislature enacted a law requiring the University of Texas to admit all high school seniors who ranked in the top ten percent of their high school classes. After finding differences between the racial and ethnic makeup of the university's undergraduate population and the state's population, the University of Texas decided to modify its race-neutral admissions policy. The new policy continued to admit all in-state students who graduated in the top ten percent of their high school classes. For the remainder of the in-state freshman class the university would consider race as a factor in admission.

Abigail N. Fisher, a Caucasian female, applied for undergraduate admission to the University of Texas in 2008. Fisher was not in the top ten percent of her class, so she competed for admission with other non-top ten percent in-state applicants. The University of Texas denied Fisher's application.

Fisher filed suit against the university and other related defendants, claiming that the University of Texas' use of race as a consideration in admission decisions was in violation of the equal protection clause of the Fourteenth Amendment and a violation of42 U.S.C. Section 1983. The university argued that its use of race was a narrowly tailored means of pursuing greater diversity. The district court decided in favor of the University of Texas, and the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision. Fisher appealed the appellate court's decision.

The issue before the court is whether the Equal Protection Clause of the Fourteenth Amendment permits the consideration of race in undergraduate admissions decisions.

***Shelby County v. Holder* (pending before the Supreme Court)**

The Fourteenth Amendment protects every person's right to due process of law. The Fifteenth Amendment protects citizens from having their right to vote abridged or denied due to "race, color, or previous condition of servitude." The Tenth Amendment reserves all rights not expressly granted to the federal government to the individual states. Article Four of the Constitution guarantees the right of self-government for each state.

The Civil Rights Act of 1965 was enacted as a response to the nearly century-long history of voting discrimination. Section 5 prohibits eligible districts from enacting changes to their election laws and procedures without gaining official authorization. Section 4(b) defines the eligible districts as ones that had a voting test in place as of November 1, 1964 and less than 50% turnout for the 1964 presidential election. Such districts must prove to the Attorney General or a three-judge panel of a Washington, D.C. district court that the change "neither has the purpose nor will have the effect" of negatively impacting any individual's right to vote based on race or minority status. Section 5 was originally enacted for five years, but has been continually renewed since that time.

Shelby County, Alabama, filed suit in district court and sought both a declaratory judgment that Section 5 and Section 4(b) are unconstitutional and a permanent injunction against their enforcement. The district court upheld the constitutionality of the Sections and granted summary judgment for the Attorney General. The U.S. Court of Appeals for the District of Columbia Circuit held that Congress did not exceed its powers by reauthorizing Section 5 and that Section 4(b) is still relevant to the issue of voting discrimination.

The issue before the court is whether the renewal of Section 5 of the Voter Rights Act under the constraints of Section 4(b) exceed Congress' authority under the Fourteenth and Fifteenth Amendments, and therefore violate the

Tenth Amendment and Article Four of the Constitution.