RECENT FEDERAL CASES
OF INTEREST TO GOVERNMENTAL ENTITIES

TEXAS CITY ATTORNEYS ASSOCIATION
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I. FIRST AMENDMENT

Texans for Free Enterprise v. Texas Ethics Commission, et al, 732 F.3d 535 (5th Cir. 2013)

Texans for Free Enterprise, a political committee formed and incorporated to advocate for candidates in Texas elections, acts exclusively as a "direct campaign expenditure only committee," meaning it does not make any contributions to candidates or their official committees, according to the opinion. Rather, it spends funds only to support its own speech in favor of or against candidates. To engage in that advocacy, it solicits contributions from individuals and corporations.

The group filed suit against the Texas Ethics Commission in 2012 seeking to prohibit the state from cutting off its corporate funding sources via a Texas law barring corporate contributions to political committees. The group successfully obtained an injunction.

Affirming a preliminary injunction issued in favor of Texans for Free Enterprise, the appeals court said provisions of the Texas Election Code that outlaw corporate donations to independent political committees "in connection with a campaign for elective office" runs afoul of U.S. Supreme Court precedent finding similar limits in violation of the First Amendment. "There is no difference in principle — at least where the only asserted state interest is in preventing apparent or actual corruption — between banning an organization such as [Texans for Free Enterprise] from engaging in advocacy and banning it from seeking funds to engage in that advocacy."

Citing Citizens United v. Federal Election Commission, the Fifth Circuit ruled that the ethics commission could not enforce the election code against Texans for Free Enterprise in a way that curtails its free speech. In Citizens United, the high court rejected a federal ban on independent corporate expenditures used to produce a political film attacking then-Sen. Hillary Clinton, who was running for president. Emphasizing that the only relevant governmental interest in restricting political speech is to avoid the appearance of or actual corruption, the high court said such fears were unfounded since Citizens United's film was funded with independent corporate expenditures that were not prearranged or coordinated with a particular candidate.

Based on precedent, the Fifth Circuit held that Texas law is even more restrictive than the federal law at issue in Citizens United and equally unenforceable as applied to Texans for Free Enterprise. "Instead of banning Citizens United from producing its movie, the Texas code provisions would instead have forbidden Citizens United from giving money to another political group so that that group would produce and distribute the film….And the statute would have prohibited Citizens United from accepting donations from other corporations so that Citizens United could produce the film during the election season."

The appeals court rejected Texas' argument that the injunction should be tossed because Texans for Free Enterprise was not hindered in its ability to collect contributions and make expenditures during the 2012 election season, which was the group's "primary concern." "We have repeatedly held, however, that '[t]he 'loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction.'" "[Texans for Free Enterprise's] ability to speak is undoubtedly limited when it cannot raise money to pay for speech."

Haverda v. Hays County, 723 F.3d 586 (5th Cir. 2013)

Richard Haverda, a deputy sheriff in Hays County, supported the re-election campaign of the incumbent sheriff, who subsequently lost to Gary Cutler. The new sheriff hired Jaime Page as the chief deputy who, soon after arriving, recommended termination of the jail's three-person supervisory staff, which included Haverda. The recommendation cited various problems at the jail. Cutler, the new sheriff, however, decided to

retain them "if they worked hard and the [j]ail substantially improved" in the next 60 days. The 60-day period ended in January 2011 with no terminations, but in February 2011 Haverda was demoted, which led to a meeting in March 2011 between him and Cutler, during which Cutler accepted a resignation letter that Haverda had submitted a couple of weeks before. Haverda then sued Cutler and the county for retaliating against his political speech during the campaign several months before, in violation of the First Amendment. On summary judgment, the district court ruled for the defendants (including qualified immunity for Cutler in his individual capacity).

On appeal, the Fifth Circuit, reversed and remanded. First, there was a genuine issue about whether Haverda's political speech was a motivating factor in his demotion. During the campaign, Haverda wrote a letter, published in a newspaper, saying that "'Sheriff Ratliff [the incumbent against whom Cutler was then campaigning] didn't come in here and bring a whole new staff like his alternative [c]onservative Mr. Cutler wants to do.'" During the March 2011 meeting (which Haverda secretly recorded), Sheriff Cutler made comments that could be inferred as "negatively referencing Haverda's [published] letter." Also, Paige's demotion memorandum, "approved and adopted" by Cutler, mentioned "Sheriff Cutler's campaign promise not to terminate any employees." That "should be considered evidence that Sheriff Cutler was indirectly referencing his awareness of Haverda's [published] ... letter and that the demotion was in retaliation for [it]."

Second, Cutler's evidence for having many reasons for demoting Haverda even if he had not written the letter did not eliminate a genuine issue on the Mt. Healthy defense, because Haverda showed that the reasons could have been pretexts for retaliation. Further, "[t]he issue is not whether Haverda could have been demoted for the condition of the [j]ail, but whether he would have been demoted," so even if Haverda was "'borderline or marginal,'" Cutler's personal motivation—not an objective assessment of Haverda—remained the key question.

Third, Haverda's published letter was not unprotected speech in an employee capacity but was protected speech: he "was speaking as a citizen, supporting a candidate during an election." Thus, the official capacity defendants were not entitled to summary judgment.

***Town of Greece v. Galloway,* --S.Ct. --, 2014 WL 1757828, U.S., May 05, 2014.**

Since 1999, Greece, New York has opened monthly town board meetings with a roll call, recitation of the Pledge of Allegiance, and a prayer by a local clergy member. While the prayer program is open to all creeds, nearly all local congregations are Christian. Citizens alleged violation of the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers and sought to limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God." The district court entered summary judgment upholding the prayer practice. The Second Circuit reversed, holding that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that the town endorsed Christianity. A divided Supreme Court reversed, upholding the town's practice. Legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. Most states have also had a practice of legislative prayer and there is historical precedent for opening local legislative meetings with prayer. Any test of such a practice must acknowledge that it was accepted by the Framers and has withstood the scrutiny of time and political change. The inquiry is whether the town of Greece's practice fits within that tradition. To hold that invocations must be nonsectarian would force legislatures sponsoring prayers and courts deciding these cases to act as censors of religious speech, thus involving government in religious matters to a greater degree than under the town's current practice of neither editing nor approving prayers in advance nor criticizing their content after the fact. It is

doubtful that consensus could be reached as to what qualifies as a generic or nonsectarian prayer. The First Amendment is not a "majority rule" and government may not seek to define permissible categories of religious speech. The relevant constraint derives from the prayer's place at the opening of legislative sessions, where it is meant to lend gravity and reflect values long part of the Nation's heritage. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based only on the content of a particular prayer will not likely establish a constitutional violation. If the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers to achieve religious balance.

***Morgan v. Swanson*, ---F.3d.---, 2014 WL 1316929 (Fifth Circuit, April 2, 2014)**

Doug Morgan sued Lynn Swanson—the principal of his son's public elementary school—for preventing him, in violation of the First Amendment, from "distribut[ing] ...religious material to other consenting adults" who were also present in his son's classroom for a party during a school day in December 2003. Separately, Morgan and his wife on behalf of their son, and some other parents on behalf of their children, sued Swanson, at least one other principal, and the Plano Independent School District for violating their children's First Amendment right to distribute such materials at these parties. In 2011, the Fifth Circuit en banc held that the principals did violate the children's right, but that they were entitled to qualified immunity. Morgan v. Swanson, 659 F.3d 359 (5th Cir. 2011) (en banc). There were also two related appeals. In one, the Court held that the school district's modified (in 2005) policy for distribution of material was facially constitutional, but that the plaintiffs' challenges to the earlier policy were not moot. Morgan v. Plano Independent School District, 589 F.3d 740 (5th Cir. 2009) (King, Higginbotham and Clement). In the other, the Court held that the school district was entitled to summary judgment against the Morgan child's claim under the Texas Religious Freedom Restoration Act because his parents failed to satisfy the statute's pre-suit notice requirement. Morgan v. Plano Independent School District, 724 F.3d 579 (5th Cir. 2013) (King, Davis and Elrod). But, again, in this case Morgan had sued Swanson for his own alleged deprivation when Swanson, at the party, told him "not to distribute the religious material to other consenting adults

in the classroom." The district court held that Swanson was entitled to qualified immunity and dismissed the claim against her in her individual capacity. The Fifth Circuit affirmed. Like the district court, the Fifth Circuit did not consider whether Swanson's prohibition was constitutional, only whether "'no reasonable official' would have deemed the disputed conduct constitutional." Morgan could not satisfy that standard because there was no case sufficiently on point. He "argue[d] that his right to distribute religious material is clearly established because 'regardless of forum, viewpoint discrimination regarding private speech is unconstitutional.'" The Court did not disagree, but found that principle far too broad to provide a public official "with any sense of what is permissible under a certain set of facts." Indeed, it noted that the en banc opinion in 2011, dealing with the children's First Amendment right, "already rejected the viewpoint discrimination principle as 'far too general' to establish the law in this context." Judge Benavides, in a special concurrence, observed that "[g]iven the wholesale absence of authority addressing the rights of adults in the classroom, the contours of those rights are even less distinct" than the children's rights that the en banc Court considered in 2011.

***Morgan v. Swanson*, --F.3d.--, 2014 WL 2484235 (5th Cir., June 3, 2014)**

In a separate lawsuit, Morgan and his wife on behalf of their son (and some other parents on behalf of their children) sued Swanson, at least one other principal, and the Plano Independent School District for violating their children's First Amendment right to distribute such materials at these parties. In 2011, the Fifth Circuit en banc held that the

principals violated the children's right, but that they were entitled to qualified immunity because the right was not clearly established. *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc). There were also two appeals related to the lawsuit on behalf of the children. In one, the Court held that the school district's modified (in 2005) policy for distribution of material was facially constitutional, but that the plaintiffs' challenges to the earlier policy were not moot. *Morgan v. Plano Independent School District*, 589 F.3d 740 (5th Cir. 2009). In the other, the Court held that the school district was entitled to summary judgment against the Morgan child's claim under the Texas Religious Freedom Restoration Act because his parents failed to satisfy the statute's pre-suit notice requirement. Morgan v. Plano Independent School District, 724 F.3d 579 (5th Cir. 2013). But, again, in this case, Morgan had sued Swanson for his own alleged deprivation when Swanson, at the party, told him "not to distribute the religious material to other consenting adults in the classroom." The district court held that Swanson was entitled to qualified immunity and dismissed the claim against her in her individual capacity.

Like the district court, the Fifth Circuit did not consider whether Swanson's prohibition was constitutional, only whether "'no reasonable official' would have deemed the disputed conduct constitutional." Morgan could not satisfy that standard because there was no "factually analogous precedent [that] clearly established the disputed conduct as unconstitutional." He "argue[d] that his right to distribute religious material is clearly established because 'regardless of forum, viewpoint discrimination regarding private speech is unconstitutional.'" The Court did not disagree, but found that principle far too broad to provide a public official "with any sense of what is permissible under a certain set of facts." Indeed, it noted that the en banc opinion in 2011, dealing with the children's First Amendment right, "already rejected the viewpoint discrimination principle as 'far too general' to have clearly established, at the time of the incident, Swanson's constitutional obligations vis-à-vis the holiday party."

Judge Benavides, in a special concurrence, observed that "[g]iven the wholesale absence of authority addressing the rights of adults in the classroom, the contours of those rights are even less distinct" than the children's rights that the en banc Court considered in 2011. Judge Clement, in a concurrence, opined that Morgan en banc's holding about the children's right compelled the conclusions that Swanson also violated Morgan's right and that Morgan's right was not clearly established. But she also noted that since Morgan en banc, the law now is clearly established, so "[i]f the facts of Morgan were repeated in another case today, the outcome would be different, and rightly so. Ours was a nation founded by those who sought a place where they could proclaim their faith freely."

II. 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.

Maryland v. King, 133 S.Ct. 1958 (2013)

The individual involved in the case, Alonzo Jay King, Jr., of Wicomico County, Maryland, was arrested in 2009 on a charge of assault. Police took a DNA sample by swabbing his inner cheek with a cotton tip and, ultimately, that sample linked him to a previously unsolved rape case that had occurred six years before. His DNA was found to match that on semen taken from the victim of the rape. There was no other evidence linking King to that crime. He was tried, convicted, and sentenced to life in prison without parole.

Maryland's highest state court, the Maryland Court of Appeals, ruled that this sampling violated King's Fourth Amendment right to personal privacy. The Supreme Court reversed.

The Court held that the state's interest in learning King's full identity, including the chance that he had committed crimes in the past, and its interest in solving old cases, was more than sufficient to offset what the majority found to be a minimal intrusion into King's personal privacy. Justice Kennedy stressed that Maryland's DNA sampling law had several key restrictions in it, including that the samples were to be used only to help identify an individual taken into custody, and not to probe into the medical privacy of the individual by learning what his body chemistry showed.

Kennedy wrote: "A suspect's criminal history is a critical part of his identity that officers should know when processing him for

detention." When officers take a DNA sample, they essentially are only seeking to find a link into the criminal records they already have on file, the opinion said. "The task of identification necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him," the majority said, adding: "It uses a different form of identification than a name or fingerprint, but its function is the same."

Turning to King's privacy claims, the majority said that "once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, his or her expectations of privacy and freedom from police scrutiny are reduced." Moreover, the opinion said, merely touching the interior of a suspect's mouth with a cotton swab involves no pain and no significant invasion of privacy.

Missouri v. McNeely, 133 S.Ct. 1552 (2013)

Around 2 a.m. on October 3, 2010, Tyler Gabriel McNeely was stopped by a highway patrolman for speeding in Cape Girardeau County, Missouri. McNeely failed several field sobriety tests, and was asked to submit to an alcohol breath test, which he refused. He was then transported to a medical clinic where the clinic staff administered a blood test without the suspect's consent. The test showed McNeely's blood-alcohol levels to be well above the legal limit, and he was charged with driving while intoxicated.

A trial judge ruled in McNeely's favor, stating that administering a blood test without a warrant was a violation of the suspect's Fourth Amendment protection against unreasonable searches and seizures. State prosecutors argued that the administration of the test without a warrant was justified as blood alcohol would be metabolized with time, and a delay in obtaining a warrant would amount to destruction of evidence, citing the "special facts" or "exigent circumstances" exception in the U. S. Supreme court decision Schmerber v. California. A state appeals court agreed with the prosecutors and reversed the trial court decision, but the Missouri Supreme Court reversed again, ruling in favor of McNeely that the administration of the test was not justified.

The United States Supreme Court granted a petition for writ of certiorari on September 25, 2012. A divided Supreme Court affirmed the Missouri Supreme Court, agreeing that an involuntary blood draw is a "search" as that term is used in the Fourth Amendment. As such, a warrant is generally required. However, the Court left open the possibility that the "exigent circumstances" exception to that general requirement might apply in some drunk-driving cases.

None of the Court's four opinions — a majority, two separate opinions supporting the result, and one dissenting opinion — said that officers investigating drunk-driving cases must always get a warrant. But the majority did say that the Constitution does not allow police to get a blood sample without ever having to get a warrant, in any case (as the dissenting opinion suggested). So that sets up the case-by-case approach, suggesting that getting a warrant very likely would remove the doubt.

Because the vote of Justice Anthony M. Kennedy was necessary to make a majority for the requirement that each case be judged on its own facts, his separate opinion may have special importance for local governments and their police forces as they decided how to react to the new ruling.

Justice Kennedy suggested that local officials still retain the authority to work out "rules and guidelines that give important, practical instruction to arresting officers," and that those kinds of rules might well allow blood testing without a warrant "in order to preserve the critical evidence" of blood alcohol content. As further cases develop, Kennedy wrote, the Court itself might find it worthwhile "to provide more guidance than it undertakes to give today." His fifth vote supported this bare conclusion: "always dispensing with a warrant for a blood test when a driver is arrested for being under the influence of alcohol is inconsistent with the

Fourth Amendment." With his qualifications stated, Kennedy joined most of the Court opinion written by Justice Sonia Sotomayor and supported in full by Justices Ruth Bader Ginsburg, Elena Kagan, and Antonin Scalia.

The Sotomayor opinion stressed that getting a warrant should be the default protocol in drunk-driving cases where officers decide to have a blood test made. That opinion said that the mere fact that alcohol in the blood does dissipate over time is not enough, by itself, to do away totally with the requirement for a search warrant — the position that the state of Missouri took in this case.

The lead opinion sought to make the point that the Court was simply applying standard Fourth Amendment doctrine, and that the Court's precedents simply did not support a blanket rule that blood could be drawn by the government without ever having to seek a warrant from a judge first. That opinion also stressed that state and local governments have adopted a number of new procedures that make it easier, and faster, to get blood-test warrants, and that those procedures will help to assure that blood alcohol evidence does not disappear before a test could be made. "Our ruling will not severely hamper law enforcement," Justice Sotomayor wrote.

Chief Justice John G. Roberts, Jr., in an opinion joined by Justices Samuel A. Alito, Jr., and Stephen G. Breyer, argued for a more-or-less flat constitutional rule that an officer must seek a warrant before having a DUI blood test made, if there is time, but not otherwise. If there is not time, in the officer's judgment, that opinion said, there is no warrant requirement. That is an exigency, the Chief Justice wrote, because of "the imminent destruction of evidence" that results from the way the blood absorbs alcohol. Those four would have sent the case back to Missouri's state courts to apply the approach recited by the Chief Justice.

***Hogan v. Cunningham*, 722 F.3d 725 (5th Cir. 2013)**

A mother's concern that her ex-husband was in violation of a Texas court's child custody order led to the dispatch of two Corpus Christi police officers to meet the mother. The officers then proceeded to the apartment of the ex-husband, John Hogan. In the apartment, the officers tried to conduct a warrantless arrest that led to a "'controlled take-down'" that left Hogan with two broken ribs. Hogan then brought claims against the officers for unlawful arrest and use of excessive force to make the arrest and, under Texas law, for assault and battery. On summary judgment, the district court denied qualified immunity against the federal claims, and the officers' privilege defense under TEX. PENAL CODE § 9.51(a) against the state claims.

The Fifth Circuit affirmed in regards to the unlawful arrest claim. "For Hogan's [warrantless] arrest inside his home to be constitutional, there must have been probable cause and exigent circumstances." There was "probable cause [for the officers] to believe that Hogan was committing the felony offense of interference with child custody," but there were no exigent circumstances that existed as a matter of law. The officers argued that Hogan created exigent circumstances when, while they were standing in the open doorway of his apartment while they talked to him, he suddenly tried slamming the door, which hit the head of one of the officers. But

Hogan disputed that version, so the Court had to assume there were no exigent circumstances for going into Hogan's apartment to arrest him. Further, no reasonable police officer would have thought it was permissible for them to do so without a warrant or exigent circumstances.

Regarding Hogan's excessive force claim, the Fifth Circuit reversed and rendered for the officers. The officers testified that on entering the apartment, Officer Robert Cunningham instructed Hogan to turn around with his hands behind his back because he was

under arrest, and that when Hogan refused, Cunningham started the take-down, which went so awry that Cunningham fell on top of Hogan and broke two of his Hogan's ribs. Hogan testified that both officers moved to tackle him to the floor as soon as they entered the apartment and that perhaps both officers were on top of him. Assuming the truth of Hogan's version, the officers used an amount of force that was not excessive as a matter of constitutional law or, even if it was, that not every reasonable police officer would know was unconstitutionally excessive.

III. SECTION 1983

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 probable 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. Maryland*, 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.

Harris v. Serpas, 745 F.3d 767 (5th Cir. 2014)

Brian and Tyralyn Harris had divorced, but he still lived in the same house with her and their two children in New Orleans. On April 9, 2010, Tyralyn called 911 because Harris had locked himself in a bedroom and, she feared, was trying to commit suicide by overdosing on sleeping pills because he was depressed over recently losing his job. Five New Orleans police officers arrived at the house, where Tyralyn gave them keys to the locked bedroom. She told them that Harris did not have a gun but he might have "a folding knife ... that he usually carried due to his former job as a welder." The officers proceeded to the locked door and called Harris's name. He didn't respond, so they unlocked the door, and found the entrance barricaded by furniture. They forced their way in, and saw "Harris lying on his back in his bed under a blanket, not moving." He also didn't respond to commands to show his hands, so one of the officers removed the blanket; they saw that he was holding the knife in his right hand. Harris

refused commands to let go of the knife, so one of the officers attempted, unsuccessfully, to tase him. (The tasers—the officers had two—were equipped for audio and video recording, so much of the encounter was on tape.) "Harris stood up out of his bed after the first taser attempt, and he appears agitated at this point." Another officer used the second taser, but this "attempt apparently failed to work as well because ... Harris was not incapacitated." He was, though, provoked: he "began flailing his arms at the taser wires, and raised the knife above his right shoulder in a stabbing position." One officer yelled at Harris to drop the knife, he answered "'I'm not dropping nothing,'" and then one of the officers shot him three times. Harris died of the gunshot wounds.

His surviving children sued the officers via 42 U.S.C. § 1983 for using unconstitutionally excessive force and a warrantless entry; they also sued the city for inadequate policies and training that led to the constitutional violation. The district court found that the officers did not use excessive force and entered with Tyralyn's consent, so it granted their summary judgment motion for qualified immunity and dismissed the claim against the city.

The Fifth Circuit affirmed. Following Rockwell v. Brown, 664 F.3d 985 (5th Cir. 2011) (Jolly, DeMoss and Prado), the Court emphasized that an assessment of the reasonableness of force must focus on "'whether the [officer] was in danger at the moment of the threat that resulted in the [officer's] shooting.'" In Rockwell, a mother had called 911 because of concern about her son's being in a mental health crisis. As in this case, the officers entered his bedroom. The son was holding two eight-inch serrated knifes, rushed towards the officers, and then struggled with them, until they shot and killed him. Similarly, the taser video in this case "confirms that ... Harris was holding a knife above his head at the moment [an officer] fired his weapon." The plaintiffs argued that the officer who shot Harris was not in "actual, imminent danger" of Harris stabbing him, but that was irrelevant. It was enough that the taser video showed that "the officers reasonably feared for their safety at the moment of the fatal shooting." The plaintiffs also claimed that the warrantless entry into Harris's bedroom was unconstitutional, but this claim could not survive the fact that Harris's co–occupant of the house gave the officers the key to the bedroom. Since there was no constitutional violation—neither excessive force nor an unconstitutional entry—there was also no basis for the claim against the city for inadequate policies and training.

***Coleman v. Sweetin*, 745 F.3d 756, (5th Cir. 2014)**

Texas inmate Freddie Coleman slipped and fell in a shower room in June 2009 after he had allegedly complained several times in May-June 2009 about the room's slippery floor, all without result. He suffered two more falls (on June 20 and on June 23). After the June 20 fall, he was examined by a physician's assistant (Cheryl McManus) on June 23. Coleman told McManus

"that he could neither move his right leg nor stand upon it." McManus ordered an x-ray and, after reviewing it, diagnosed Coleman with acute arthritis. She put him on crutches, though Coleman "protested (to no avail) that [the prison] was not handicap accessible." Later that day, June 23, Coleman suffered the third fall when, in the shower, "his crutches slipped out from underneath him." He was not able to visit the infirmary until July 18, in large part because of a lockdown. During the lockdown, on July 10, a nurse practitioner (Brenda Hough) made a sick call to Coleman's cell but she would not examine him because she had no access to an examination table. "Coleman explained that he experienced extreme pain and believed that his right hip was broken," which turned out to be true. "Hough responded that she was not authorized to transport inmates to the infirmary unless they were 'bleeding or dying,'" and suggested that he continue submitting requests for permission to go to the infirmary. Coleman alleged that he had already submitted numerous such requests, each of which Hough disregarded.

Also during the lockdown, on July 12, two prison officials (Debbie Erwin, an assistant

warden, and Craig Fisher) visited Coleman's cell. He told them "he had fallen multiple times, his right hip was broken, and he was unable to move his leg, lie in bed, or use the toilet," and that he had been trying to get into the infirmary since June 23. Coleman alleged that nothing came of their visit. When the lockdown was lifted on July 18, Hough examined Coleman in the infirmary, but he had to wait until July 21 to get an x-ray. This one disclosed the hip fracture, and Coleman was soon hospitalized for hip surgery (though Hough refused to give him any pain medication for the 178-mile trip).

He then sued (pro se and in forma pauperis) various prison officials: four who allegedly failed to respond to his complaints about the slippery shower floor, and seven who allegedly ignored his medical treatment needs. After a Spears hearing that touched on exhaustion—a grievance coordinator testified that Coleman had not exhausted internal remedies concerning the slippery floor; the court also had Coleman's form complaint, which requested information about the internal steps he had taken—the court dismissed all claims except a treatment claim against McManus (who, reading the first x-ray, diagnosed acute arthritis). Later, however, the district court also dismissed the claim against McManus. Sometime after the district court allowed Coleman to proceed against her, the Texas attorney general advised the court that he had been unable to contact McManus and was unable to file a responsive pleading for her; he provided to the court her last known address. The district court ordered service on her by the U.S. Marshal, but that was not successful and, after various extensions of a service deadline and in light of Coleman's inability to provide an address for McManus, the court dismissed her, effectively with prejudice because the statute of limitations had run.

The Fifth Circuit affirmed with respect to dismissal of the claim regarding the slippery floor, although the district court erred by considering whether Coleman exhausted that claim. It is error to dismiss a prisoner's complaint for want of exhaustion before a responsive pleading is filed unless the failure to exhaust is clear from the face of the complaint. District courts may not circumvent this rule by considering testimony from a Spears hearing or requiring prisoners to affirmatively plead exhaustion through local rules. Nonetheless, the claim was properly dismissed because the slippery floor was not an unconstitutionally unsafe condition. "The usual reasoning [in cases that have rejected such claims] is that the existence of slippery conditions in any populous environment represents at most ordinary negligence ...." Regarding Coleman's treatment needs, the Court reversed the dismissals of Erwin, Fisher, Hough, and McManus. The complaint sufficiently alleged facts indicating that Erwin and Fisher (who visited Coleman's cell on July 18) were deliberately indifferent to his serious medical needs. Likewise, "Coleman [allegedly] suffered substantial harm as a result of Hough's persistent refusal to answer his 'sick-call request slips' or provide pain medication even when he was in so much pain that he was unable to lie down in bed or use the toilet properly," and when he was transported for surgery. McManus also should not have been dismissed for failure of service. When the AG advised of his inability to locate McManus and her last known address, Coleman requested leave to conduct some discovery in order to find her. The district court thought it would be futile, but "it does not follow from the AG's inability to provide a current address ... that any attempt to discover the address [from the sources that Coleman proposed] ... would be futile."

***The Inclusive Communities Project, Inc. v. Texas Dep't of Housing & Community Affairs,* ---F.3d ----, 2014 WL 1257127, (Fifth Circuit, March 24, 2014)**

The Inclusive Communities Project sued the defendant Texas department (including its director and board members in their official capacities) for racial discrimination in housing. The claims involved the state's administration of a federal tax-credit program for low-income housing. "Developers apply to [the department] for tax credits for particular housing projects." Rental housing constructed with the assistance of the tax credits must be open to tenants who use Section 8 vouchers. In Dallas, the state

allegedly awarded fewer tax credits for rental housing to be built in Caucasian-majority neighborhoods than in other neighborhoods; conversely, it allegedly denied more tax-credit applications for rental housing to be built in Caucasian-majority neighborhoods than in other neighborhoods. According to ICP's complaint, the state's "disproportionately approving tax credit [housing] units in minority-concentrated neighborhoods and disproportionately disapproving tax credit units in predominantly Caucasian neighborhoods ...creat[ed] a concentration of the units in minority areas, a lack of units in other areas, and maintain[ed] and perpetuat[ed] segregated housing patterns." ICP sued for disparate impact discrimination under the Fair Housing Act, and for intentional discrimination under the Fourteenth Amendment and 42 U.S.C. § 1982 (via 42 U.S.C. § 1983). It moved for summary judgment to establish its standing to sue (ICP "'seeks racial and socioeconomic integration in the Dallas metropolitan area,'" in part by "'assist[ing] low-income, predominately African-American families who are eligible for the Dallas Housing Authority's Section 8 Housing Choice Voucher program ... in finding affordable housing in predominately Caucasian, suburban neighborhoods'") and its proof of prima facie cases for both of its claims. The state cross-moved, arguing that even if ICP proved prima facie cases, it prevailed ultimately on the complete evidence. The district court held that ICP had standing and had made a prima facie showing for both claims, and denied the state's motion. After a bench trial, it "found that ICP did not meet its burden of establishing intentional discrimination," but that it won on disparate impact because the state did not counter ICP's prima facie case. To do so, it held that the state had to "(1) justify their actions with a compelling governmental interest and (2) prove that there were no less discriminatory alternatives." The district court assumed that the state did the first, but found it failed to do the second.

The Fifth Circuit reversed and remanded for reconsideration of the disparate impact claim. Although the Fifth Circuit has held that "disparate impact claims are cognizable under the FHA" (the Supreme Court has granted review in two cases in which a party has questioned that proposition, but neither case reached oral argument), it "has not previously addressed ... what legal standards apply to a disparate impact housing discrimination claim." Other circuits have developed four different standards. Plus, the Department of Housing and Urban Development issued, after the district court issued its judgment, a regulation (29 C.F.R. § 100.500(c)) setting out a proof standard for such a claim. Noting that HUD has "authority to administer the FHA, including authority to issues regulations interpreting the Act," that HUD's standard is similar to "the most recent decisions" from other appellate courts, and that HUD's standard is "similar to settled precedent concerning Title VII disparate impact claims in employment discrimination cases," the Court decided to "now adopt the burden-shifting approach found in 29 C.F.R. § 100.500 for claims of disparate impact under the FHA." That approach differed from the district court's. Again, the district court required ICP to establish a prima facie case (i.e., to "show 'adverse impact on a particular minority group' or 'harm to the community generally by the perpetuation of segregation,'" N.D. Texas slip op. at 18). Relying on statistics and two governmental reports (one state and one federal), the district court found that ICP established a prima facie case, then required the defendants to "(1) justify their actions with a compelling governmental interest and (2) prove that there were no less discriminatory alternatives." The new HUD standard, on the other hand, requires defendants to prove their "'substantial, legitimate, nondiscriminatory interests,'" and then plaintiffs to prove that those interests "'could be served by another practice that has a less discriminatory effect.'" So instead of defendants having to prove that "there were no less discriminatory alternatives," plaintiffs have to prove that there are.

The Court remanded for the district court to apply this standard. "[W]e do not hold that the district court must retry the case; we leave it to the sound discretion of that court to decide whether any additional proceedings are necessary or appropriate."

***Pierce et al. v. Springfield Township, Ohio, --- Fed.Appx. ----,* 2014 WL 1408885 (6th Circuit, April 11, 2014)**

In the late evening of December 5, 2010, and early morning of December 6, Cordell Drummond fired several handgun rounds into the ground. Officers Marc Downs and Joseph Powers were parked in their patrol cars chatting with the windows down at the car wash at Seven Hills Plaza. At around 1:12 a.m., both officers responded to calls from the neighbors about the gunshots and drove-only 400 yards away-to the 10900 block of Birchridge Drive to investigate. At around 1:15 a.m., the officers arrived at the scene. Powers and Downs saw Drummond in front of 10929 Birchridge Drive. Downs got out of his car and approached Drummond to inquire about the reported gunshots. Downs made eye contact with Drummond, but Drummond ran from Downs before Downs could ask any questions. Downs immediately saw Drummond put his hands in his front waistband. After Drummond took about four steps, Downs heard a gunshot. He saw Drummond stop momentarily, jump several times, and then continue running. Downs saw that Drummond held a black 9-mm Glock in his right hand. Downs pursued Drummond and yelled to Powers, "Joe, he's got a gun. He's got a gun." Drummond collapsed in the snow in the front yard of 10904 Birchridge Drive, where his grandmother Gail Lewis lived in an apartment building. The officers approached Drummond with guns drawn and pointed, unsure of whether Drummond was still armed. Powers heard Drummond yell "I'm going to die!" The officers observed that Drummond was conscious but bleeding; they also observed that for the entire five minutes until the EMT squad arrived, Drummond was holding his right upper thigh with both hands. They radioed to Sergeant Burton Roberts that Drummond had a self-inflicted gunshot wound to his abdomen area. At 1:16 a.m., an EMT squad was dispatched. By 1:17 a.m., it was en route to the scene. At 1:22 a.m., an ambulance arrived. By 1:27 a.m., the EMT squad was transporting Drummond to the University of Cincinnati Medical Center. Tragically, Drummond died from his wound at the hospital. In the five minutes intervening, Powers and Downs did not touch Drummond, handcuff him, or restrain him in any way, nor did they allow anyone else to render aid, including his grandmother, girlfriend, and brother.

Drummond's relatives filed suit against the responding officers and the Township and alleged that the officers violated Drummond's Fourteenth Amendment Due Process rights by not giving Drummond first aid, by preventing Drummond from treating his own wounds, and by preventing others from carrying out a private rescue. The district court granted summary judgment on behalf of the defendants and Drummond's relatives appealed to the Sixth Circuit Court of Appeals. The issues on appeal were as follows:

- Whether there existed a special relationship between the officers and Drummond because they had placed him in custody;

- Whether the officers exposed Drummond to a state created danger by preventing him from applying pressure to his own wounds; and

- Whether the Township violated Drummond's liberty when the officers prevented others from effecting a private rescue of Drummond.

At the outset, the Sixth Circuit examined the lead United States Supreme Court case regarding the government's constitutional duty to protect, Deshaney v. Winnebago County Dep't of Soc. Servs. In Deshaney, child protection service workers, despite receiving credible complaints of abuse regarding a young boy's father, failed to protect the young boy from beatings which ultimately left the boy severely brain damaged. The boy, and relatives, sued the child protection workers and alleged that they violated the boy's Fourteenth Amendment rights by depriving him of his liberty without due process when they failed to protect him. The Supreme Court held:

That the substantive component of the Due Process Clause does not "require[] the State

to protect the life, liberty, and property of its citizens against invasion by private actors." Id. at 195. The Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." Id.

Thus, the Sixth Circuit recognized that Deshaney stands for the legal principal that there is no general duty on the state to protect its citizens from private harm inflicted by third parties.

With the above in mind, the Sixth Circuit then examined the first issue before them, specifically whether a special relationship existed between the officers and Drummond because they had placed him in custody. When the state has placed a person in custody, often the courts will recognize a "duty to protect" that person on the part of the state. This is because the state has essentially removed that person's ability to care for themselves. However, the distinction that the Sixth Circuit found relevant on this issue was the difference between custody in the Fourth Amendment context and custody in the Fourteenth Amendment context.

Under the Fourth Amendment, a person is "in custody" when a police officer restrains a person's liberty such that a reasonable person would not feel free to leave. However, this standard does not apply in Drummond's case, because the suit is alleging a violation of Drummond's Fourteenth Amendment rights. As such, the more rigorous standard under the Fourteenth Amendment applies. The court stated:

For purposes, however, of the Fourteenth Amendment and of DeShaney's custody exception, custody requires that the state restrain an individual "through incarceration, institutionalization, or other similar restraint." DeShaney, 498 U.S. at 200. DeShaney's custody exception requires, "at a minimum-actual, physical restraint of the suspect by the police." Cutlip v. City of Toledo, 488 F. App'x 107, 114 (6th Cir. 2012).

The Sixth Circuit then held that in this case, since Drummond was merely being covered by officers with weapons drawn after he shot himself, but not "incarcerated, institutionalized or subject to a similar restraint," Drummond was not in custody for liability to attach under the Fourteenth Amendment and Deshaney.

Further, regarding the officers duty to provide medical aid to Drummond, the court also noted that the officers had no special training, beyond basic first aid, in treating gunshot wounds. The court then stated that, because of the officer's lack of training in this area, "any failure to treat would be, at most, negligent and thus not actionable under Section 1983." The Sixth Circuit did not speculate whether the officers would have had a different duty if they had more advanced medical treatment.

The court then examined the second issue before them, which was whether the officers exposed Drummond to a state created danger when they prevented him from treating his own wounds. The court noted that the rule regarding a "state created danger" liability is as follows:

A state is not subject to liability under DeShaney's state-created danger exception unless it takes an "affirmative action that exposed decedent to [a] danger to which [he] was not already exposed." Sargi v. Kent City Bd. of Educ., 70 F.3d 907, 913 (6th Cir. 1995).

In Drummond's case, the court noted that the officers did not increase his risk of harm by their actions or make him more vulnerable. In fact, eye-witness testimony indicated that Drummond was applying pressure to his wound while the officers covered him with their weapons. As such, since the officer's actions did not expose Drummond to a danger to which he was not already exposed, there was no liability under the "state created danger" theory.

The court then examined the final issue, which was whether the Township violated Drummond's liberty when the officers prevented others from effecting a private rescue of Drummond. Specifically, two of Drummond's relatives attempted to approach him, allegedly to apply pressure to his wound, and the officers ordered them back. To this issue, the Sixth Circuit stated:

If police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt,… it would certainly be permissible to forbid such an attempt." Id. Even construing the facts in the light most favorable to Pierce, it is undisputed that neither Lewis nor Jason Drummond informed the officers of any ability on their part to render medical aid. And, far from the case in Beck I, the officers had no reason to believe Lewis and Drummond could provide aid. Powers and Downs, like the defendant police officers in Tanner v. County of Lenawee, were not "aware of the would-be rescuer's qualifications," if any. Tanner v. Cnty. of Lenawee, 452 F.3d 472, 481 (6th Cir. 2006).

The Sixth Circuit then held that, based on the above principals, the Township and officers are not liable under the Fourteenth Amendment for preventing Drummond's relatives from providing aid. As such, the Sixth Circuit affirmed the decision of the district court.

***Plumhoff, et al., v. Rickard,* --- S.Ct. ----, 2014 WL 2178335 (U.S., May 27, 2014)**

At midnight on July 18, 2004, West Memphis Police Officer Forthman pulled over Donald Rickard's vehicle because of an inoperable headlight. After Officer Forthman noticed damage on the vehicle and asked Rickard to step out of the car, Rickard sped away. Officer Forthman called for backup and pursued Rickard from West Memphis, Arkansas to Memphis, Tennessee. The police officers were ordered to continue the pursuit across the border and ultimately surrounded Rickard in a parking lot in Memphis, Tennessee. When Rickard again attempted to flee, the police fired shots into the vehicle. Both Rickard and Kelley Allen, a woman who had been a passenger in the vehicle, were killed by the barrage of gunfire. The entire exchange was captured on police video.

The families of Rickard and Allen sued the police officers, the chief of police, and the mayor of West Memphis under federal and state law claims. The families argued that the police used excessive force when pursuing and ultimately killing Rickard and Allen and that using that force violated the Fourth Amendment. The government argued that, because the police acted in their official capacity, they were entitled to either absolute or qualified immunity from any lawsuit. The district court refused to dismiss the case against the government, and the U.S. Court of Appeals for the Sixth Circuit affirmed the decision of the trial court. The Court of Appeals held that qualified immunity only applies when officers are acting reasonably, and after reviewing subsequent cases, held that the police did not act reasonably in this case. Additionally, because the video evidence showed that the police fired on unarmed, fleeing drivers, a jury could determine that the police were not acting reasonably.

The Supreme Court reversed the Sixth Circuit, holding that the officers acted reasonably in using deadly force. A "police officer's attempt to terminate a dangerous high-speed chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." Rickard's outrageously reckless driving—which lasted more than five minutes, exceeded 100 miles per hour, and included the passing of more than two dozen other motorists, posed a grave public safety risk, and the record conclusively disproved that the chase was over when Rickard's car came to a temporary standstill and officers began shooting. Under the circumstances when the shots were fired, all that a reasonable officer could have concluded from Rickard's conduct was that he was intent on resuming his flight, which would have again posed a threat to others on the road.

The Supreme Court also held that the officer's did not shoot more than necessary to end the public safety risk. It makes sense that, if officers are justified in firing at a suspect in order to end a severe threat to public safety, they need not stop shooting until the threat has ended. Here, during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee and eventually managed to drive away. A passenger's presence does not bear on whether officers violated Richard's Fourth Amendment rights, which "are personal rights [that] may not be vicariously asserted.

Lastly, even if the officer's conduct had violated the Fourth Amendment, the officers would still have been entitled to summary judgment based on qualified immunity. The respondent could point to no case that could be said to have clearly established the unconstitutionality of using lethal force to end a high-speed car chase.

IV. AMERICANS WITH DISABILITIES ACT

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.

***Shirley v. Precision Castparts Corp.*, 726 F.3d 675 (5th Cir. 2013)**

Employee Bryan Shirley twice entered an in-patient rehabilitation program for abuse of prescription medication. Both times, he successfully detoxed but left the program prior to completing the treatment phase. His employer terminated him after he prematurely left the program the second time, and Shirley sued for violations of the ADA and the FMLA.

Shirley argued that the ADA's safe harbor provision shielded him because, at the time of the termination, he was not "currently engaging in the illegal use of drugs." He further argued that the FMLA guaranteed him reinstatement upon return from his approved leave for rehab. The district court disagreed, and granted summary judgment for the employer. Shirley appealed.

The Fifth Circuit affirmed the grant of summary judgment. The Circuit said that merely entering a rehab program does not automatically trigger the safe harbor. Current users in rehab are not absolutely protected from termination. The employee had used drugs illegally in the weeks preceding the termination and had failed to complete the rehab program a second time, so the employer had good reason to believe that illegal drug use would continue beyond the employee's second failed rehab stint. Thus, the ADA's safe harbor provision did not apply.

Second, the FMLA did not guarantee the employee's reinstatement because his drug abuse justified his termination. The employer's policy provided that an employee who does not complete a rehab program can be subject to termination. The FMLA shield does not trump an employer's legitimate reason for termination; in this case, drug abuse and failure to complete rehab. The employee would have been subject to termination even if he had not taken FMLA leave, and thus the fact that he took FMLA leave does not wipe the slate clean.

Accordingly, based on this case, employers should be cognizant of four things. First, the ADA does not protect an employee who illegally used drugs at any time within the weeks preceding the termination. Courts grant employers some leeway in determining whether an employee's recent drug abuse issues will continue to be a problem even if the employee's actual drug use has ceased at the time of the termination.

Second, simply entering a rehab program does not automatically trigger the ADA safe harbor provision's protections. An employee who has not been drug-free for a significant amount of time is still "currently engaging" in illegal drug use.

Third, reinstatement following FMLA leave is not guaranteed. In an important holding, the Fifth Circuit clarified earlier decisions suggesting that FMLA leave guaranteed reinstatement. The employee must still be eligible for the position. Here, the employee's position required that he successfully complete a rehab program, which is a valid job requirement under the FMLA.

Finally, "illegal" drug abuse is not confined to drugs that are per se illegal. In this case, the employee was addicted to prescription drugs. But his "legal" prescription drug use became "illegal" when he received additional prescriptions for the same drug from multiple physicians without their knowledge. In this light, the ADA does not protect prescription drug users when their legal use of the prescription has become illegal drug abuse.

V. FIFTH AMENDMENT

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 (5th 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.

***Salinas v. Texas*, 133 S.Ct. 2174 (U.S. 2013)**

Almost all Americans are aware of the Supreme Court case called *Miranda v. Arizona*, that held a criminal suspect who is in police custody must be advised of his right to remain silent; if the suspect chooses to remain silent, that silence cannot be used against him in a trial. The question before the Court in the *Salinas* case was whether this protection of silence applies before a suspect is actually arrested. The defendant in this case, Genevevo Salinas, voluntarily went to the police station, where officers interviewed him about a pair of 1992 murders. When asked whether a shotgun given to police by his father would match shell casings found at the crime scene, Salinas did not answer. At his trial for the murders, prosecutors used Salinas's silence as evidence of his guilt; Salinas was convicted and sentenced to twenty years in prison.

Over the years, the lower courts had been divided on whether prosecutors can point to the "precustodial" silence of suspects. Today the Court resolved that conflict, holding that because Salinas failed to invoke his right to remain silent in response to the officers' questions, his silence was fair game at his trial. The Court reasoned that the privilege against self-incrimination applies only when it is asserted, and that merely remaining silent in response to questions is not enough.

The Court's decision was fractured. Justice Alito wrote for a plurality of the Justices (himself, Chief Justice Roberts, and Justice Kennedy), setting forth the rule that the right to remain silent must be expressly invoked. Justices Thomas (joined by Justice Scalia) concurred only in the result, arguing that even if Salinas had invoked his right to remain silent, he still would have lost because the prosecutor's comments regarding his silence did not compel him to give self-incriminating testimony. These five votes, together, added up to a loss for Salinas, and the rule in Justice Alito's opinion is the controlling rule going forward. Justice Breyer, joined by the remaining three Justices, dissented, arguing that a defendant need not expressly invoke the privilege against self-incrimination.

Doe, et al. v. Robertson, et al., ---F.3d----, 2014 WL 1796653 (Fifth Circuit, May 06, 2014)

Plaintiffs filed suit against federal officials and others after they were sexually assaulted while being transported from an immigration detention center. Plaintiffs claimed violations of their Fifth Amendment due process right to freedom from deliberate indifference to a substantial risk of serious harm, alleging that the officials knew of violations of a contractual provision requiring that transported detainees be escorted by at least one officer of the same gender, and that the officials understood the provision aimed to prevent sexual assault. On appeal, Defendants Robertson and Rosado, federal officials who worked as ICE Contracting Officer's Technical Representatives (COTRs), challenged the denial of their motion to dismiss based on qualified immunity. The court concluded that plaintiffs properly alleged that Robertson and Rosado had actual knowledge both of the violations of the Service Agreement provision and of that provision's assault-preventing objective. However, because the complaint did not plausibly allege the violation of a clearly established constitutional right, Robertson and Rosado were entitled to qualified immunity and the district court erred in denying their motion to dismiss.

***Hollingsworth v. Perry* --- S.Ct. ----, 2013 WL 3196927 (U.S. 2013)**

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.

The Supreme Court never got to the merits of the case, holding the proponents of California's ban on same-sex marriage did not have standing to appeal the district court's order invalidating the ban.

***United States v. Windsor,* --- S.Ct. ----, 2013 WL 3196928 (U.S. 2013)**

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.

Justice Kennedy's opinion reads much like his opinion in *Lawrence v. Texas* (2003), in which the Court ruled 6-3 that state criminal bans on same-sex sexual behavior violate the right to privacy protected in the Due Process Clause of the Fourteenth Amendment. The majority opinion in that case was sensitive to the developing social norms about gay rights and relationships and nuanced in its analysis of relevant constitutional principles.

Kennedy's analysis of the constitutional claim in *Windsor* begins by noting that "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." And the belief that a man and woman are "essential to the very definition" of marriage "became even more urgent, more cherished when challenged." At the same time, however, other people responded to the suggestion of same-sex marriage with "the beginnings of a new perspective, a new insight." In a relatively short period of time, the "limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion." The opinion also notes that New York's decision to legalize same-sex marriage in 2011 came after "a statewide

deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage" and to "correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood."

Justice Kennedy then launched into a discussion of the traditional regulation of marriage. Although "by history and tradition" marriage has been "treated as being within the authority and realm of the separate states," Congress has the authority to "make determinations that bear on marital rights and privileges" when acting "in the exercise of its own proper authority." Congress thus can, for example, refuse to grant citizenship rights to the non-citizen spouse in a sham marriage (one entered into solely for purposes of procuring immigration rights) even if the marriage would be valid for state-law purposes. Congress can also make its own determinations about marriage, if it chooses to, when doling out Social Security benefits, or impose special protections on spouses under pension plans regulated by ERISA.

What makes DOMA different from these examples—and unconstitutional? Justice Kennedy writes of its "far greater reach;" a "directive applicable to over 1,000 federal statutes and the whole realm of federal regulations." Moreover, DOMA is targeted at a single class of persons, a class that a dozen states have sought specifically to protect. But its reach alone does not dictate its validity. The majority opinion notes that marriage has traditionally been the province of the states. State laws must conform to constitutional rights (a principle applied in *Loving*, mentioned above), but within those parameters, states have largely been left to determine the rules regarding entry into, conduct of, and exit from marriage. The federal government, Kennedy notes, "through our history, has deferred to state-law policy decisions with respect to domestic relations." As a general matter, this is certainly true. Whether or not the federal government has the power to define marriage (or other aspects of family status), it has largely chosen not to. The vast majority of federal laws that turn on marital status rely on state definitions, rather than supplying their own. And those state laws vary, although not to the degree that they once did.

It is against this background, Justice Kennedy writes, that "DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each States, though they may vary, subject to constitutional guarantees, from one State to the next." But, as he correctly notes, the background is descriptive, but not necessarily prescriptive. Can the federal government choose to act against this longstanding tradition of deference to the states? The majority did not rule on this issue per se. Kennedy wrote that the Court did not have to decide whether "this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance." Instead, the majority concluded, the problem is in the nature of this particular intrusion.

Quoting *Romer v. Evans*, in which the Court struck down a voter referendum in Colorado that had prevented the legislature from passing any law designed to prevent discrimination against gays and lesbians, Kennedy wrote: "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." In other words, the federal government's departure from the longstanding tradition of deference to state regulation of marriage makes it suspect, but not necessarily invalid. And the fact that the federal government acted for the "opposite purpose" of a state like New York, which acted to protect same-sex relationships, makes it even more suspect.

The states, Kennedy wrote, are better situated to define marriage because the "dynamics of state government" are designed "to allow the formation of consensus respecting the way the members of discrete community treat each other in their daily contact and constant interaction with each other." And when they define marriage, they are doing more than imposing a "routine classification for purposes of certain statutory benefits." They are, rather,

giving further "protection and dignity" to the bond between two people engaged in an intimate relationships. It was recognition of these personal bonds that gave rise to the Court's ruling in *Lawrence*, and the shift towards gay rights that the decision triggered.

New York's legalization of same-sex marriage reflects "both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." Yet DOMA, according to Kennedy's opinion, "seeks to injure the very class New York seeks to protect. And, by doing so, "it violates basic due process and equal protection principles applicable to the Federal Government." (Equal protection challenges against state laws are rooted in the Fourteenth Amendment; challenges against federal laws come under the Fifth Amendment, which has been interpreted to protect both due process and equal protection rights.) The Court wrote in *Romer* that the guarantee of equality "'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." The more unusual a discriminatory law is, the more likely it is the product of animus. DOMA falls squarely into this trap. As Kennedy wrote, "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class." With DOMA, the "avowed purpose and practical effect" are to "impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." The very title of the act—the *Defense* of Marriage Act—shows the federal government's desire to exclude, and clear language in the legislative history shows Congress' moral disapproval of homosexuality.

Kennedy concludes his opinion with a long and pointed critique of DOMA and its impact on same-sex married couples. The law diminishes "the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect." It "undermines both the public and private significance of state-sanctioned marriages" by telling couples "and all the world" that "their otherwise valid marriages are unworthy of federal recognition." It imposes upon them a "second-tier marriage." It "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family its concord with other families in their community and in their daily lives." Same-sex couples "have their lives burdened . . . in visible and public ways." The law touches "many aspects of married and family life, from the mundane to the profound." And it does all this under the guise of a law whose "principal purpose and necessary effect" are to "demean those persons who are in a lawful same-sex marriage."

The Court thus holds "that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." The statute "is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." Then, in the last sentence, the majority wrote that its "opinion and holding are confined to those lawful marriages," preempting any argument that *Windsor*, alone, invalidates state bans on same-sex marriage.

Three separate dissents to the opinion were filed by Justices Roberts, Scalia and Alito. Two of these opinions focused primarily on the question of standing. Both Justices Scalia and Roberts argued that the Court lacked jurisdiction to review the lower court decision in *Windsor*. They both also wrote and argued that the law was constitutional on the merits. Justice Roberts wrote that "interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that very point, had been adopted by every State in our Nation, and every nation in the world." Justice Scalia argues that the majority's decision and reasoning

"spring forth from the same diseased root: an exalted conception of the role of this institution in America."

***Fisher v. University of Texas* --- S.Ct. ----, 2013 WL 3155220 (U.S. 2013)**

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.

Justice Anthony M. Kennedy's opinion for seven Justices (Justice Ruth Bader Ginsburg dissented and Justice Elena Kagan did not participate) ordered the Fifth Circuit Court to take a new, and seemingly more demanding, look at an admissions formula adopted to be a close match of one that the Supreme Court had actually upheld in 2003 in the *Grutter v. Bollinger* decision, involving the University of Michigan Law School. The university thought it was following the guidance of that ruling, and the Fifth Circuit agreed that it had.

The Fifth Circuit, Kennedy wrote, did not even apply the constitutional standard laid out in the *Grutter* ruling, and went seriously awry in giving too much emphasis to the University of Texas's "good faith" in adopting its own version of a *Grutter* plan.

Justice Kennedy spoke of *Grutter*'s continuation as a precedent in two places. First, he mentioned it along with other "affirmative action" precedents and commented: "We take those cases as given for purposes of deciding this case." Second, he mentioned what *Grutter*had concluded, and then said that "the parties do not challenge, and the Court therefore does not consider, the correctness of that determination."

***Shelby County v. Holder* --- S.Ct. ----, 2013 WL 3184629 (U.S. 2013)**

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.

In an opinion by Chief Justice John Roberts that was joined by Justices Scalia, Kennedy, Thomas, and Alito, the Court did not invalidate the principle that preclearance can be required. But much more importantly, it held that Section 4 of the Voting Rights Act, which sets out the formula that is used to determine which state and local governments must comply with Section 5's preapproval requirement, is unconstitutional and can no longer be used. Thus, although Section 5 survives, it will have no actual effect unless and until Congress can enact a new statute to determine who should be covered by it.

VI. TITLE VII

Equal Employment Opportunity Commission v. Boh Brothers Construction Company, 731 F.3d 444 (5th Cir. 2013)

In this case, the Fifth Circuit directly holds that a plaintiff can rely on gender-stereotyping evidence to support a violation of Title VII in a same-sex discrimination case. While working on an all-male bridge-maintenance crew, one member of the crew was singled out for "almost-daily verbal and physical harassment because [he] did not conform to [the crew's superintendent's] view of how a man should act." Both the harasser and the target of the harassment were heterosexual. After complaining to a higher supervisor, the injured party was put on leave without pay, reassigned to another crew, and eventually fired. The EEOC brought suit on behalf of the victim.

At trial, a jury found that the harassment violated Title VII and awarded $201,000 in compensatory damages and $250,000 in punitive damages. The district court adjusted the compensatory damages down to $50,000 to comply with a statutory cap limiting total damages to $300,000. Following the judgment, the district court denied motions for judgment as a matter of law and for a new trial. On Boh Brothers' appeal, a panel overturned the jury verdict citing a lack of evidence to sustain the jury's finding that the harassment violated Title VII's protection against sex discrimination. The EEOC then requested en banc review.

On rehearing, the Fifth Circuit rejected Boh Brothers' claim that a Title VII same-sex discrimination case cannot rely on gender-stereotyping evidence. The Court cited numerous gender-stereotyping decisions based on the Supreme Court's leading precedent, Price Waterhouse. It also expressly agreed with other circuits in interpreting the three evidentiary paths for claiming same-sex harassment discussed in the Supreme Court's Oncale decision as "illustrative, not exhaustive," thereby allowing for the present claim which did not fit within the three paths the Oncale Court established.

The Fifth Circuit then reviewed the jury verdict, stating that the context of this case required that two elements be met: (1) was the harassment "because of . . . sex" and (2) was it severe and pervasive. Finding that the harassment fulfilled the first element, the Court quoted testimony of the harasser in which he admitted to calling the victim names because he found the victim's usage of a personal-hygiene item as feminine. Responding to Judge Jones's claim in her dissenting opinion that the "judgment portends a government-compelled workplace speech code," the majority emphasized that there were other sexualized acts which accompanied the name-calling including the harasser exposing his genitals to the victim and simulating anal sex with the victim. The Court concluded that taken as a whole the record provided enough evidence that the jury's finding of sexual harassment should not be overturned. Regarding the second element, the Court ruled there was enough evidence of daily and repeated harassment to support the jury's finding that the harassment was severe and pervasive. Though the harassment took place on an all-male construction site, the majority found that jury was able to analyze the harassment within the proper social context and still deem the actions as rising to the level of severity required. After having found the evidence sufficient for a Title VII claim, the Court dismissed Boh Brothers' assertion of an affirmative defense to vicarious liability, finding that the company's nondiscrimination policies "offered no specific guidance regarding sexual harassment."

The Court also reviewed the punitive damages awarded by the jury and found that the punitive damages were not supported by the record because the defendants did not know that male-on-male harassment could violate Title VII. Therefore, the harassment was not done "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." After vacating the punitive damages, the Fifth Circuit then remanded the case back to the district court to re-assess the damages award. The district court had previously reduced the compensatory damages from $201,000 to $50,000 alongside the previous award of $250,000 in punitive damages to comply with the statutory cap.

VII. TITLE VIII

Vance v. Ball State University, --- S.Ct. ----, 2013 WL 3155228 (U.S. 2013)

Under Title VII of the Civil Rights Act of 1964, the standard for imposing liability on an employer for acts of workplace harassment depends on the status of the alleged harasser. When the harassment is committed by a co-worker, the employer ordinarily is not liable unless the plaintiff demonstrates that the employer was negligent in preventing or responding to the harassment. In a pair of 1998 cases, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), however, the Supreme Court established a different liability standard for harassment by supervisors. Under *Faragher* and *Ellerth*, an employer is vicariously liable for harassment by a supervisor—without proof of negligence—unless it establishes affirmatively that (1) it exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided.

In *Vance v. Ball State University*, No. 11-556, the Supreme Court resolved a long-standing circuit split concerning who qualifies as a "supervisor" for purposes of applying *Faragher* and *Ellerth's* vicarious liability rule. In a 5–4 opinion authored by Justice Alito, the Supreme Court held that a supervisor is an employee authorized by an employer to take "tangible employment actions" against another worker. Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined the majority opinion. Justice Ginsburg filed a dissenting opinion, joined by Justices Breyer, Sotomayor, and Kagan, in which she advocated for a broader definition of "supervisor."

Petitioner Maetta Vance, who is African-American, worked in respondent Ball

State University's catering department. A co-worker who had been given the authority to direct the work of several employees, including Vance, allegedly subjected Vance to severe and pervasive racial harassment. Vance sued the university under Title VII, asserting hostile-environment and retaliation claims. The district court granted Ball State's motion for summary judgment. It relied on Seventh Circuit precedent holding that, for purposes of imposing vicarious liability on an employer, "supervisor" status turned on "the power to hire, fire, demote, promote, transfer, or discipline an employee," which the alleged harasser lacked. The Seventh Circuit affirmed.

The Supreme Court largely adopted the Seventh Circuit's definition. After examining the origins of the supervisor-liability rule, the majority held that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has "empowered" the employee to take "tangible employment actions against the victim." The Court defined such actions to mean that the co-employee must be vested with the authority "to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The majority rejected as unworkable the broader definition that had been adopted by the Equal Employment Opportunity Commission and by several circuits. That definition afforded supervisor status to any employee bestowed with the authority to exercise significant control over the plaintiff's daily work. Although the majority today adopted a relatively narrow definition of who counts as a supervisor, it cautioned that an employer that "concentrates all decision-making authority in a few individuals" would be unlikely to "isolate itself from heightened liability" because "the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies."

In dissent, Justice Ginsburg criticized the majority's decision as "ignor[ing] the conditions under which members of the work force labor," and "disserv[ing] the objective of Title VII to prevent discrimination from infecting the Nation's workplaces." Noting that Congress had "in the recent past, intervened to correct the Court's wayward interpretations of Title VII," she urged Congress to "restore the robust protections against workplace harassment the Court weakens today."

Justice Thomas filed a short concurrence, in which he stated that *Faragher* and *Ellerth* were wrongly decided. He joined with the majority, however, because in his view the Court's decision "provides the narrowest and most workable rule for when an employer may be held vicariously liable for an employee's harassment."

This case is important to all employers. The Court's adoption of a clear and objective rule for determining when an employer is vicariously liable for harassment is likely to promote the resolution of claims at the summary-judgment stage. The decision is also likely to affect other statutes that borrow definitions from Title VII, such as the Federal Labor Standards Act.

VIII. FAIR LABOR STANDARDS ACT (FLSA)

Sandifer v. United States Steel Corporation, 134 S.Ct. 870 (2014)

This suit was brought by a number of U.S. Steel's workers who sought to recover, under the FLSA, for the time they spent donning and doffing protective clothing. A section of the FLSA (Section 203(o)) provides that, if an employer and a union agree to make "time spent in changing clothes" noncompensable, that time will not count for purposes of the statute's minimum wage and overtime provisions. Collective bargaining agreements dating back to 1947 between U.S. Steel and the United Steelworkers of America provide that workers are not paid for the time they spend donning and doffing protective clothing and equipment at the beginning and end of the workday. The protective clothing and equipment that a U.S. Steel worker must wear depends on the worker's

job task. But the company's workers often must wear such items as hardhats, safety glasses, earplugs, respirators, "snoods" (protective hoods that extend to the chest), flame-retardant hoods, flame-retardant jackets, flame-retardant pants, work gloves, "wristlets" (protective Kevlar sleeves that cover the lower arm and the opening of the work glove), steel-toed boots, and "leggings" (protective Kevlar sleeves that cover the lower leg and the opening of the boot). The Plaintiffs claimed activities during the donning and doffing time period did not constitute "changing clothes" for purposes of the statute, thus making this time compensable. Both the district court and the Seventh Circuit rejected this argument and granted summary judgment to the company. The Supreme Court granted certiorari to resolve the question of the meaning of "changing clothes" under Section 203(o), a question that had divided the circuits.

The Court affirmed the Seventh Circuit's judgment. Consulting dictionaries from the period during which Congress added Section 203(o) to the FLSA, the Court concluded that "clothes" refers to "items that are both designed and used to cover the body and are commonly regarded as articles of dress." The Court rejected the workers' argument that "clothes" could not refer to items designed to protect against workplace hazards. Justice Scalia noted that, for many workers (he listed "factory workers, butchers, longshoremen, and a host of other occupations"), "protective gear is the only clothing that," when donned or doffed, would trigger a requirement of compensation in the absence of Section 203(o). The workers' position, then, would "run[] the risk of reducing § 203(o) to near nothingness."

In emphasizing that the ordinary meaning of "clothes" applies in this context, the Court explicitly rejected "the view, adopted by some Courts of Appeals, that 'clothes' means essentially anything worn on the body—including accessories, tools, and so forth." As Justice Scalia's opinion noted, U.S. Steel had essentially urged the Court to adopt that broad view. The opinion explained that such a construction might be more readily administrable than the one the Court adopted. But, "[f]or better or for worse," Justice Scalia wrote, Congress "used the narrower word 'clothes.'"

In addition to pressing for a narrow definition of "clothes," the workers argued that "changing" clothes requires taking off the clothes a person is wearing and putting on new ones. Thus, they contended, simply putting on protective clothing over one's street clothes—as at least some of U.S. Steel's workers do when they arrive at work—did not constitute "changing clothes." The Court acknowledged that "the normal meaning of 'changing clothes' connotes substitution." But it observed that "the phrase is certainly able to have a different import"—namely, altering what one is wearing, whether or not one removes what one had been wearing before. The Court concluded that this latter, broader understanding of "changing clothes" is the one that best fit the statute. The Court reasoned that the decision whether to take off one's street clothes before putting on work clothes depends on the idiosyncrasies of personal preference, changing fashions, weather conditions, and so forth, and that an interpretation of Section 203(o) that depended on such variables would not provide a solid basis for employers and unions to negotiate collective-bargaining agreements.

Having resolved these definitional disputes, the Court readily concluded that the vast majority of the items donned and doffed by the plaintiff workers at the beginning and end of the work day—all but safety glasses and ear plugs—constituted "clothes," and that the donning and doffing constituted "changing" those clothes. As for the safety glasses and ear plugs, the Court held that, as a whole, the workers' time donning and doffing their protective items at the beginning and end of the day constituted "time spent in changing clothes," and that the small amount of time it took to put on and take off ear plugs and safety glasses did not change that conclusion. Justice Scalia's opinion explained that we say that we spent the day skiing "even when less¬-than-negligible portions of the day are spent having lunch or drinking hot toddies." (Presumably, he meant to say "more than negligible.") "The question for

courts," he said, "is whether the period at issue can, on the whole, be fairly characterized as 'time spent in changing clothes or washing.'"

IX. QUALIFIED IMMUNITY

***Zapata, et al. v. Melson, et al.*, --- F.3d.---, 2014 WL 1545911 (5th Circuit, April 18, 2014)**

The plaintiffs alleged that "Operation Fast and Furious" (OFF) distributed the firearms that led to the shooting death of Jaime Zapata and the injury of Victor Avila. Zapata and Avila, both special agents of Immigration and Customs Enforcement, "were ambushed and shot by drug cartel members in Mexico using weapons they allegedly obtained unlawfully in the United States" as a consequence of OFF. The plaintiffs sued a number of federal officials for civil rights violations under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1999). At least some of the defendants moved in the district court under FRCP 12(b)(6) for dismissal on the ground of qualified immunity. The district court declined to rule on the motion, but "issu[ed] an order allowing ... limited discovery on the issue of qualified immunity." The order "did not give the parties further guidance or limitations on the scope of discovery." The defendants timely appealed.

The Fifth Circuit vacated and remanded. First, the Court found that because the district court did not rule on the motion, it was "tantamount to an order denying" the motion, thus making it appealable. Regarding the merits, the Court found that the district court erred under precedents "'establish[ing] a careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense.'" It may defer ruling if, first, it "find[s] 'that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity'"; then, "'if [it] remains 'unable to rule on the immunity defense without further clarification of the facts,' it may issue a discovery order 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.'"" Here, the district court did neither: it "failed to make an initial determination that the plaintiffs' allegations, if true, would defeat qualified immunity," and it "did not identify any questions of fact it needed to resolve before it would be able to determine whether the defendants were entitled to qualified immunity." The Court instructed the district court on remand "to follow the[se] procedures."

X. 42 U.S.C. § 1981

***Campbell v. Forest Pres. Dist. of Cook Cnty., Ill.*, No. 13-3147, 2014 WL 1924479 (7th Cir. May 15, 2014)**

As a matter of first impression, the Seventh Circuit has held that 42 U.S.C. §1981 does not create a private right of action against state actors. The plaintiff was fired after a security camera recorded him having sex with a coworker in the company's office. Two and a half years later, he sued his former employer. His suit included a claim under 42 U.S.C. §1981 that his termination violated that statute's prohibition on racial discrimination in the making and enforcement of contracts. His initially suit included claims under 42 U.S.C. § 1983, but he amended his complaint to leave them out, apparently conceding that they were time-barred.

The Seventh Circuit wrote that, under Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 731-35 (1989), § 1981 itself provides a remedy for violations committed by private actors, but an injured party must resort to §1983 to obtain relief for violations committed by state actors. Campbell argued that the Civil Rights Act of 1991 superseded Jett by adding the following language to §1981 as subsection (c): "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." As a result, he argued § 1981 provides a remedy against state actors independent of §1983. The Seventh Circuit recognized that the Ninth Circuit had taken this position in 1996 but that all six circuits considering the issue since then had not.

Finding against the plaintiff—and affirming the decision below—the Seventh Circuit observed that §1981(c) was intended not to overrule Jett but to codify an earlier Supreme Court holding that §1981 prohibits intentional racial discrimination in private as well as public contracting. Further, the Seventh Circuit reasoned that the fact that Congress has created a specific remedy against state actors under §1983 still counsels against inferring a remedy against them under §1981, even after the Civil Rights Act of 1991. Joining the "overwhelming weight of authority," the Seventh Circuit held that Jett remains good law, and consequently, §1983 remains the exclusive remedy for violations of §1981 committed by state actors.