RECENT FEDERAL CASES
OF INTEREST TO GOVERNMENTAL ENTITIES

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I. FIRST AMENDMENT

***Minnesota Voters Alliance v. Mansky* – 585 US ___ (2018)**

At issue in this case is Minnesota Statute § 211B.II which prohibits individuals from wearing political apparel at or around polling places on primary or election days. The text of the statute did not define "political", so Minnesota election officials distributed policy materials to help identify which items fell within the scope of the law. Election officials received instructions to request that anyone wearing apparel which violated the guidelines laid out in the policy materials remove the apparel or cover it up. While officials were instructed to allow the person to vote regardless of their compliance, misdemeanor prosecution was a possible outcome, if an individual refused the removal or cover-up request. This case arose when Andrew Cilek, executive director for Minnesota Voters Alliance, was temporarily prevented from voting at his local polling place in November 2010 because he was wearing a t-shirt with a Tea Party logo and a button that advocated for the requirement of a photo ID to vote.

Minnesota Majority, Minnesota Voters Alliance, and Minnesota Northstar Tea Party Patriots, along with their association Election Integrity Watch (EIW), filed a lawsuit against the Minnesota Secretary of State and various county election officials to enjoin enforcement of the statute as unconstitutional. The parties claimed that the statute violated the First Amendment, facially and as-applied, and was selectively enforced, which also violated their Equal Protection rights.

Initially, the district court dismissed all claims. The Eighth Circuit affirmed as to the claims regarding Equal Protection and facial First Amendment violations. However, it reversed and remanded the as-applied First Amendment claim. The district court ultimately granted summary judgment against EIW, et al., on the as-applied First Amendment claim. Reviewing de novo the grant of summary judgment against EIW, the Eighth Circuit considered EIW's claim that the Minnesota statute was not reasonable, as applied to Tea Party apparel, because the Tea Party is not a political party in Minnesota. The Eighth Circuit was unpersuaded and held that the district court was correct in its ruling, since EIW had failed to present specific facts that showed banning Tea Party apparel was not reasonable, given the Minnesota statute's purpose. The Eighth Circuit held that EIW's argument that voters in Tea Party apparel were affected by selective enforcement had also failed, as it offered nothing more than speculation that voters wearing other forms of political apparel avoided enforcement of the statute. EIW, et al., then petitioned the Supreme Court to decide whether the lower courts' ruling was correct.

EIW indicates in their petition for a writ of certiorari that there is a circuit split on the issues presented, where the Eighth Circuit's ruling aligns with the D.C. and Fifth Circuit, which both have held that the government has authority to ban forms of political speech near polling places. The Fourth and Seventh Circuits have held, by contrast, that a complete ban on all political speech, absent any limiting principle, is unconstitutional, regardless of the location in which such speech has been banned. The questions presented to the Supreme Court is whether Minnesota Statute § 211B.II is facially overbroad, thus infringing upon the Free Speech Clause of the First Amendment by banning all political apparel at a polling place, effectively imposing a "speech-free zone".

In a 7-2 opinion authored by Chief Justice John Roberts, the Court held that the statute prohibiting individuals from wearing political apparel at a polling place violated the Free Speech Clause of the First Amendment. The Court reasoned that a polling place is a nonpublic forum under its precedents, which means that the state may place reasonable limits

on speech therein. Content-based restrictions on speech must be "reasonable and not an effort to suppress expression" based on the speaker's viewpoint. The text of the Minnesota statute made no distinction based on the speaker's political persuasion, so it would be permissible so long as it is "reasonable." One component of reasonableness is the presence of "objective, workable standards" guiding enforcement of the law. Because the statute in question does not define the term "political" nor any other key terms describing the types of apparel subject to the prohibition, the law affords too much discretion in enforcing the ban and is thus unreasonable.

***Sause v. Bauer* – 585 US ___ (2018)**

Mary Ann Sause, representing herself, filed a lawsuit under 42 U.S.C. § 1983 against members of the Louisburg, Kansas, police department, as well as the current and former mayor of the town. In her complaint she alleges that two police officers visited her apartment in response to a noise complaint, entered her apartment without consent, and "then proceeded to engage in a course of strange and abusive conduct." She further alleges that at one point she "knelt and began to pray but one of the officers ordered her to stop." Sause claims that the officers' conduct violated her First Amendment right to the free exercise of religion and her Fourth Amendment right to be free of unreasonable searches and seizures. The defendants moved to dismiss Sause's claim for failure to state a claim, asserting that they were entitled to qualified immunity. The district court granted the motion and dismissed the complaint. On appeal, Sause—now with counsel—argued only that her free exercise rights were violated by the officers' conduct (dropping her Fourth Amendment claims). The Tenth Circuit affirmed the district court's dismissal of the action, concluding that the officers were entitled to qualified immunity.

The issue presented to the Supreme Court is whether the failure of the self-represented plaintiff in this case to raise her Fourth Amendment claim on appeal after bringing closely related First and Fourth Amendment claims in the original action rendered it unnecessary for the court to resolve her Fourth Amendment claims. The Supreme Court held that the Tenth Circuit erred by holding that the police officer defendants were entitled to qualified immunity before considering petitioner's Fourth Amendment claims.

In a per curiam opinion, the Court held that Sause's failure to raise her Fourth Amendment claims on appeal did not render unnecessary the lower court's resolution of the "inextricabl[y]" linked First and Fourth Amendment claims. The district court should have interpreted the pro se complaint "liberally," and in doing so it should find that the plaintiff's Fourth Amendment claims cannot properly be dismissed for failure to state a claim. Although the plaintiff raised only her First Amendment claim on appeal, even that claim "demanded consideration of the ground on which the officers were present in the apartment and the nature of any legitimate law enforcement interests that might have justified an order to stop praying at the specific time in question." Without such consideration, a finding of qualified immunity for the officers would be premature.

II. SECOND AMENDMENT

***Mance v. Sessions* -- F.3d – Docket No. 15-10311 (5th Cir., July 20, 2018)**

The Fifth Circuit denied a petition for rehearing en banc, withdrew the prior opinion, and substituted the following opinion.

Federal laws generally prohibit the direct sale of a handgun by a federally licensed firearms dealer (FFL) to a person who is not a resident of the state in which the FFL is located. In a suit brought by Fredric Russell Mance, Jr. and others, the federal district court enjoined the enforcement of these laws, concluding that they violated the Second Amendment and the Due Process Clause of the Fifth Amendment

The Fifth Circuit reversed the district court's decision holding that the laws did not

violate the Second Amendment and the Due Process Clause of the Fifth Amendment. The court held that the in-state sales requirement was narrowly tailored to a compelling government interest in preventing circumvention of the handgun laws of various states; the in-state sales requirement was not unconstitutional as applied to plaintiffs; the in-state sales requirement did not discriminate based on residency and was thus not subjected to any scrutiny under the equal protection component of the Due Process Clause; and plaintiffs' equal protection claim failed because the in-state sales requirement did not favor or disfavor residents of any particular state.

III. FOURTH AMENDMENT

***Collins v. Virginia,* 584 US ___ (2018)**

On two occasions, a particular unique-looking motorcycle evaded Albemarle police officers after they observed the rider violating traffic laws. After some investigation, one of the officers located the house where the suspected driver of the motorcycle lived and observed what appeared to be the same motorcycle covered by a tarp in the driveway. The officer lifted the tarp and confirmed that it was the motorcycle (which was also stolen) that had eluded detainment on multiple occasions. The officer waited for the suspect to return home, at which point he went to the front door to inquire about the motorcycle. Initially the suspect denied knowing anything about it but eventually confessed that he had bought the motorcycle knowing that it had been stolen. The officer arrested the suspect for receipt of stolen property.

At trial, the defendant sought to suppress the motorcycle as evidence on the grounds that the police officer conducted an illegal warrantless search (by lifting the tarp covering the motorcycle parked in the driveway) that led to its discovery. The trial court held that the search was based on probable cause and justified under the exigent circumstances automobile exceptions to the Fourth Amendment's warrant requirement and convicted the defendant. The appeals court affirmed on the grounds of exigent circumstances, and the Virginia Supreme Court affirmed as well, but under the automobile exception only. The Virginia Supreme Court reasoned that the automobile exception applies even when the vehicle is not "immediately mobile" and applies to vehicles parked on private property.

The issue for the Supreme Court was whether the Fourth Amendment's automobile exception permits a police officer without a warrant to enter private property in order to search a vehicle parked a few feet from the house. In an 8–1 opinion authored by Justice Sonia Sotomayor, the Court held that its own Fourth Amendment jurisprudence regarding the home and the "curtilage" of one's home (the area immediately surrounding it) clearly prevents officers from entering and searching without a warrant, even if the object searched is an automobile. The Court found that the area searched (the back of the driveway) was indeed the curtilage of the defendant's home, and thus the Fourth Amendment's highest degree of protection applies there. Although warrantless searches of automobiles are permissible in limited circumstances, the warrantless search of an automobile parked within the curtilage of one's home is not permissible.

***Byrd v. United Sates,* 584 US ___ (2018)**

Terrence Byrd was driving on a divided four-lane highway near Harrisburg, Pennsylvania, when he was pulled over allegedly for violating a state law requiring drivers to use the left lane for passing only. Recognizing the car as a rental car, the officers asked Byrd for his license and rental agreement, which he had difficulty locating. Once he did locate them, the officers noted that the rental agreement did not list Byrd as an authorized driver, and when they ran his identification, the officers noted that Byrd was using an alias and had an outstanding warrant in New Jersey. Despite the warrant's indication that it did not request extradition from other jurisdictions, the officers attempted to contact authorities in New Jersey to confirm they did not seek Byrd's arrest

and extradition, allegedly following protocol for such situations. The officers experienced difficulty with their communications, however, and returned to Byrd's car, where they asked him to exit the vehicle and questioned him about his warrant and alias.

The officers asked whether Byrd had anything illegal in the car and then requested Byrd's consent to search the car, noting that they did not actually need his consent because he was not listed on the rental agreement. The officers allege that Byrd gave his consent, but Byrd disputes this contention. The subsequent search turned up heroin and body armor in the trunk of the car.

At trial, Byrd moved to suppress the evidence, challenging the initial stop, the extension of the stop, and the search. The district court determined that the violation of the traffic law justified the initial stop and that the extension of the stop was justified by the officers' developing reasonable suspicion of criminal activity. Byrd maintains that he did not consent to the search, so the issue remains whether he needed to consent at all—that is, whether he had a reasonable expectation of privacy in the rental vehicle, despite not being listed on the rental agreement. If he did not have a reasonable expectation of privacy, then the officers' search of the vehicle did not require his consent.

The Court noted that there was a circuit split as to whether an unlisted driver of a rental car has a reasonable expectation of privacy in the rental vehicle, and the Third Circuit (where the district court in this case sits) has held that such a driver does not. Thus, the district court denied Byrd's motion to suppress, and the Third Circuit, reviewing the factual questions for clear error and the legal question de novo, affirmed the judgment of the district court.

The issue before the Supreme Court was whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement. In a unanimous opinion authored by Justice Anthony Kennedy, the Court held that a person who is in lawful possession of a rental car has a reasonable expectation of privacy in it, regardless of whether he is listed as an authorized driver on the rental agreement. Although such a driver does not have a property interest in the car, property principles inform the reasoning behind this conclusion. A driver who has the permission of the lawful possessor or owner of the car has complete "dominion and control" over the property and can rightfully exclude others from it. The Court analogized to the situation in Jones v. United States, 362 U.S. 257 (1960), where the Court found that the defendant had a reasonable expectation of privacy in the apartment in which he was staying temporarily with the owner's permission, notwithstanding the fact that the apartment was not lawfully his. Essential to the Court's holding was the finding that the driver in this case was in lawful possession; indeed, the driver of a stolen vehicle lacks a reasonable expectation of privacy in a car he may be driving.

***Carpenter v. United States*, 585 US ___ (2018)**

In April 2011, police arrested four men in connection with a series of armed robberies. One of the men confessed to the crimes and gave the FBI his cell phone number and the numbers of the other participants. The FBI used this information to apply for three orders from magistrate judges to obtain "transactional records" for each of the phone numbers, which the judges granted under the Stored Communications Act, 18 U.S.C. 2703(d). That Act provides that the government may require the disclosure of certain telecommunications records when "specific and articulable facts show that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." The transactional records obtained by the government spanned several months and included the date and time of calls, and the approximate location where calls began and ended based on their connections to cell towers—"cell site" location information (CSLI).

Based on the CLSI evidence, the government charged Timothy Carpenter with, among other offenses, aiding and abetting robbery that affected interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951. Carpenter moved to suppress the government's CLSI evidence on Fourth Amendment grounds, arguing that the FBI needed a warrant based on probable cause to obtain the records. The district court denied the motion to suppress, and the Sixth Circuit affirmed.

The issue before the Supreme Court was whether the warrantless search and seizure of cell phone records, which include the location and movements of cell phone users, violated the Fourth Amendment. Chief Justice John Roberts authored the opinion for the 5-4 majority in favor of Carpenter. The Court held that the government's acquisition of Carpenter's cell-site records was a Fourth Amendment search and that a warrant from a judge based on probable cause was required. The majority first acknowledged that the Fourth Amendment protects not only property interests, but also reasonable expectations of privacy. Expectations of privacy in this age of digital data do not fit neatly into existing precedents but tracking person's movements and location through extensive cell-site records is far more intrusive than the precedents might have anticipated. The Court declined to extend the "third-party doctrine"—a doctrine where information disclosed to a third party carries no reasonable expectation of privacy—to cell-site location information, which implicates even greater privacy concerns than GPS tracking does. One consideration in the development of the third-party doctrine was the "nature of the particular documents sought," and the level of intrusiveness of extensive cell-site data weighs against application of the doctrine to this type of information. Additionally, the third-party doctrine applies to voluntary exposure, and while a user might be abstractly aware that his cell phone provider keeps logs, it happens without any affirmative act on the user's part. Thus, the Court held narrowly that the government generally will need a warrant to access cell-site location information.

Justice Anthony Kennedy filed a dissenting opinion based primarily on third-party doctrine grounds, in which Justices Clarence Thomas and Samuel Alito joined. Justice Kennedy would find that cell-site records are no different from the many other kinds of business records the government has a lawful right to obtain by compulsory process. Justice Kennedy would continue to limit the Fourth Amendment to its property-based origins asserting that Carpenter can "assert neither ownership nor possession" of the records and had no control over them.

Justice Thomas filed a dissenting opinion, emphasizing the property-based approach to Fourth Amendment questions. In Justice Thomas's view, the case should not turn on whether a search occurred, but whose property was searched. By focusing on this latter question, Justice Thomas reasoned, the only logical conclusion would be that the information did not belong to Carpenter.

Justice Alito filed a dissenting opinion, in which Justice Thomas joined. Justice Alito distinguishes between an actual search and an order "merely requiring a party to look through its own records and produce specified documents"—with the former being far more intrusive than the latter. Justice Alito criticized the majority for what he characterizes as "allow[ing] a defendant to object to the search of a third party's property," a departure from long-standing Fourth Amendment doctrine.

Justice Gorsuch filed a dissenting opinion in which he emphasized the "original understanding" of the Fourth Amendment and lamented the Court's departure from it.

***United States v. Williams*, -- F.3d – Docket No. 17-30198 (5th Cir., January 24, 2018)**

Williams was convicted in 2012 on state charges of distributing marijuana and placed on five years of probation. Conditions of Williams's probation included permitting home visits from the probation officer, refraining from owning or possessing firearms, and consenting to probation

officer searches of his person or property at any time with or without an arrest warrant.

Probation officer Patrick Green testified that during the term of Williams's probation, he was a model probationer and as a result, in 2014 Officer Green began the process of drafting a "petition for cause" to request that the court terminate Williams's probation early. While Officer Green was writing the petition, he was informed by the DEA that Williams was involved in the narcotic trafficking of large amounts of heroin. Officer Green testified that he was "shocked" at the news.

As a result of the tip from the NOPD and DEA and his knowledge of Williams's prior criminal history involving drugs, including the offense for which he was currently on probation, Officer Green concluded that he was warranted in conducting a compliance check on Williams. Officer Green, along with several other probation officers and law enforcement officers traveled to Williams's car dealership to begin the process of the compliance check, which involved transporting Williams to his home. When he arrived at the dealership, Officer Green testified that he walked up to Williams he noticed bulges underneath his clothing. He asked Williams whether he had anything illegal, sharp, or anything that could hurt him. Williams replied he had cash in his pockets. Officer Green testified that at that point, he Mirandized Williams and started to conduct a frisk, a pat-down. He felt large objects underneath in his pockets, which he removed. The objects were wads of cash. Officer Greed testified that he removed the objects because he wanted to see if there were any weapons on the other side of the large bulges. Williams initially indicated that the money was from selling cars. Officer Green testified that he found this large amount of cash odd since Williams had previously reported that he made approximately $2,500 per month in income. A drug dog subsequently alerted to the presence of drug residue on the cash that was found on Williams's person.

Thereafter, Officer Green obtained consent from Williams to search his business, his mother's home, and his personal residence. At Williams' personal residence, officers found $2,000 on a closet shelf and subsequently seized over $425,000 in cash in a safe and a .40 caliber Smith and Wesson pistol in the nightstand drawer. A K–9 unit again alerted to the presence of drug residue on the cash. Williams was arrested on charges of being a felon in possession of a firearm.

In January 2015, Williams was indicted on five charges. Following his indictment, Williams moved to suppress the evidence officers seized on the day of his arrest. The district court held an evidentiary hearing and denied the motion, concluding that Officer Green had sufficient probable cause and reasonable suspicion, under the case law, to justify the actions that took place after the initial frisk of Williams's person at the additional locations.

Williams ultimately entered a guilty plea to two counts and signed a factual basis admitting to criminal conduct. In his plea agreement, Williams retained the right to appeal the district court's rulings on his motions to suppress and to withdraw the plea if the appeal was successful. This appeal followed.

The Fifth Circuit affirmed defendant's motions to suppress evidence. The court held that the officer's Terry-style frisk of defendant once he arrived at the dealership to transport defendant to his residence was proper given the visible bulges in defendant's pockets that were large enough to conceal weapons; the officers had reasonable suspicion to conduct the searches of defendant's residence, his dealership, and his mother's home; and thus the district court did not err by denying the motions to suppress.

***United States v. Wise,* -- F.3d – Docket No. 16-20808 (5th Cir., December 6, 2017)**

Wise was traveling on a Greyhound bus when police officers performed a bus interdiction at a Conroe, Texas bus stop. Bus interdictions typically involve law enforcement officers boarding a bus to speak with suspicious-looking passengers. The officers aim to discover individuals transporting narcotics, weapons, or

other contraband. If the officers suspect criminal activity, they ask a passenger for his identification and boarding pass; they may also ask whether the passenger has any luggage with him. During the interdiction, passengers may leave the bus. They may also refuse to speak with officers.

Officers boarded the Greyhound, and Wise aroused an officer's suspicion. The officer questioned Wise about his luggage. Two pieces of luggage were stored in the luggage rack above Wise's head. Wise claimed only one piece of luggage as his own; no one claimed the second piece. The officers removed the unclaimed article from the bus, and they determined that the luggage contained cocaine. The officers asked Wise to leave the bus. The officers did not tell Wise that he could refuse to speak to him or refuse to exit the bus. Wise complied. Once off the bus, the officers identified themselves and told Wise what they had found in the bag. The officers asked Wise to empty his pockets and Wise complied. Among other items, Wise gave the officers a lanyard with keys; one key connected Wise to the backpack. The officers then arrested Wise.

Wise moved to suppress the evidence that officers found in his pockets. Following a suppression hearing, the district court suppressed all evidence obtained during the bus search. The district court found that the officers had established an unconstitutional checkpoint stop. The court also concluded that the bus driver did not voluntarily consent to the bus search.

The Fifth Circuit reversed the district court's grant of defendant's motion to suppress evidence that officers found in his pockets. The court held that the police did not establish an unconstitutional checkpoint by stopping a Greyhound bus where the police did not require the bus driver to stop at the station; the driver made the scheduled stop as required by his employer; the police only approached the driver after he had disembarked from the bus; the police did not order him to interact with them; after the police approached him, the driver could have declined to speak with the police; and the police in no way restrained the driver. The court also held that defendant lacked standing to challenge whether the bus driver voluntarily consented to the search. In this case, the officers did not unreasonably seize wise, Wise voluntarily consented to answering the officers' questions and to the search of his luggage, and the officers did not perform an unconstitutional Terry pat down.

***Evans v. Davis*, -- F.3d – Docket No. 15-11066 (5th Cir., November 9, 2017)**

Lavelle Evans was convicted for the murder of Crystal Jenkins and sentenced to life in prison. After exhausting his state habeas remedies, Evans petitioned for federal habeas relief. Evans's pro se petition claims, among other things, that his trial counsel rendered ineffective assistance by failing to move for suppression of a cell phone found in Evans's home. He contends that the cell phone, and the subsequently discovered call records linking him to the scene of the murder, were obtained from an unconstitutional search conducted pursuant to a deficient warrant. The district court denied this claim.

The Fifth Circuit affirmed the district court's denial of petitioner's claim. Despite the warrant failing to designate the things to be seized (instead only providing a description of Evans's house), the court rejected petitioner's defaulted Fourth Amendment claim and held that the evidence fell within the good faith exception to the exclusionary rule. To support its ruling the court looked to the supporting affidavit which stated that "instruments of a crime," among other things, were being concealed at Evans's home. The affidavit further explained that on the night before the murder, Evans called Jenkins's sister. He asked for Jenkins, and the sister handed over the phone. The sister then overheard Evans telling Jenkins to meet him at a Subway restaurant. The affidavit was sworn to in the presence of the judicial officer who issued the warrant, and the judicial officer signed the affidavit. The state habeas record does not reveal whether the affidavit was physically attached to the warrant

or even physically present when the warrant was executed.

***Lincoln v. Colleyville, Texas,* -- F.3d – Docket No. 17-10201 (5th Cir., April 5, 2018)**

On December 26, 2013, agents of the Colleyville Police Department ("CPD") responded to a report that a man, armed with a gun, was on his way to an identified location—4101 Lexington Parkway in Colleyville, Texas—to kill his mother. Officers were dispatched and upon their arrival were advised that John Lincoln and his daughter, Erin Lincoln, were inside the house, that Erin had confirmed John was armed, and that she did not feel threatened. During the incident, John repeatedly came to the front door of the house, would open the door, and make comments such as "come and take it," and "make your move." The officers requested that a SWAT team assemble because John was armed and posed a threat to his mother, his daughter, and the officers. Sgt. Tinsman said that he heard SWAT officers instruct John to "drop the weapon" and shortly after there was a burst of gunfire. John was hit by the gunfire and eventually died from the gunshots. He fell very close to the threshold of the front doorway, and Erin began screaming. Erin was the only other person in the home and rushed to her father's side as soon as the shots were fired. SWAT officers had to physically remove Erin from her father's side to secure the scene and provide John medical attention. When the officers removed Erin, she was handcuffed, taken through the back exit of the house, and placed in the back seat of a CPD officer car. According to the officers, Erin never told them she wanted to leave. Erin was eventually interviewed. Officers claim that Erin never expressed any wish not to give an interview or not to be transported to the CPD station. Erin was initially interviewed for about 11 minutes and then provided a five page statement. Erin remained at the station, sitting with her family, while other members were interviewed. At no time did she indicate that she wanted to leave. The district court granted qualified immunity as to the officers and dismissed Erin Lincoln's claims against them. Erin timely appealed.

The Fifth Circuit affirmed the district court's grant of qualified immunity to the officers who responded to the shooting incident. The court held that, although the officers violated Erin's Fourth Amendment rights by detaining her for four hours without probable cause, such a right was not so clearly established that the officers could be liable. The court explained that it, as well as other circuits, have determined that officers acting under similar circumstances—detaining a sole witness for questioning and investigative preservation—did not violate any clearly established right. The court reasoned that it followed that these officers similarly were not bound by any such clearly established law.

***United States v. Mendez,* -- F.3d – Docket No. 16-41057 (5th Cir., March 23, 2018)**

Eligio San Miguel Mendez was one of the targets of a gang and narcotics investigation. Officers secured a search warrant for his residence but were unable to arrange for a SWAT team to assist them. As a result, they decided to wait for him to leave the residence before moving in for the search. Once he left, the officer leading the search directed nearby officers to stop his vehicle and detain him while the search was underway. The Government does not contest on appeal that the stop was in violation of Bailey v. United States. After the officers detained Mendez, they found a revolver in his car. The search team later discovered ammunition and an empty Glock pistol case in the residence. Mendez was then arrested for being a felon in possession of a firearm and interrogated at a police station. He told officers where they could find the pistol, and he confessed to ownership of the firearms and ammunition. Before trial, Mendez moved to suppress all of the Government's evidence, except for the ammunition found during the execution of the search warrant. The district court suppressed the revolver, but admitted the pistol and Mendez's statements. Mendez was convicted following a jury trial of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On appeal, Mendez challenged the admission of statements he made

to officers confessing to his ownership of the firearms and ammunition arguing that they were tainted by the unlawful stop and search of his vehicle.

The Fifth Circuit affirmed defendant's conviction and sentence for being a felon in possession of a firearm. The court held that the connection between the unlawful stop and search and defendant's subsequent statements was sufficiently attenuated. In this case, defendant was informed of, and waived his Miranda rights; his lawful arrest for being a felon in possession of ammunition was a critical intervening circumstance; and the misconduct at issue was not purposeful and flagrant, but instead was motivated by legitimate safety concerns. Finally, the court noted that defendant's speculation as to how the officers may have exploited the unlawfully obtained revolver to secure his statements was simply too little, too late.

***Hernandez v. Mesa, Jr.*, -- F.3d – Docket No. 12-50217 (5th Cir., March 20, 2018)**

According to the court, Mesa shot and killed Hernandez, 15, on June 7, 2010, while he was in a culvert along the border between Ciudad Juarez and El Paso. Mesa said he opened fire because Mexican youths were throwing rocks at him. Hernandez's parents alleged numerous claims in a federal lawsuit against Mesa, other Border Patrol officials, several federal agencies, and the United States government. The federal district court dismissed all claims but was reversed in part by a divided panel of this court. The panel decision allowed only a Bivens claim, predicated on Fifth Amendment substantive due process, to proceed against Mesa alone. The Fifth Circuit elected to rehear the appeal en banc. Without ruling on the cognizability of a Bivens claim in the first instance, the court concluded unanimously that the plaintiffs' claim under the Fourth Amendment failed on the merits and that Mesa was shielded by qualified immunity from any claim under the Fifth Amendment. The court rejected the plaintiffs' remaining claims. The Supreme Court granted certioriari and heard this case in conjunction with Ziglar v. Abbasi. In Abbasi, the Court reversed the Second Circuit and refused to imply a Bivens claim against policymaking officials involved in terror suspect detentions following the 9/11 attacks. The Court, however, remanded for reconsideration by the appeals court whether a Bivens claim might still be maintained against a prison warden. The Court's decision in this case tagged onto Abbasi by rejecting this court's approach and ordering a remand for us to consider the propriety of allowing Bivens claims to proceed on behalf of the Hernandez family in light of Abbasi's analysis.

Following remand from the United States Supreme Court, the Fifth Circuit acknowledged that this case was not a garden variety excessive force case against a federal law enforcement officer. At issue was whether federal courts have the authority to craft an implied damages action for alleged constitutional violations under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999 (1971). The court noted that no federal statute authorized a damages action by a foreign citizen injured on foreign soil by a federal law enforcement officer under these circumstances. The court held that the transnational aspect of the facts presented a "new context" under Bivens, and numerous "special factors" counseled against federal courts' interference with the Executive and Legislative branches of the federal government. In the majority ruling, the court held that "[i]mplying a private right of action in this transnational context increases the likelihood that board patrol agents will 'hesitate in making split-second decision." Therefore, the court affirmed the district court's dismissal of the case.

***United States v. Molina-Isidoro*, -- F.3d – Docket No. 17-50070 (5th Cir., March 1, 2018)**

This case presents an important question about the extent of Fourth Amendment privacy rights in the digital age, where the use of mobile devices is widespread. After discovering kilos of meth in the suitcase Maria Isabel Molina-Isidoro

was carrying across the border, customs agents looked at a couple of apps on her cell phone. Molina argues that the evidence found during this warrantless search of her phone should be suppressed. Along with amici, Plaintiff invites the court to announce general rules concerning the application of the government's historically broad border-search authority to modern technology for which the Supreme Court has recognized increased privacy interests. The Fifth Circuit declined defendant's invitation to announce general rules concerning the application of the government's historically broad border-search authority to modern technology for which the Supreme Court has recognized increased privacy interests. The court held that the nonforensic search of defendant's cell phone at the border was supported by probable cause and thus, at a minimum, the border patrol agents had a good-faith basis for believing the search did not run afoul of the Fourth Amendment. Accordingly, the court affirmed defendants' drug-related conviction and sentence.

IV. TITLE VII

***Gardner v. CLC of Pascagoula, LLC,* -- F.3d – Docket No. 17-60072 (5th Cir., June 29, 2018)**

Plaintiff, a nursing assistant, filed suit under Title VII against her employer after she was terminated in part for refusing to care for an aggressive patient in a nursing home. At issue on appeal were plaintiff's claims of hostile work environment and retaliation. The Fifth Circuit reversed the district court's grant of summary judgment for the employer and held that the hostile work environment claim could proceed to trial where a jury could conclude that an objectively reasonable caregiver would not expect a patient to grope her daily, injure her so badly she could not work for three months, and have her complaints met with laughter and dismissal by the administration. Furthermore, the employer knew or should have known of the hostile work environment and should have taken reasonable measures to try to abate it. The court reiterated that an employer may be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. The court also held that the retaliation claim could proceed to trial where there was a triable issue on the "but for" causation element. Therefore, the court remanded for further proceedings.

V. SECTION 1983

***Escobar v. Montee,* -- F.3d – Docket No. 17-10467 (5th Cir., July 11, 2018)**

This case concerns a police chase that occurred after Israel Escobar assaulted his wife and fled with a knife. After noticing police vehicles at his home, Escobar fled into the night and was found hiding in neighbor's backyard. According to the decision, while a police helicopter monitored Escobar, police were informed that Escobar had a knife. Escobar's mother also called the police and told them they would have to kill Escobar to catch him and that he would not be arrested without a fight, the court said.

Based on those facts, Grand Prairie police officer Lance Montee released Bullet, a Belgian Malinois police dog on Escobar, without his usual warning that he was about to deploy the canine. Montee followed the dog along the side of the house, where he claims he saw Escobar with a knife. Escobar disputed that claim, contending that, once he heard the dog and the officer approaching, he dropped the knife and lay flat on the ground "like a parachute man."

Bullet bit Escobar on the leg. Escobar claims he remained on the ground in an attempt to convey his surrender. But Montee—believing Escobar was still a threat because of the knife and the warnings from Escobar's mother—allowed Bullet to continue biting Escobar until he was fully subdued and in handcuffs. Escobar was bitten for approximately one minute—bites which allegedly caused his calf muscle to detach from his leg, according to his civil complaint.

He eventually pleaded guilty to third-degree family assault.

Escobar sued Montee under 42 U.S.C. 1983, alleging, among other things, that the initial bite from a police dog and the continued biting were excessive force in violation of the Fourth Amendment. Montee claimed qualified immunity and moved to dismiss both of Escobar's claims. The district court dismissed the initial bite claim on a Federal Rule of Civil Procedure 12(b)(6) motion but denied summary judgment to the officer ruling that a reasonable officer would have known after Bullet's first bite that Escobar was not resisting and was surrendering, and that continuing to use force in the face of surrender was a clearly established violation of the Fourth Amendment. Both Montee and Escobar appealed the decision to the Fifth Circuit.

The Fifth Circuit held that there was no Fourth Amendment violation because the totality of the circumstances and the Graham factors established that the officer's use of force was not objectively unreasonable. In this case, police were chasing plaintiff after he assaulted his wife, they were informed that they would have to kill plaintiff to get him (thereby giving Montee reason to doubt the sincerity of Escobar's surrender), and he had a knife within reach (supporting Montee's belief that Escobar would try and harm someone). Therefore, the court reversed the denial of qualified immunity to the officer. The court dismissed the cross-appeal for lack of jurisdiction and remanded.

***Darden v. City of Fort Worth, Texas* – 800 F.3d 722 (5th Cir., January 24, 2018)**

Fort Worth Police Officers W.F. Snow and Javier Romero arrested Jermaine Darden, a black man who was obese, while executing a no-knock warrant at a private residence. Officer Snow was assigned to the entry team, which was tasked with breaking down the front door, entering the residence, and securing the premises. Officer Romero drove the van that transported the team to the residence. He was also assigned to stand guard near the front door while other officers entered the residence and arrested the people inside (however he eventually ran into the house to assist). In arresting Darden, Officer Snow and threw him to the ground and tased him twice. Officer Romero allegedly choked him, punched and kicked him in the face, pushed him into a face-down position, pressed his face into the ground, and pulled his hands behind his back to handcuff him. There was testimony that Darden never made any threatening gestures and did not resist arrest. During his arrest, both Darden himself and eyewitnesses told the officers that Darden could not breathe. Darden suffered a heart attack and died during the arrest. The administrator of Darden's estate subsequently brought this 42 U.S.C. § 1983 case against Officers Snow and Romero and the City of Fort Worth (the "City"). The district court granted summary judgment in favor of the officers and the City and dismissed all claims.

The Fifth Circuit initially denied the petition for panel rehearing and denied the petition for rehearing en banc. Subsequently, the court withdrew the previous opinion and held that a jury could conclude that no reasonable officer on the scene would have thought that Darden was resisting arrest; Officer Snow was not entitled to qualified immunity where there were genuine disputes of material fact as to whether Darden was actively resisting arrest and whether the force Officer Snow used was clearly excessive and clearly unreasonable; Officer Romero was not entitled to qualified immunity where a reasonable jury could conclude that he used excessive force; and plaintiff adequately alleged facts that made out violations of a clearly established constitutional right. Therefore, the court reversed in part, vacated in part, and remanded.

***Wilkerson v. University of North Texas* – 878 F.3d 147 (5th Cir., December 20, 2017)**

The University of North Texas is a state institution with a formal tenure track. Wilkerson was never on that track. He was instead an untenured lecturer in the University's Department of Philosophy and Religion Studies

from 2003 to 2014. For the first eight years, he and the University entered separate, one-year teaching contracts. In 2011, Wilkerson became the Philosophy Department's "Principal Lecturer" under a contract that provided a "temporary, non-tenurable, one-year appointment with a five-year commitment to renew at the option of the University."

In 2013, Wilkerson had a brief relationship with a graduate student which resulted in a formal complaint of sexual harrassment. While an internal investigation found no violation of the University's consensual relationship policy and insufficient evidence of sexual harassment, the University of North Texas declined to renew Wilkerson contract. After several extensive but unsuccessful administrative appeals, Wilkerson sued the school and its administrators, alleging a deprivation of his property interest in his job without due process and tortious interference with his employment contract. The district court denied summary judgment to the administrators on their immunity defenses.

The Fifth Circuit reversed the district court's denial of summary judgment to the administrators of a university on their immunity defenses. Plaintiff filed suit alleging that he was deprived of his property interest in his job without due process and tortious interference with his employment contract. The court held that the district court erred in denying the administrators qualified immunity against the section 1983 claim because plaintiff did not have a clearly established property right. Furthermore, state law compelled a similar result on the tortious interference claim. Accordingly, the district court should have granted immunity to the administrators.

***Lewis v. Secretary of Public Safety & Corrections*, -- F.3d – Docket No. 16-30037 (5th Cir., September 1, 2017)**

Freddie R. Lewis brought suit under 42 U.S.C. § 1983 alleging he was subjected to unconstitutional strip searches while incarcerated at the Winn Correctional Center (WCC) in Winnfield, Louisiana.

While incarcerated at WCC, Lewis worked at the WCC Garment Factory owned and operated by the Louisiana Department of Corrections. The building contained sewing machines, cutting tables, needles, scissors, clippers, nails, electrical cords, and other items and machines. The Garment Factory was next to a sally-port, through which supply trucks and civilian drivers enter. The inmates working at the Garment Factory were subject to strip searches at least twice a day, once before they reenter the main prison for lunch and again before returning to the main prison at the end of the day. Inmates are also subject to a strip search if a head count of the inmates at the prison, which occurs several times each day, does not match the total number of inmates assigned to the facility. The strip searches are conducted in a partially secluded room in the Garment Factory in groups of approximately ten inmates. Inmates are not physically touched by the officers during this search. Lewis brought suit under § 1983, alleging that the defendants violated his Fourth Amendment rights by subjecting him to strip searches. He also alleged that LaDPSC failed to monitor CCA, the private contractor that runs WCC, adequately and that LaDPSC and CCA both failed to comply with their own rules and regulations. The defendants, the Secretary of the Louisiana Department of Public Safety and Corrections (LaDPSC), Corrections Corporation of America (CCA), the President of CCA, WCC, the former warden of WCC, the current warden of WCC, a number of correctional and security officers, and the former security chief of WCC, moved for summary judgment. The federal district court granted summary judgment for the defendants.

The Fifth Circuit affirmed the district court's grant of summary judgment to defendants. It found that the policies at issue were aimed at preventing the flow of contraband from the outside truck drivers and others to inmates in the Garment Factory and to the main prison, as well as to prevent the removal of items from the Garment Factory that could be used as weapons. The court held that Lewis

failed to rebut this reasonable justification of the strip and visual body searches and thus the district court did not err in granting summary judgment to defendants. The court also held that the LaDPSC and CCA internal rules and regulations did not alone create federally-protected rights and a prison official's failure to follow prison policies or regulations did not establish a violation of a constitutional right. Further, it rejected Lewis's various challenges to discovery, and it held that the district court did not abuse its discretion by dismissing the complaint against three named defendants based on failure to serve them properly.

***Trammell v. Fruge* – 868 F.3d 332 (5th Cir., August 17, 2017)**

Round Rock Police Department police officers were dispatched to a scene after receiving a 911 call about an individual who had crashed his motorcycle after leaving the El New Goal Post Club ("the Goal Post") and was believed to be intoxicated. The initial officer contends that on arrival he immediately detected a strong odor of alcohol. Trammell was on the phone and is hearing impaired and did not hear the officer's command to step away from the motorcycle. After the second request, he complied. The officer began questioning Trammell who denied wrecking his bike or drinking anything that evening. Trammell then refused to answer further questions or comply with further commands. However, he remained calm throughout the interaction with the officer. At one point, Trammell took off the jacket he was wearing because he felt hot and said, "I'm not going to jail." At this point, the officer believed he had probable cause to arrest Trammell for public intoxication, and he grabbed Trammell's right arm as he told him to put his hands behind his back. Trammell immediately pulled back and told the officer that it hurt and not to grab him there. Another officer then grabbed Trammell's left arm, but Trammell again pulled away. Yet another officer executed a knee strike on Trammell's right thigh, and Trammell lost his balance. Yet another officer put Trammell in a headlock as he and two of the other officers pulled Trammell to the ground. Trammell states that he initially had his arms in front of his body in order to prevent his fall, but that the officers were grabbing at his arms and landed on top of his body so that he landed face first on the pavement. Trammell claims that at some point when he was on the ground he "lost memory," but prior to this, he recalled a brief period of time where he could not breathe. While on the ground, the officers continued to try and grab hold of Trammell's arms, which were underneath him. The officers repeatedly asked Trammell to put his hands behind his back, and he apparently refused to comply. After the officers tackled Trammell, he can first be heard yelling that he is a cop, and later, as the officers command him to "stop resisting," Trammell can be repeatedly heard yelling that his arm is fused. During this time, the officers administered knee strikes to Trammell's arms, thighs, and ribs so that they could subdue and handcuff him.

Trammell filed suit under 42 U.S.C. 1983 and 1988, alleging that defendants violated his Fourth and Fourteenth Amendment rights during his arrest. The Fifth Circuit held that Trammell presented sufficient facts to allege a violation of his constitutional right to be free from excessive force against three of the officers because the law at the time of the arrest clearly established that it was objectively unreasonable for several officers to tackle an individual who was not fleeing, not violent, not aggressive, and only resisted by pulling his arm away from an officer's grasp. The Court held that the failure to intervene claim was waived. It found that summary judgment was appropriate as to Trammell's municipal liability claim against Round Rock because, generally, a municipality cannot be held liable for constitutional violations committed by its employees or agents on a theory of vicarious liability. Summary judgement was also appropriate with relation to Trammell's allegation of against the City of failure to train or supervise claim as he failed to identify any specific inadequacies in Round Rock's training materials or procedures which give rise to his claim. Accordingly, the court affirmed in part, reversed in part, and remanded for further proceedings.

Sanchez v. Young County, Texas* – 866 F.3d 274 (2017) (5th Cir., July 31, 2017*)

The family of Diana Simpson brought a § 1983 lawsuit claiming that Young County violated Mrs. Simpson's constitutional rights when she died in the county jail from a probable suicide-caused drug overdose the evening after she was arrested for public intoxication. The family asserted that the County is liable for the acts and omissions of its personnel who arrested and jailed Mrs. Simpson. The family also asserted that unconstitutional conditions of pretrial confinement, arising from the County's policies and procedures, caused Mrs. Simpson's death. The district court granted summary judgment to the county and dismissed the complaint.

The facts reveal that Diana Simpson struggled with depression and a year before her death had attempted suicide. After his wife went missing, Mr. Simpson believed she was in danger and possibly suicidal. Mrs. Simpson was eventually discovered in her parked vehicle along a roadside. She was asleep in the driver's seat and when questioned by authorities appeared to be impaired. She stated she had a drink the night before to help her sleep but at that point denied ingesting medicine. Medics were called to evaluate Mrs. Simpson and she had a slightly elevated blood pressure and slightly low pulse, which she stated was normal. She denied being depressed or wanting to hurt herself. Mrs. Simpson dozed off while the officer attempted to conduct a horizontal gaze nystagmus test. However, Simpson told the officer she did not want to be taken to the hospital. Simpson later admitted that she had taken medication and drank alcohol the previous night. Simpson was again asked if she was trying to hurt herself, which Simpson denied. She again declined an offer to go to the hospital. Mrs. Simpson was arrested for public intoxication and taken to the Young County Jail. During intake, Mrs. Simpson was "responsive, talking coherently and providing satisfactory answers" to her questions during the intake. Mrs. Simpson also indicated, in response to screening form questions, that she was not depressed, not thinking about killing herself, and had never attempted suicide. During the book-in process, no County employee ran a Continuity of Care Query (CCQ), a Texas law enforcement information-sharing service that provides real-time identification of individuals who have received State-funded mental health services within the past several years. How frequently jail staff checked on Mrs. Simpson in the holding cell is disputed. There is nevertheless evidence that another female detainee was placed in Mrs. Simpson's cell during the evening and that Mrs. Simpson was checked around midnight at which time she was lying on the floor, wearing nothing but a tee-shirt.

In the meantime, after learning that his wife had been arrested, Mr. Simpson called the Graham police station and requested that they take his wife to the hospital. He told the officer she was a suicide risk, but he did not say that she might have taken drugs or overdosed because he did not know that. He was informed that she had been evaluated by medical personnel and refused to go to the hospital. In a later call to the jail, he says he "begged" them to take his wife to the hospital. Finally, in a call to the jail about 8 p.m., Mr. Simpson requested that the Texas Department of Mental Health and Mental Retardation ("MHMR") assist his wife, but was told that MHMR would not see her until she was sober. The jail employee who took this call stated that Mrs. Simpson was just drunk and needed to sleep it off.

About 2:40 a.m., Mrs. Simpson was found unresponsive. Paramedics took her to the hospital where she was pronounced dead. An autopsy identified the cause of death as mixed drug intoxication, and the manner of death was found to be consistent with and highly suspicious of suicide.

Mrs. Simpson's husband and children sued individually and as representatives of the estate of Diana Simpson, contending that Young County violated 42 U.S.C. § 1983 and the Texas Tort Claims Act. The district court granted the defendant's motion for summary judgment, dismissing all claims. Plaintiffs appealed only the dismissal of their § 1983 claim.

The Fifth Circuit affirmed the judgment of the district court regarding the claim that the jailers' acts and omissions caused Mrs. Simpson's death and rendered the County liable. It held that the Constitution does not require that officers always take arrestees suspected to be under the influence of drugs or alcohol, or reported by relatives to be at risk, to a hospital against their wishes. The court held that, although Simpson's decision to take her own life was tragic, the county could not be held responsible for fatal decisions she made that were, under all the circumstances, not obvious to government employees. The court vacated the judgment as to whether there is a genuine issue of material fact that the County's policies created unconstitutional conditions of confinement that caused the decedent's death and remanded the matter for further proceedings.

Rivera v. Bonner, -- F.3d – Docket No. 16-10675 (5th Cir., July, 2017)

In December 2014, Appellant Ezmerelda Rivera was sexually assaulted by Manuel Fierros, an officer at the Hale County Jail. Fierros was hired as a jailer at the Hale County Jail in October 2012. During the hiring process, Hale County Sheriff David Mull and Hale County Jail Administrator A.J. Bonner (collectively, "Appellees") became aware that Fierros had been arrested on two occasions when he was fifteen years old—once in Randall County and once in Potter County—for indecency with a child by sexual contact. After learning about these arrests, Bonner purportedly called the Randall County district attorney's and probation offices as well as the Potter County district attorney's office to inquire about the incidents. Bonner claims that no records of the arrests were found, the individuals he spoke with had no knowledge of the charges, and "no convictions [were] shown." In July 2014, a senior jailer at the Hale County Jail sexually abused a female detainee. In subsequent staff briefings, jail officials purportedly reminded jail staff that sexual exploitation of detainees was prohibited, but they did not implement any additional training regarding sexual misconduct. Jail officials also displayed a poster at the facility that showed a red prohibition sign across the words "sex with inmates," followed by "it's a felony." No policies or procedures were revised in response to the incident. Approximately six months later, Rivera was sexually assaulted by Manuel Fierros, which he confessed to doing.

In March 2015, Rivera filed this suit against Fierros and Appellees under 42 U.S.C. § 1983. Appellees moved for summary judgment on the basis of qualified immunity. The district court granted the motion for summary judgment and dismissed Rivera's claims against Appellees. This appeal followed.

Rivera subsequently brought claims against Fierros and Appellees under 42 U.S.C. § 1983. In addition to claims against Fierros, Rivera brought Fourteenth Amendment claims against Appellees, asserting that they were deliberately indifferent to the risks associated with hiring Fierros and that they inadequately trained and supervised jail employees. The district court granted summary judgment and dismissed Rivera's claims against Appellees.

The Fifth Circuit affirmed the district court's grant of summary judgment and dismissal of plaintiff's claims, holding that the county sheriff and the jail administrator were not deliberately indifferent to known or obvious risks associated with hiring the officers. Therefore, the district court did not err in holding that they were entitled to qualified immunity on this claim. The court also held that the district court did not err in concluding that defendants were entitled to qualified immunity with respect to plaintiff's inadequate training and supervision claims. In this case, it was not clearly established at the time of the alleged misconduct that the county sheriff and the jail administrator needed to make significant changes to their training, supervision, and policies in response to the incident of sexual abuse.

***Hicks-Fields v. Pool,* -- F.3d – Docket No. 16-20003 (5th Cir., June 26, 2017)**

Plaintiffs, heirs of Norman F. Hicks, Sr., filed suit against the County and other defendants under 42 U.S.C. 1983, the Texas Tort

Claims Act, and the Texas Wrongful Death Act. While being temporarily segregated in an attorney visitation booth, Norman F. Hicks, Sr., punched Harris County Detention Officer Christopher Pool in the face, prompting a responsive punch from Pool. As Hicks fell down, he struck his head on a concrete ledge in the booth. There were two other officers on the scene, one of whom looked through a window in the door and saw Hicks starting to lift himself off the ground. They left Hicks there, who some fifteen minutes later was found without respiration or a pulse. Jail clinic staff were summoned to render aid, and while Hicks recovered a pulse, he slipped into a coma from which he did not recover. The district court ultimately granted summary judgment and final judgment for the County. His survivors appeal summary judgment regarding any liability of the county for the officers' actions.

The Fifth Circuit affirmed and held that plaintiffs did not meet their evidentiary burden of showing a genuine dispute of material fact as to the existence of a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, was so common and well settled as to constitute a custom that fairly represents municipal policy; plaintiffs also failed to produce competent summary judgment evidence of the County's failure to train regarding responses to assaults by inmates and medical aid following a response incident; and the magistrate judge did not abuse her discretion in denying leave to amend after the amendment deadline.

***Gorman v. State of Mississippi,* -- F.3d – Docket No. 17-60515 (5th Cir., June 6, 2018)**

The circumstances that led to this lawsuit are unquestionably tragic— an accidental fatal shooting during an officer training session. During a preliminary safety briefing before a firearms training exercise hosted by the Mississippi Gaming Commission, instructor and former Commission Special Agent Sharp forgot to replace his real firearm with a "dummy" firearm. Sharp accidentally discharged his real firearm against fellow instructor and Mississippi Gaming Commission Special Agent Gorman. Gorman subsequently died from the gunshot wound.

In a suit under 42 U.S.C. 1983, the Fifth Circuit reversed the district court's denial of Sharp's motion for judgment on the pleadings based on qualified immunity holding that the Constitution does not afford a cure for every tragedy. In this case, the court held that under established Supreme Court precedent, the Fourth Amendment concerns only intentional, not accidental, searches and seizures. "There is no question about the fundamental interest in a person's own life, but it does not follow that a negligent taking of life is a constitutional deprivation." The shooting of Gorman, as tragic as it was, was not "willful[ly]" performed by Sharp." As such, there is no Fourth Amendment violation due to the absence of intentional conduct.

***Bustillos v. El Paso County Hospital District,* -- F.3d – Docket No. 17-50022 (5th Cir., May 23, 2018)**

Bustillos, a U.S. citizen, brought a 42 U.S.C. 1983 action against Defendant alleging violation of her constitutional rights when defendants (state medical staff) conducted increasingly intrusive body searches during a border stop in El Paso, Texas. The searches included a pat down and a K-9 search, both of which produced no evidence of drugs. The agents proceeded with a visual vaginal and anal inspection, which also revealed no evidence of drugs. Despite this, Bustillos was transported to University Medical Center to undergo a series of x-rays and a rectal exam, neither of which revealed any drugs. The district court dismissed Bustillos's claims based on qualified immunity, failure to allege a valid claim for county liability under § 1983, and failure to meet Texas state tort standards.

The Fifth Circuit affirmed the district court's dismissal of Bustillos's claims. The court held that plaintiff's substantive due process claims were not cognizable with her Fourth Amendment allegations; doctors and nurses

were entitled to qualified immunity on plaintiff's claim that they violated her Fourth Amendment right to be free from unreasonable searches and seizures by detaining her in order to conduct x-ray, pelvic, and rectal exams because the right at issue was not clearly established; because plaintiff did not demonstrate a clearly established right, it follows that her claims for deliberate indifference against the District also failed; the district court did not err by dismissing plaintiff's intentional torts claim against the doctor; and the district court did not err by declining to grant plaintiff's discovery requests because her claims could not overcome the clearly-established prong of the qualified immunity defense.

***Romero v. Grapevine, Texas* – 888 F.3d 170 (5th Cir., April 20, 2018)**

Plaintiffs are surviving family members of Ruben Garcia-Villalpando ("Villalpando") and the representative of his estate (collectively "Romero"). On February 20, 2015, shortly after six PM, Officer Clark responded to a burglar alarm at a commercial building. Clark encountered an idling four-door sedan which ultimately led him on a high-speed pursuit onto a heavily trafficked highway. Clark informed the police dispatcher that he was in pursuit and that he believed the sedan's occupant or occupants were responsible for the break-in at the commercial building. After roughly one-and-a-half minutes of highway pursuit, Villalpando waved one hand out of his driver's side window, apparently signaling that he would pull over and he did so. Clark treated the stop as a "felony traffic stop" during which an officer will take additional precautions when encountering the stopped vehicle, including the officer's duty weapon, which he did before exiting his vehicle.

Clark instructed Villalpando to keep his hands outside the window, but the suspect repeatedly moved at least one of his hands back into the vehicle and out of the officer's view. Villalpando then opened the driver's side door with his left hand and then raised both of his hands in the air. Clark ordered Villalpando to stay right where he was and keep his hands outside the window. Villalpando again briefly moved his right arm back inside the vehicle. Despite Clark's instructions, Villalpando proceeded to open his door, exit his car, and turn towards Clark. He initially kept his arms raised above his head and then placed them on his head. Villalpando dropped his hand briefly on two occasions and then, despite Clark's warning, began to walk towards Clark telling the officer to kill him. Villalpando began to walk slowly towards Clark with his hands on his head. Clark continued to tell Villalpando to stop but the suspect continued walking towards the officer with his hand on his head. Eventually, Villalpando got so close to Clark's vehicle on the driver's side that he was no longer visible on the dash cam. Seconds after Villalpando stepped off camera, Clark fired two gunshots. Clark yelled at Villalpando several times to "get your hands where I can see them" as he radioed to dispatch "shots fired." Clark told dispatch "he was coming at me ... he kept coming at me. I gave him commands to stop. He kept coming at me, he wouldn't stop." Villalpando died several hours later. He was ultimately found to be unarmed.

In the first amended complaint, Plaintiffs brought claims under 42 U.S.C. § 1983 against the City; Eddie Salame, Chief of the Grapevine Police Department; and Clark, for failure to provide adequate training, excessive force, and deliberate indifference to medical needs. Plaintiffs also alleged that defendants conspired to deprive Villalpando of his Fourth Amendment rights in violation of 42 U.S.C. § 1985. Lastly, Plaintiffs brought claims under the Texas wrongful death and survival statutes, Texas Civil Practice and Remedies Code §§ 71.001 and 71.021. The district court granted defendants' motion to dismiss all claims against the City and Salame, as well as the § 1985 claim against Clark and the portion of Romero's § 1983 claim alleging indifference to Villalpando's medical needs. Only Romero's excessive force claim under § 1983 against Clark was allowed to proceed, and the district court allowed discovery limited to qualified immunity issues. The district court ultimately granted Clark's motion for summary judgment, holding that he was entitled to qualified immunity. Plaintiffs appealed.

The Fifth Circuit affirmed the district court's grant of a motion to dismiss plaintiff's claims against the City and Eddie Salame, Chief of the Grapevine Police Department (GPD). The court also affirmed the district court's grant of summary judgment for Officer Robert Clark on plaintiff's remaining excessive force claim under 42 U.S.C. 1983 on the basis of qualified immunity. Given the tense and evolving factual circumstances, the court held that Clark reasonably believed that Villalpando posed a threat of serious harm. In this case, Villalpando fled the scene of a serious crime, drove recklessly and endangered others, refused to obey roughly thirty commands, and approached Clark on a narrow highway shoulder directly adjacent to speeding traffic. The court explained that the fact that Villalpando was ultimately found to have been unarmed was immaterial. Because Plaintiffs failed to demonstrate that Villalpando's Fourth Amendment rights were violated, the claims against the City and Salame for failure to train and inadequate screening/hiring failed as well.

***Johnson v. Thibodaux City,* -- F.3d – Docket No. 17-30088 (5th Cir., April 17, 2018)**

Jackalene Johnson, Dawan Every, Kelly Green, and Latisha Robertson (the driver) were riding in a truck. Thibodaux Officer Amador recognized Robertson and knew she had an outstanding warrant. He stopped the truck, asked Robertson to exit, and handcuffed her. Every opened her door. Amador told her to get back in; she complied. More officers arrived and asked the passengers for identification. Green said she did not have any but provided her name. She was not arrested. Johnson and Every refused to identify themselves. The officers arrested them for resisting an officer by refusing to identify themselves during a supposedly lawful detention (Louisiana Revised Statute 14:108) and pulled the women from the truck and forced them to the ground. According to Every, Officer Buchanan pulled Every from the truck by her head and hand. Johnson said that Officer Buchanan opened her door, yanked her from the truck, and slung her to the ground. Though the officers said that Johnson and Every yelled obscenities throughout the encounter, Johnson maintains she was silent. Officer Buchanan said that as he handcuffed Every, she kicked, yelled, and threatened to have him fired. Officer Christopher Bourg, who only then arrived, walked Every to his car after she had been subdued and placed on the ground. On the way there, Every began to run, so Officer Thibodeaux used his Taser to subdue her. The officers took Johnson and Every to jail.

Johnson and Every sued the City of Thibodaux and seven officers—in their official and individual capacities—for unlawful arrest and excessive force under 42 U.S.C. § 1983. The district court generally denied motions in limine seeking to exclude the testimony of the city's experts on orthopedic surgery and on arrest techniques, police procedures, police training, and use of force, but prohibited testimony as to plaintiffs' drug use, prior incidents with doctors or law enforcement, or the facts. The jury returned a verdict for the officers. The district court denied plaintiffs' motion for judgment as a matter of law.

The Fifth Circuit determined there was ample evidence for the jury to find that plaintiffs had failed to prove a necessary element of their excessive force claims—causation. It further held that Every was precluded from seeking damages under § 1983 for her allegedly unlawful arrest because she pleaded no-contest to resisting arrest. However, the court reversed as to Johnson's unlawful arrest claims against the four arresting officers because under the Fourth Amendment, officers may not require identification absent an otherwise lawful detention based on reasonable suspicion or probable cause. It determined that the jury's verdict was predicated upon an erroneous legal conclusion: that Johnson was lawfully stopped when the officers asked for identification. Because she was not lawfully stopped, she committed no crime by refusing to provide identification.

***Vann v. City of Southhaven,* -- F.3d – Docket No. 16-60561 (5th Cir., March 5, 2018)**

This lawsuit arises from the death of Jeremy W. Vann, who was shot and killed by police in a retail parking lot in Southaven, Mississippi during a small-scale drug sting operation. During the encounter, which included Vann knocking one of the officers to the ground with his vehicle and trying to approach the other officer a second time, Vann was shot by two officers, Sergeant Jeff Logan and Lieutenant Jordan Jones. Plaintiff sued the officers involved and the City of Southaven under 42 U.S.C. § 1983, claiming that the officers violated Vann's Fourth Amendment right to be free from unreasonable seizure, excessive force, and deadly force, and that the City had failed properly to train its officers and had permitted an official practice or custom that violated the constitutional rights of the public at large. The officers and the City simultaneously moved for summary judgment. The district court granted the officers' and the City's summary-judgment motion.

The court held that Officer Jones' use of force did not violate clearly established law, and that even if Officer Logan used excessive force, there was no existing law at the time to put Logan on notice that his actions were unconstitutional. Accordingly, the court affirmed the district court's grant of summary judgment to defendants.

***Veasey v. Abbott* – 888 F.3d 792 (5th Cir., April 27, 2018)**

This appeal by the state of Texas followed remand from the en banc court concerning the state's former photo voter ID law ("SB 14"). During the remand, the Texas legislature passed a law designed to cure all the flaws cited in evidence when the case was first tried. The legislature succeeded in its goal. Yet the plaintiffs were unsatisfied and successfully pressed the district court to enjoin not only SB 14, but also the new ameliorative law ("SB 5").

The Fifth Circuit reversed and rendered the district court's permanent injunction enjoining Senate Bill 14 and 5, which concerned the state's former photo voter ID law. SB 14 generally required voters to present one of five forms of government-issued identification in order to vote at the polls. In 2014, the Fifth Circuit affirmed the district court's finding that SB 14 had an unlawful disparate impact on African American and Hispanic voters in violation of Section 2 of the Voting Rights Act. However, the en banc court reversed and remanded. The district court then entered an interim remedy whereby in-person voters who lacked an SB 14 ID could cast a regular ballot upon completing a Declaration of Reasonable Impediment and presenting a specified form of identification. SB 5 was subsequently enacted as a legislative remedy to cure and replace SB 14. The district court subsequently entered a remedial order permanently enjoining SB 14 as well as SB 5, vacating the interim remedy, and reinstating the pre-SB 14 law that lacked any photo voter ID requirement. The Fifth Circuit then granted the State's emergency motion and stayed the district court's orders until the final disposition of the appeal. The court held that the appeal was not moot and the district court's overreach in its remedial injunction and proceedings was an abuse of discretion meriting reversal. The court held that, under the circumstances of this case, the district court had no legal or factual basis to invalidate SB 5, and its contemplation of Section 3(c) of the VRA relief also failed.

***Quinn v. Guerrero* – 863 F.3d 353 (5th Cir., July 10, 2017)**

The facts underlying the search of Quinn's home are disputed. According to Quinn, the City of McKinney's SWAT Team forcibly entered his home around 12:06 a.m. on August 4, 2006, to execute a routine search warrant. Quinn's adult son Brian, who also lived in the home, was the subject of the warrant. Quinn argues the police had multiple opportunities to detain Brian in the days prior to the search but chose instead to execute a "violent SWAT raid in the middle of the night." Quinn, who was holding a gun, was shot through the hand during

the raid. Quinn alleges that the SWAT Team executed its raid in a violent manner "to exact retribution" for Quinn's "earlier filing of a civil-rights suit against the police." Based on the officers' conduct, Quinn argues "the raid and the shooting were intentional, tortious acts of terrorism conducted in bad faith, intentionally, and with malice."

Quinn originally sued individual police officers and the City of McKinney, Texas, in state court for claims arising from the execution of a search warrant on his home. The state court dismissed Quinn's claims against the officers and instructed him to replead to clarify whether he intended to assert federal claims. Quinn amended his petition to assert new claims under 42 U.S.C. §§ 1983 and 1985. The defendants removed the case to the district court, which later denied Quinn's motion to remand. The district court then dismissed Quinn's remaining claims against the officers and the City and denied his claim for punitive damages.

The Fifth Circuit affirmed the district court's judgment for defendants. The court held that the district court did not err in denying plaintiff's motion to remand; the state court did not err in dismissing the common law claims against the officers pursuant to section 101.106(e) of the Texas Tort Claims Act; the district court properly dismissed plaintiff's federal claims against the individual officers; because plaintiff's negligence claims arose from the same conduct as his intentional-tort claims, governmental immunity applied and the state-law claims were properly dismissed; plaintiff failed to allege a claim of municipal liability under 42 U.S.C. 1983 because he never alleged either an official policy or a widespread custom that caused a violation of his constitutional rights; plaintiff's requested period of discovery was impermissible; and the court rejected plaintiff's claim for punitive damages. Finally, the court denied as moot the individual defendants' motion to dismiss.

Melton v. Phillips* – 875 F.3d 256 (5th Cir., November 13, 2017*)

After Melton spent 16 days in county jail for an assault he did not commit, he filed suit under 42 U.S.C. 1983 against Kelly Phillips, a sheriff's office deputy. In June 2009, Deputy Phillips interviewed an alleged assault victim and filled out an incident report identifying the alleged assailant by the name "Michael David Melton." After Deputy Phillips submitted the report, an investigator with the Sheriff's Office began investigating the assault. A year later, the alleged victim provided the investigator with a sworn affidavit identifying the alleged assailant as "Mike Melton." The Hunt County Attorney's Office then filed a complaint against "Michael Melton." The alleged assailant's first and last names are the only identifying information contained in the complaint, and their accuracy is undisputed. Four days after the complaint was filed, a Hunt County judge issued a capias warrant correctly identifying the assailant as "Michael Melton." Two years after the judge issued the warrant, Melton was arrested on assault charges and detained for sixteen days before being released on bond. It is undisputed that Deputy Phillips's involvement in the chain of events that led to Melton's May 2012 arrest and detention ended with the incident report in June 2009. Melton alleged that Phillips intentionally or recklessly misidentified him as the assailant in the offense report that he prepared, thereby leading to Melton's arrest without probable cause in violation of the Fourth Amendment. The district court denied Phillips's motion for summary judgment based on qualified immunity due to a genuine issue of material fact existing regarding Phillips's recklessness in not obtaining or verifying additional identifying information beyond the first and last names of the suspect.

The Fifth Circuit held that while an officer who has provided information for the purpose of its being included in a warrant application or has assisted in preparing the warrant application may be liable, an officer who has not provided information for the purpose of its being included in a warrant application can only be liable if he signed or

presented the application. As such, the court reversed the district court's denial of summary judgment in favor of Phillips and held that he was entitled to summary judgment even when construing all the facts in the light most favorable to Melton. The court reasoned that the connection between Phillips's conduct and Melton's arrest was too attenuated to hold the deputy liable under the rule that the court reaffirmed or under any law that was clearly established at the time defendant filled out the incident report.

***Littell v. Houston Independent School District,* -- F.3d – Docket No. 16-20717 (5th Cir., June 27, 2018)**

During a sixth-grade choir class, an assistant principal allegedly ordered a mass, suspicionless strip search of the underwear of twenty-two preteen girls. The allegations in the complaint describe how $50 went missing during a sixth-grade choir class at Houston's public Lanier Middle School. Assistant Principal Verlinda Higgins was brought in to investigate. When no money turned up, the school police officer "suggested that girls like to hide things in their bras and panties." Higgins took all twenty-two girls in the choir class to the female school nurse, who strip searched them, taking them one at a time into a bathroom, where she "check[ed] around the waistband of [their] panties," loosened their bras, and checked "under their shirts." The girls "were made to lift their shirts so they were exposed from the shoulder to the waist." No parents were notified, despite the girls' requests. No money was found. All agree the search violated the girls' constitutional rights under Texas and federal law. Even so, the district court dismissed the girls' lawsuit against the school district for failure to state a claim.

The Fifth Circuit reversed the district court's dismissal of an action alleging claims under 42 U.S.C. 1983 and the Texas Constitution. The court held that the complaint alleged a claim for municipal liability where the students were searched in violation of their Fourth Amendment rights; plaintiffs adequately alleged an official municipal policy on which section 1983 liability may rest where the school district failed to train its employees about their legal duties not to conduct unreasonable searches; and, to the extent the amended complaint plausibly alleged deliberate indifference, it also plausibly alleged causation. The court also held that the district court erred by dismissing the Texas cause of action for failure to state a claim.

VI. QUALIFIED IMMUNITY

***District of Columbia vs. Wesby,* 583 US ___ (2018)**

On March 16, 2008, Metropolitan Police Department officers responded to a noise complaint related to a house party. Upon arrival, the officers heard loud music coming from the house. The officers entered the house and observed party guests, including Theodore Wesby, drinking and watching "scantily clad women with money tucked into garter belts." The partygoers claimed that a woman called "Peaches" was the host of the party, and that she had received permission from the owner, from whom Peaches was leasing the house. Since Peaches was not present, one partygoer called Peaches on the phone for an officer. Peaches confirmed that she had permission from the owner, but when an officer called the owner, the owner claimed that the lease had not been executed and that he had not given permission for the party. The officers subsequently arrested the partygoers.

Sixteen of the arrested partygoers sued the officers and the District of Columbia for false arrest. The district court ruled in favor of the partygoers. The U.S. Court of Appeals for the D.C. Circuit affirmed and held both that the officers did not have probable cause for entry and were not entitled to immunity from liability. Probable cause to arrest for unlawful entry under D.C. law exists where a reasonable officer concludes from information known at the time that the arrestee knew or should have known that they entered the house against the will of the owner. The court reasoned that, because the partygoers believed in good faith that the owner had given Peaches permission for the party, they could not have intended to enter unlawfully. The

court also ruled that the officers were not entitled to immunity because it was unreasonable for them to believe that they were not violating the partygoers' clearly established Fourth Amendment rights against false arrest.

The issues for the Supreme Court were (1) whether the officers had probable cause to arrest for unlawful entry under D.C. law despite a claim of good-faith entry and (2) whether the law sufficiently clearly established to justify the denial of immunity to the officers. In an unanimous decision, the Court held that the officers had probable cause to arrest the partygoers based on the totality of the circumstances, and that they were entitled to qualified immunity under 42 U.S.C. § 1983 because their actions were not clearly unlawful at the time.

The Court reversed and remanded. Justice Thomas authored the majority opinion. With regard to probable cause, Justice Thomas explained that the D.C. Circuit erred in analyzing individual factors rather than the totality of the circumstances at the party scene, which could have reasonably led the officers to believe that there was a substantial chance of criminal activity. On the qualified immunity question, the majority held that the officers were protected from suit unless their actions were "clearly" unlawful at the time. Given that they could have reasonably but mistakenly thought that they had probable cause to make the arrests at the time, their actions were not clearly unlawful.

***Kisela v. Hughes*, 584 US ___ (2018)**

Tuscon police officer Andrew Kisela and two other officers responded to a police radio report that a woman was engaging in erratic behavior with a knife. When they arrived, they saw Amy Hughes holding a large kitchen knife in what appeared to be a confrontation with another woman later identified as Sharon Chadwick. Despite at least two commands to drop the knife, Hughes did not do so and instead took several steps toward Chadwick. Officer Kisela fired four shots through the chain link fence, seriously injuring Hughes.

Hughes sued Officer Kisela under 42 U.S.C. §1983, alleging that Officer Kisela had used excessive force in violation of the Fourth Amendment. The district court granted summary judgment to Officer Kisela, but the Court of Appeals for the Ninth Circuit reversed, finding that the record, viewed in the light most favorable to Hughes (as is required in a motion for summary judgment), was sufficient to demonstrate that Officer Kisela violated the Fourth Amendment. The Ninth Circuit further held that Officer Kisela was not entitled to qualified immunity because, in its view, his actions violated clearly established law in that jurisdiction.

The issue before the Supreme Court was whether Officer Kisela's shooting of Hughes violated clearly established law, thus depriving the officer of qualified immunity. In a per curiam opinion the Court held that Officer Kisela's conduct did not violate clearly established law and he was entitled to qualified immunity. In a per curiam opinion, the Court reversed the Ninth Circuit, finding that Officer Kisela's actions were not obviously unconstitutional nor clearly proscribed by existing law in the Ninth Circuit. In the absence of a decision in that circuit or by the Supreme Court clearly defining the right the officer violated such that he would have understood that he was violating it, the officer is entitled to qualified immunity for his actions. The Court did not consider whether his actions constituted excessive force.

Justice Sonia Sotomayor filed a dissenting opinion in which Justice Ruth Bader Ginsburg joined. The dissent criticizes the Court for "misapprehend[ing] the facts and misappl[ying] the law, effectively treating qualified immunity as an absolute shield." The dissent argues that a jury could find that Officer Kisela violated Hughes' clearly established Fourth Amendment rights by his use of lethal force and accuses the Court of ignoring the facts that demonstrate a clear constitutional violation, focusing instead whether the right was clearly established. In the dissent's view, Officer Kisela was on clear notice that his conduct was

unconstitutional and thus was not entitled to qualified immunity.

***Lincoln v. Turner,* -- F.3d – Docket No. 16-10856 (5th Cir., October 31, 2017)**

The police shot and killed John Lincoln as he stood beside then eighteen-year-old daughter Erin. She filed suit alleging that after she collapsed and cried out, Officer Patrick Turner picked her up, threw her over his shoulder, and carried her to a police car, where she sat handcuffed against her will. Erin brought suit under 42 U.S.C. § 1983 against Turner, alleging unreasonable seizure and excessive force. The district court sustained Turner's defense of immunity and granted his motion to dismiss.

The Fifth Circuit affirmed the district court's grant of defendant's motion to dismiss based on qualified immunity. While the court held that Erin sufficiently pled unconstitutional seizure and excessive force, it determined that her claims were still barred on the basis of qualified immunity. In regard to the unconstitutional seizure claim, the court determined that it was not clearly established at the time that defendant needed probable cause to detain Erin. Specifically, Erin failed to cite any authority to establish that every reasonable officer would have known that he could not detain a witness for a period of approximately two hours while an investigation was underway. Nor did she show that Turner's actions in removing her from the area where medical personnel were treating her injured father was clearly unreasonable and that every officer would have known so. In regard to the excessive force claim, the court determined that Erin waived her argument as to the clearly established law prong and could not overcome qualified immunity. It noted, however, that regardless of this waiver, it could on the record provided conclude that Erin could overcome qualified immunity on her excessive force claim given the lack of guiding precedent that shows the force used in this particular situation was "clearly unreasonable."

***Artis v. District of Columbia,* 583 US ___ (2018)**

In 2007, Stephanie Artis was employed by the District of Columbia Department of Health (DOH) as a code inspector. She alleges that she and her supervisor developed a contentious relationship and that he singled her out for unfair treatment in the workplace. On April 17, 2009, Artis took her first administrative step against DOH by filing a discrimination claim with the U.S. Equal Employment Opportunity Commission, and while that claim was pending, DOH terminated Artis's employment in November 2010.

In December 2011, Artis filed a lawsuit against the District in federal court alleging violations of Title VII of the Civil Rights Act of 1964 and invoked the district court's supplemental jurisdiction to assert claims based on the District's Whistleblower Act, False Claims Act, and common law. The district court granted the District's motion on the pleadings and dismissed Artis's sole federal claim, violation of Title VII, as facially deficient. It thus found it had no basis to exercise jurisdiction over the remaining claims.

Fifty-nine days after her claims were dismissed in federal court, Artis filed the remaining claims in a D.C. trial court. The District alleged that Artis's claims were time barred based on the respective statutes of limitations, and the trial judge agreed, finding that the federal supplemental jurisdiction statute 28 U.S.C. § 1367(d) does not suspend state statutes of limitations at the time of the unsuccessful federal filing.

The issue for the Supreme Court was whether the tolling provision in 28 U.S.C. § 1367(d) suspends the limitations period for state-law claims while the claim is pending and for 30 days after the claim is dismissed, or does it merely provide 30 days beyond the dismissal for the plaintiff to refile.

In a 5-4 decision, the Court reversed and remanded, ruling in favor of Artis and finding that the tolling provision of 28 U.S.C. § 1367

suspends or "stops the clock" on the limitations period for supplemental state law claims while the underlying case is pending in federal court and for 30 days thereafter, rather than merely providing a 30-day grace period after dismissal for the plaintiff to refile in state court. The majority rejected the District of Columbia's argument that the statute simply provides for a 30-day grace period to refile those claims in state court. The Court also rejected the argument that it should disavow the stop-the-clock approach as a matter of constitutional avoidance, explaining that questions regarding the constitutionality of §1367(d) had been settled under prior case law. Justice Gorsuch dissented, with Justices Thomas, Alito, and Kennedy joining.

VII. ADA

***Windham v. Harris County, Texas* – 875 F.3d 229 (5th Cir., November 22, 2017)**

Two Harris County sheriff's deputies detained plaintiff William Windham on suspicion of driving while impaired. Windham suffered from cervical stenosis. As a result, his neck involuntarily assumed a flexed, downward-looking position. He carried an explanatory doctor's note. The note stated that Windham's stenosis placed him at risk of neurologic injury from neck extension. The note requested the reader to afford Windham the opportunity to address these issues in whatever way that could help him, but it provided no further details as to the nature of Windham's issues or the accommodations they required. The deputies read the note and assured Windham that nobody would extend his neck. The deputies sought permission to administer certain standard field sobriety tests and while Windham declined to perform some tests, he agreed to a gaze nystagmus test, which tracks eye movements. The first time the test was administered the results were negative or inconclusive and Windham had no complaints of pain. The second time the test was administered Windham indicated that it hurt his neck but he never indicated that he could not complete the test or asked to stop the test. He also never asked the deputies to administer the test differently or to use another test instead. To the contrary, he completed the gaze nystagmus test without further complaint. He held his head in the requested position for about forty-five seconds. He then completed the walk-and-turn test and the one-leg-stand. The deputies concluded that Windham was insufficiently impaired to justify arrest and released him approximately 90 minutes after the first deputy arrived. Windham filed suit against the officers and the County, contending that the field sobriety test injured him as a result of his preexisting neck condition. The district court determined, and no one now disputes, that a reasonable jury could find that Windham suffered injury as a result of the deputy's administration of the gaze nystagmus test. Windham sued the deputies and the County, all of whom secured summary judgment on the relevant claims.

Windham appealed the district court's grant of summary judgment for defendants on his failure-to-accommodate claim under Title II of the Americans with Disabilities Act ("ADA"), and on his claims for unjustified detention, excessive use of force, and municipal liability under 42 U.S.C. § 1983 and the Fourth Amendment.

The Fifth Circuit affirmed the district court's grant of summary judgment for defendants on Windham's failure to accommodate claim under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12132, and on his claims for unjustified detention, excessive use of force, and municipal liability under 42 U.S.C. 1983 and the Fourth Amendment. In regard to the ADA claim, the court held that the record contained no evidence that plaintiff requested an accommodation for his neck disability; in regard to the claim of unjustified detention, the undisputed facts established reasonable suspicion and Windham failed to demonstrate that the length of the traffic stop transformed it into an arrest; in regard to the excessive force claim, the seizure was justified by reasonable suspicion and was conducted in a reasonable manner; and because Windham failed to demonstrate the existence of a constitutional violation, the County was

entitled to judgment on his *Monell* claim as a matter of law.

***Deutsch v. Annis Enterprises, Inc.*, -- F.3d – Docket No. 17-50231 (5th Cir., February 8, 2018)**

The Fifth Circuit affirmed the district court's dismissal, for want of Article III standing, plaintiff's claims under the Americans with Disabilities Act (ADA). A plaintiff seeking injunctive relief under the Americans with Disabilities Act ("ADA") must show a real and immediate threat of repeated injury in order to establish standing – merely having suffered an injury in the past is not enough. Plaintiff, a paraplegic, alleged that defendant's parking lot did not have the number of spaces required by the ADA and lacked access ramps. In this case, defendant filed nearly 400 lawsuits in just over 300 days and could not remember a single establishment that he sued and then returned to or intended to revisit. Further, he failed to identify how the supposed ADA violations would negatively affect his day to day life. Therefore, plaintiff failed to show any likelihood of future injury necessary to obtain equitable relief; the district court did not abuse its discretion in issuing a contempt order fining counsel $2,500; and the district court did not wrongfully award attorney's fees where the district court only awarded costs.

VIII. MISCELLANEOUS

Murphy v. Smith, 583 US ___ (2018)

Charles Murphy was an inmate in the Vandalia Correctional Center in Illinois. In July 2011, correctional officers hit Murphy, fracturing his eye socket, and did not provide him proper medical attention. Murphy sued under 42 U.S.C. § 1983 and state law theories. A jury returned a verdict in his favor and awarded him damages for some of his claims under state law, and the district court awarded him attorney fees under 42 U.S.C. § 1988. Two of the defendants appealed the judgment, arguing that the Illinois doctrine of sovereign immunity bars the state-law claims and that the Prison Litigation Reform Act requires that 25 percent of the damages awarded be used to pay the attorney fee award.

The Seventh Circuit affirmed the district court's holding that the state officials or employees are not entitled to sovereign immunity against state-law claims where the officials or employees violated statutory or constitutional law, which violations Murphy alleged and proved. The Seventh Circuit reversed on the attorney fee award, however, finding that the 42 U.S.C. § 1997e(d) requires that the attorney fee award must first be satisfied from up to 25 percent of the damage award and that the district court does not have discretion to reduce that maximum percentage.

The issue before the Supreme Court was whether the parenthetical phrase "not to exceed 25 percent," as used in 42 U.S.C. § 1997e(d)(2), meant any amount up to 25 percent (as four circuits hold), or exactly 25 percent (as the Seventh Circuit holds). Justice Neil Gorsuch delivered the opinion of the 5-4 majority for Smith. The Court held that the phrase "not to exceed 25 percent" as used in 42 U.S.C. § 1997e(d)(2) with respect to the award of attorneys fees in a civil rights suit means that the district court must use as much of the judgment as necessary to satisfy the fee award without exceeding the 25% limit, as the Seventh Circuit held. The language of the provision, including the words "shall" and use of the infinitive phrase "to satisfy the amount of attorney's fees awarded" indicated the mandatory, rather than discretionary, nature of the provision's command to the district court. The majority also found that the statutory scheme, including Congress's intent in enacting a new and different law for prisoner rights suits, as well as the surrounding provisions, supported this reading of the statute.

Justice Sonia Sotomayor filed a dissenting opinion, in which Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan joined. In the dissent's view, the plain language of the provision at issue should give district courts the discretion to allocate a portion of a prisoner-plaintiff's monetary judgment to an attorney's fee award, provided that the portion is not greater than 25 percent. In support of its

position, the dissent points to language considered but not accepted by Congress that more clearly supports the respondent-prisoners' interpretation.

Jones v. TDCJ, -- F.3d – Docket No. 17-10302(5th Cir., January 29, 2018)

Jones, a diabetic, alleged that he was prescribed a special diet due to his diabetes and that he suffered a stroke on April 3, 2016. Jones further alleged that during routine lockdowns his prescribed diet was discontinued and replaced with a "sugar based diet." Jones claimed that he sent "numerous written complaints" to Cruise and other personnel, to no avail. He attempted to file an official grievance with prison authorities but it was returned after being deemed redundant. According to Jones, on April 20, 2016, he suffered a heart attack. Pertinent to the instant appeal, on August 2, 2016, Jones also filed a motion for a preliminary injunction which included additional allegations similar to his previous complaints. He specifically alleged that the prison staff's interference with his prescribed dietary regimen "results in higher blood sugar levels" and "exposes [him] to another stroke or heart attack, or other diabetic complications and consequences that are life threatening." Jones additionally averred that the deprivation of his prescribed diet forced him to inject more insulin to lower his blood-sugar level, thus exposing him to a risk of serious physical injuries in the event his blood-sugar level drops too rapidly. The magistrate judge denied Jones' motion for a preliminary injunction, without holding an evidentiary hearing or requesting a response from the defendants.

The Fifth Circuit vacated the magistrate judge's denial of a preliminary injunction after plaintiff filed suit alleging that prison officials exhibited deliberate indifference to his serious medical needs in violation of the Eighth Amendment. Construing plaintiff's pro se pleadings liberally, the court held that plaintiff had alleged a pattern of knowing interferences with prescribed medical care for his diabetes, despite his multiple complaints and his official grievance, which were all essentially ignored. Such allegations were sufficient to state a claim for deliberate indifference and thus plaintiff had shown a sufficient likelihood of success on the merits of his preliminary injunction. Plaintiff also alleged a substantial threat of irreparable injury. Finally, the magistrate judge's conclusion that it was improbable that plaintiff could establish that the grant of an injunction would not disserve the public interest was without basis in the record. Accordingly, the court remanded for further proceedings.

Clyce v. Butler, -- F.3d – Docket No. 15-11010 (5th Cir., November 22, 2017)

In 2008, when he was thirteen years old, Chance Clyce suffered serious and sustained injuries while detained at Hunt County Juvenile Detention Center. Though some of the details are disputed, the parties agree that when Chance was released from the Detention Center only sixteen days after he arrived, he had lost several pounds, sustained bruises and a fractured arm, and contracted a life-threating methicillin-resistant staphylococcus aureus ("MRSA") infection. Due to this severe infection, Chance required multiple extensive surgeries on his joints and heart. He asserts that he continues to suffer chronic pain and will require future surgeries.

In 2009, Chance's parents filed suit both individually and as his next friends against multiple defendants affiliated with the Detention Center. The district court dismissed claims against two of the defendants without prejudice for improper service and granted summary judgment in favor of the remaining defendants. Chance's parents appealed to the Fifth Circuit, which affirmed.

On June 24, 2014, Chance, then nineteen years old, filed the instant claims pro se against multiple defendants from the Detention Center and the Texas Juvenile Justice Department. Of these defendants, only one of them, Shanigia Williams, was also named as a defendant in 2009, when the claims against her were dismissed without prejudice for lack of service. In this second lawsuit, Chance brought some of the same claims his parents brought in

the first lawsuit, as well as a number of additional claims.

Defendants filed multiple motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), asserting, inter alia, expiration of the statute of limitations period and res judicata. Chance obtained legal counsel and filed a brief opposing all pending motions to dismiss. He argued that the claims were timely because they were brought within two years of his reaching the age of majority, and that they were not barred by res judicata because none of the defendants, other than Ms. Williams, was named in the 2009 lawsuit. The district court subsequently dismissed all of Chance's claims as untimely holding that there is an exception to this "tolling provision" when a next friend, represented by counsel, aggressively prosecutes a minor's claims on his behalf. Chance Clyce appealed the district court's dismissal of his claims as barred by Texas's statute of limitations.

The Fifth Circuit held that the district court improperly created this exception to Texas's tolling provision to its statute of limitations, and thus reversed the dismissal of plaintiff's claims. The court held that the district court erred by fashioning a rule of its own making to find that plaintiff forfeited the protection of Texas's tolling provision when his parents had brought suit as next friends. The court remanded for further proceedings, including consideration of res judicata and other issues presented.

City of El Cenizo v. Texas, -- F.3d – Docket No. 17-50762 (5th Cir., March 13, 2018)

The Fifth Circuit upheld Senate Bill 4 (SB4), a Texas law that forbids "sanctuary city" policies throughout the state, and held that SB4's provisions, with one exception, did not violate the Constitution. As a result, Texas law enforcement agencies and local governments are now blocked from choosing to limit their cooperation with the Department of Homeland Security's immigration efforts. The court held that none of SB4's provisions conflict with federal law where the assistance-cooperation, the status-inquiry, and the information-sharing provisions were not conflict preempted. The court affirmed the district court's injunction against a single provision from taking force: the attack on an elected official's "endorsement" of laws or policies limiting cooperation with federal immigration law enforcement objectives. The court held that plaintiffs failed to establish that every seizure authorized by the ICE-detainer mandate violated the Fourth Amendment; the "materially limits" phrase had a clear core and was not void for vagueness; and plaintiffs' "commandeering" argument failed. Accordingly, the court vacated in large part the district court's preliminary injunction and remanded with instructions to dismiss the vacated provisions.