

FALL 2015 NEWSLETTER

CIVIL RIGHTS LAW UPDATE

By Josh Skinner

United States Supreme Court

***Glossip v. Gross*, No. 14-7955 (June 29, 2015)**

A death-row inmate attempting to challenge a method of execution must identify a known and available alternative method of execution that presents a substantially less severe risk of pain.

Four prisoners sought a preliminary injunction, contending that the method of execution utilized by the State of Oklahoma violated the Eighth Amendment by creating an unacceptable risk of severe pain. In particular, they argued that midazolam, the first drug employed in the State's three-drug protocol, fails to render a person insensate to pain. After holding an evidentiary hearing, the district court denied their request for a preliminary injunction, finding that they had failed to prove that midazolam was ineffective. The Tenth Circuit affirmed.

The Supreme Court affirmed for two independent reasons. First, the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, which the Court described as a requirement of all Eighth Amendment method-of-execution claims. Second, the district court did not commit clear error when it found that the prisoners failed to establish the ineffectiveness of midazolam.

***Obergefell v. Hodges*, No. 14-556 (June 26, 2015)**

States are required to permit civil marriage by individuals of the same sex on the same terms that they permit civil marriage by individuals of opposite sexes. In addition, states are required to recognize a civil marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

The plaintiffs came from various states, all of which defined marriage as a union between one man and one woman. The plaintiffs were over a dozen same-sex couples who sued claiming that the refusal of their respective states to permit them to marry or to recognize their marriages performed lawfully in other states violated their Fourteenth Amendment rights. The various district courts where the plaintiffs filed suit all ruled in favor of the plaintiffs, but the Sixth Circuit, in a consolidated opinion, held that a state has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of state.

The Supreme Court reversed, holding that the state prohibitions on same-sex marriage and on recognizing out-of-state same-sex marriages violated the Fourteenth Amendment. The Court held that there is a constitutionally protected right to marry, which the Court described as a couples "wish to define themselves by their commitment to each other." The Court went on to conclude that the arguments put forth by the states to explain the exclusion of same-sex marriage, which were based on alternative understandings of the nature of marriage, were inconsistent with other aspects of the

states' marriage laws, and thus could not serve as a basis for excluding same-sex marriage.

***Tex. Dep't of Housing and Cmty. Affairs v. Inclusive Cmty. Project*, No. 13-1371 (June 25, 2015)**

Disparate-impact claims are permitted under the Fair Housing Act.

The State of Texas is responsible for distributing federal credits for the development of low-income housing. The Inclusive Communities Project (ICP), a nonprofit that assists low-income families in obtaining affordable housing, brought suit alleging that the State of Texas' distribution of the federal credits caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. The ICP contended that the State must modify its selection criteria in order to encourage the construction of low-income housing in suburban communities. The district court concluded that the ICP had established a prima facie case of disparate impact and that the State had failed to meet its burden of proving that there are no less discriminatory alternatives. The Fifth Circuit affirmed that disparate impact claims are cognizable under the FHA, but reversed and remanded on the merits.

The Supreme Court affirmed the decision of the Fifth Circuit, holding that disparate-impact claims are cognizable under the Fair Housing Act.

***Kingsley v. Hendrickson*, No. 14-6368 (June 22, 2015)**

In order to prove an excessive force claim against a jailer, a pretrial detainee must show that the jailer's use of force was objectively unreasonable. The pretrial detainee is not required to show that the officers were subjectively aware that their use of force was unreasonable.

Kingsley was arrested on a drug charge and detained prior to trial. Jailers noticed a piece of paper covering the light fixture above Kingsley's bed. The officer told Kingsley to remove it, because the placement of the paper violated Jail rules, but Kingsley refused. Various officers directed Kingsley to remove it, but he consistently refused. The Jail Administrator decided to remove Kingsley from the cell, while an officer removed the paper. Kingsley refused to cooperate with his removal from the cell and was forcibly handcuffed, carried from the cell, and taken to the receiving cell. Kingsley was placed face down on the bunk, his cuffed hands were behind his back. The officers attempted to remove the cuffs and claim that Kingsley resisted. Kingsley denies resisting. There was some back and forth between the officers and Kingsley and, ultimately, one of the officers tased Kingsley in the back for approximately five seconds. The officers then left Kingsley alone in the cell, but returned 15 minutes later and removed the handcuffs. Kingsley filed suit, alleging that his Fourteenth Amendment rights were violated. The case went to trial and the jury returned a verdict for the officers. However, Kingsley appealed, maintaining that the district court improperly required him to prove that the officers were subjectively aware that the use of force was unreasonable, rather than just showing that the use of force was objectively unreasonable. The Seventh Circuit affirmed.

The Supreme Court reversed, holding that a pretrial detainee need only show that the use of force was objectively unreasonable and is not required to show that the officers were subjectively

aware that their use of force was unreasonable. A civil rights plaintiff bringing a Section 1983 claim, like *Kingsley*, is required to show that the officers' conduct was intentional, but that means that their use of force must have been intentional, not that the officers intended the excessiveness of their use of force. A longer discussion of the *Kingsley* decision and its implications for law enforcement agencies is available in podcast form at <http://www.fed-soc.org/multimedia/detail/kingsley-v-hendrickson-post-decision-scutuscast>.

***City of Los Angeles v. Patel*, No. 13-1175 (June 22, 2015)**

A local ordinance that required hotel operators to keep records regarding their guests and make them available to the police for inspection without the necessity of a subpoena or the availability of precompliance review violated the Fourth Amendment.

Various motel operators brought a facial challenge to a Los Angeles ordinance that required them to record and keep specific information about their guests for a 90-day period and that these records "shall be made available to any officer of the Los Angeles Police Department for inspection ... at a time and in a manner that minimizes any interference with the operation of the business." Violation of the ordinance was a criminal misdemeanor. The district court entered judgment in favor of the City, holding that the motel operators lacked a reasonable expectation of privacy in their records. The Ninth Circuit reversed, holding that the inspections were Fourth Amendment searches and that such searches are unreasonable under the Fourth Amendment.

The Supreme Court affirmed the Ninth Circuit's decision. The Court first held that parties may, at least in some cases, make a facial challenge under the Fourth Amendment. Second, the Court held that the ordinance in question violated the Fourth Amendment. The inspections are searches under the Fourth Amendment and thus are *per se* unreasonable unless they fit within one of a few exceptions. One such exception is for administrative searches. However, the ordinance does not meet the requirements for an administrative search because, among other things, it must afford an opportunity to obtain precompliance review before a neutral decisionmaker.

***Reed v. Town of Gilbert*, No. 13-502 (June 18, 2015)**

A town's sign ordinance violated the First Amendment because it imposed more stringent restrictions on certain signs, that were classified based on their content. The signs subject to the greater restrictions were essentially those that directed the public to meetings of nonprofit groups.

The Town of Gilbert's Sign Code prohibits the display of outdoor signs anywhere in the Town without a permit, but it exempts 23 categories from that requirement. The categories include such things as "Ideological Sign[s]," "Political Sign[s]," and "Temporary Directional Signs Relating to a Qualifying Event." "Temporary Directional Signs Relating to a Qualifying Event," unlike other signs, may only be displayed for up to 12 hours before the event and 1 hour afterwards. The Good News Community Church wished to advertise the time and location of their Sunday church services. However, as a small, cash-strapped entity that does not own any property, the services were held at a variety of locations. In order to alert the public as to the location of a specific service, the church began placing temporary signs around Town. The signs typically displayed the church's name, along with the time and location of the upcoming service. Church members typically put the signs up on

Saturday morning and removed them Sunday afternoon. The Town's Sign Code compliance manager twice cited the church for violation of the Sign Code's time restrictions. Reed, the pastor of the church, filed suit against the Town. The district court granted summary judgment in favor of the Town and the Ninth Circuit affirmed.

The Supreme Court reversed, holding that the Sign Ordinance categorizes the signs based on content, and therefore is subject to strict scrutiny under the First Amendment. Since "Temporary Directional Signs Relating to a Qualifying Event" are subject to greater restrictions than signs with different content, the Town is required to meet the strict scrutiny standard. The Court concluded that the Town could not meet strict scrutiny because the government interests identified by the Town as justifying the distinction (aesthetic appeal and traffic safety) are underinclusive. The Town did not explain how "Temporary Directional Signs Relating to a Qualifying Event" require greater restrictions than other types of signs, such as ideological or political signs.

Walker v. Tex. Div., Sons of Confederate Veterans, No. 14-144 (June 18, 2015)

Because specialty license plates are "government speech," that is, they convey a message that is attributable to the government, the government is able to refuse to include a proposed design because of its content without violating the First Amendment.

Texas has a specialty license plate program that permits private parties to develop and submit (for a fee) proposed license plate designs that, if accepted, drivers may select (for an additional fee). The Sons of Confederate Veterans, Texas Division (SCV) applied to sponsor a specialty license plate that include the organization's logo, which has a Confederate battle flag. The State of Texas denied the application, explaining "that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that [are] demeaning to those people or groups." The SCV filed suit, alleging that the denial of their application violated their First Amendment free speech rights. The district court entered judgment for the State, but a divided panel of the Fifth Circuit reversed. The Fifth Circuit held that the specialty license plates are "private speech" entitled to First Amendment free speech protection, and that the denial of SCV's application constituted illegal viewpoint discrimination.

The Supreme Court reversed the decision of the Fifth Circuit, holding that the license plates, including specialty license plates, are "government speech" and, therefore, are not subject to the First Amendment. The Court stated that, while license plates may also implicate driver's free speech rights in that the drivers cannot be compelled to display messages they do not agree with, the license plates are, nevertheless, the speech of the government and the government can prohibit content without having to provide a viewpoint-neutral reason. The government can decide on its own message and, in the context of this case, that means that it can prohibit inclusion of the Confederate flag.

Taylor v. Barkes, No. 14-939 (June 1, 2015)

Jail personnel are entitled to qualified immunity from allegations that they violated an inmate's civil rights by failing to prevent his suicide. There is no clearly established right to the proper implementation of adequate suicide prevention protocols.

Barkes, an individual with a long history of mental health and substance abuse problems, was arrested for violating his probation. A nurse performed a suicide screening form, but, based on Barkes' responses, he was given a routine referral to mental health services and the nurse did not initiate any special suicide prevention measures. The following morning Barkes hung himself. Barkes's wife and children brought suit against various entities and individuals, alleging that they violated Barkes's civil rights in failing to prevent his suicide. Among the defendants were the petitioners, Stanley Taylor, Commissioner of the Delaware Department of Correction and Raphael Williams, the Institution's warden. Neither Taylor nor Williams had any personal involvement with Barkes, but were sued on a theory of supervisory liability. Taylor and Williams moved for summary judgment, but the district court denied the motion. The Third Circuit affirmed, holding that they could be held liable under a supervisory liability theory and that they were not entitled to qualified immunity.

The Supreme Court reversed, holding that Taylor and Williams were entitled to qualified immunity because the law was not clearly established. First, the Court pointed out that no decision of the Supreme Court had established a right to the proper implementation of adequate suicide prevention protocols. In fact, as the Court points out, no decision of the Supreme Court had even discussed them. Second, to the extent that a robust consensus of cases of persuasive authority in the courts of appeals could itself clearly establish the alleged right, such case law did not indicate that there was a clearly established right. Finally, taking up the Third Circuit's argument that the right was clearly established by two of its own decisions, the Supreme Court, assuming for the sake of argument that Third Circuit precedents could clearly establish the law despite disagreement in the courts of appeals, concluded that the cases relied upon by the Third Circuit did not clearly establish such a right.