FALL 2016 NEWSLETTER

CONSTITUTIONAL AND CIVIL RIGHTS LAW UPDATE

By Frank Valenzuela and Caroline Sileo

United States Supreme Court

***Evenwel v. Abbott,* No. 14-940 (April 4, 2016)**

A state or locality may draw its legislative districts based on total population. Constitutional history, judicial precedent, and consistent state practice under the Equal Protection Clause's "one person, one vote" principle permit the apportionment of legislative districts based on total population.

The wording of the Fourteenth Amendment and the legislative debates concerning its adoption reveal that Congress at the time clearly established that total population apportionment was the proper basis for allocating House seats. Logically, the States are also permitted to use this method of apportioning legislative seats within their own legislatures.

The Court has consistently evaluated total population statistics to determine whether the districting maps impermissibly deviate from population equality and violate the Equal Protection Clause. Also, all states and many local jurisdictions have consistently used the total population method, and the Court has found no valid reason to curtail this accepted, settled practice.

***Harris v. Arizona Independent Redistricting Commission*, No. 14-232 (April 20, 2016)**

Compliance with the Voting Rights Act is a legitimate consideration in redistricting that does not violate the "one person, one vote" principle of the Equal Protection Clause of the Fourteenth Amendment.

Although deviation from absolute equality of districts to gain an advantage for one political party over another is not justified, the Constitution permits deviations when the deviations are based on legitimate considerations intended to accomplish a rational state policy. Legitimate considerations include maintaining the integrity of political subdivisions, upholding the competing balance among political parties, and preserving the traditional interests in compactness and contiguity. Compliance with the Voting Rights Act, which prohibits redistricting plans that effectively disenfranchise minorities, has been previously acknowledged as a legitimate consideration by some members of the Court in past decisions.

Regarding the deviation in population numbers, precedent establishes that deviations of more than ten percent may be presumed to represent invidious discrimination, but challenges to a deviation of less than ten percent must show that the deviation resulted from the use of illegitimate factors. In this case, there was no evidence of illegitimate considerations, but instead that the deviations in the redistricting plan resulted from the Arizona Independent Redistricting Commission's good faith effort to comply with Voting Rights Act.

***Heffernan v. City of Paterson, New Jersey*, No. 14-1280 (April 26, 2016)**

When a government employer demotes an employee out of a desire to prevent the employee from engaging in a protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983.

An employer violates the First Amendment when it demotes an employee in order to prevent the employee from, or to punish the employee for, engaging in protected speech, even if the employer made a factual mistake and no protected speech occurred. This rule tracks the First Amendment's wording because it focuses on the harm that the government actor committed, which is the same whether or not the employer made a factual mistake. This rule also does not alter the burden that an employee claiming a First Amendment violation must meet, which is to prove that the defendant had an improper motive. The Court indicated that lower courts should decide in the first instance whether the employer may have acted under a neutral policy prohibiting police officers from overt involvement in any political campaign and whether such a policy, if it exists, complies with constitutional standards.

***Ross v. Blake*, No. 15-339 (June 6, 2016)**

There is no "special circumstances" exception to the Prison Litigation Reform Act's requirement that a prisoner must exhaust available administrative remedies before suit can be filed.

In this case, the plaintiff asserted that he reasonably believed that he had exhausted all remedies by participating in an internal investigation with Maryland prison system's Internal Investigative Unit following an alleged assault. The plaintiff brought a 42 U.S.C. § 1983 action against correctional officers, alleging the use of excessive force. Under the Prison Litigation Reform Act ("PLRA"), the claimant must exhaust administrative remedies before filing suit because the PLRA's requirement to exhaust administrative remedies does not have a "special circumstances" exception. Due to the PLRA's relatively weak exhaustion provision, the Court has consistently taken a strict approach to construing the provision; therefore, the Court did not excuse a failure to exhaust administrative remedies, regardless of what special circumstances may exist.

The Court, however, remanded the case for a determination as to whether there were any available administrative remedies the prisoner could pursue in this case. The Court explained that "available" remedies are those that are "capable of use" to obtain relief. The Court provided three kinds of circumstances in which administrative remedies are not available. First, the Court reasoned that administrative remedies are not available when, despite what is officially found in guidance materials, "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." Second, the Court observed that administrative remedies are not available when the "administrative scheme is so opaque that it becomes, practically speaking, incapable of use;" in other words, "no ordinary prisoner can make sense of what it demands." Third, administrative remedies are not available when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."

***Terrance Williams v. Pennsylvania*, No. 15-5040 (June 9, 2016)**

The claimant petitioned for relief under the Post-Conviction Relief Act, alleging governmental interference in his trial that led to his conviction and sentencing to death for robbery and murder. The Chief Justice of the Pennsylvania Supreme Court had been the District Attorney for Philadelphia throughout the claimant's trial, sentencing, and appeal, and personally authorized his office to seek the death penalty in this case. Prior to hearing this case, the judge refused to recuse himself from this case, reversed the lower court's grant of habeas relief, and lifted the stay of execution.

Although the due process precedents of the Supreme Court do not provide a specific test governing the recusal of a judge with prior involvement in a criminal case as a prosecutor, an impermissible risk of bias exists and violates the Due Process Clause of the Fourteenth Amendment when a judge was previously involved in the case as a prosecutor who participated in a crucial decision about the case. Here, the judge was involved in a critical decision in the case as a prosecutor because he played a vital role in deciding to seek the death penalty. Additionally, regardless of whether the potentially biased judge's decision was dispositive, the deliberations of an appellate panel are confidential, and it can be assumed that the judge's bias at the very least influenced the outcome. Even the appearance of such bias undermines the essential neutrality of the multi-member tribunal.

***Puerto Rico v. Franklin Cal. Tax-Free Trust*, Nos. 15-233, 15-255 (June 13, 2016)**

Chapter 9, Section 903(1) of the Bankruptcy Code pre-empts Puerto Rico's Recovery Act that allowed Puerto Rican public utilities to restructure their debt. Although Congress amended the definition of "state" to exclude Puerto Rico for the purpose of defining who may be a debtor under a specific provision of Chapter 9, this amended definition of "state" did not apply to the preemption provision. Additionally, the plain language of the preemption clause does not contain any language that excluded Puerto Rico. Therefore, Puerto Rico is a "state" within the meaning of the preemption provision of Chapter 9, and the Bankruptcy Code preempts Puerto Rico's Recovery Act.

***Birchfield v. North Dakota*, No. 14-1468 (June 23, 2016)**

A state statute may not criminalize the refusal to submit a blood test in the absence of a warrant because of the degree of intrusion involved in such a test and the availability of a less intrusive alternative, the breath test. While the Fourth Amendment allows for warrantless breath tests incident to an arrest for drunk driving, a warrantless blood test incident to an arrest violates the Fourth Amendment. Although the criminalization of refusing a breath test serves a government interest in preventing drunk driving, this same rationale does not apply to criminalizing a refusal to submit to a blood test. Blood tests implicate significant privacy concerns because they are more physically invasive, requiring the piercing of skin, and they produce a sample that can be preserved to obtain information beyond the individual's blood alcohol level at the time that the test was administrated. For these reasons, North Dakota's statute criminalizing the refusal to submit a blood test without a warrant was not reasonable and violates the Fourth Amendment.

***Fisher v. University of Texas at Austin*, No. 14-981 (June 23, 2016)**

In this case, the plaintiff, a white female, was denied admission to the University of Texas

because she did not qualify for Texas' Top Ten Percent Plan, which guarantees admission to the top ten percent of every in-state graduating high school class. For the remaining spots in the class, the University considers many factors, including race. Plaintiff sued the University of Texas, alleging that the use of race as a consideration in the admissions process violates the Equal Protection Clause of the Fourteenth Amendment.

The Court held that the University of Texas' admission process that uses race as a consideration did not violate the Equal Protection Clause of the Fourteenth Amendment. After the University of Texas' Top Ten Percent Plan, the use of race as a factor in the holistic review used to fill admission spots is narrowly tailored to serve a compelling state interest. Previous precedent has established that educational diversity is a compelling state interest so long as it is expressed as a concrete and precise goal and not a quota of minority students or an amorphous idea of diversity. In this instance, the University of Texas sufficiently had concrete goals with a reasoned explanation for its decision to pursue these goals and thoughtful consideration of why previous attempts to achieve these goals failed. There are also no other available, workable alternatives for the admission plan to achieve their compelling state interest in educational diversity.

Fifth Circuit Court of Appeals

***Legate v. Livingston*, No. 15-40079 (May 18, 2016)**

Deciding a matter of first impression, the Fifth Circuit held that a prisoner cannot establish an Eighth Amendment violation where he willingly or voluntarily participates in the conduct that gave rise to his injury.

In this case, a Native American inmate alleged that the Executive Director of the Texas Department of Criminal Justice violated his Eighth Amendment claim to be free from cruel and unusual punishment by failing to protect him from the risk of contracting a communicable disease. However, he failed to state a claim for relief under the Eighth Amendment because he voluntarily participated in communal pipe-smoking ceremonies where he allegedly contracted Hepatitis C.

***Mendez v. Poitevent*, No. 15-50790 (May 19, 2016)**

A Border Patrol agent who shot a suspect to death after a violent struggle is entitled to qualified immunity from a Fourth Amendment excessive force claim because a reasonable officer in the border patrol's situation could have believed that the suspect posed a serious threat of harm at the time that the agent shot the suspect. Before the shooting, the suspect had struggled violently and aggressively against the agent, the agent's initial attempts to subdue the suspect, including repeatedly striking him with a baton, failed, the strap on the agent's pistol holster came undone, leading him to believe that the suspect was attempting to grab the pistol, and just before the agent shot him, the suspect struck the agent in the temple, hard enough to concuss him.

***Howell v. Town of Ball*, No. 15-30552 (July 1, 2016)**

A former police officer filed a suit against the town and several individual defendants

claiming that the defendants violated his First Amendment rights when they fired him for cooperating with an FBI investigation of public corruption against town officials.

The court held that the police officer's involvement in the FBI investigation was entitled to First Amendment protection because acting as an informant for the FBI investigation was not ordinarily within the scope of his duties as a police officer. However, for the purposes of qualified immunity, a defendant cannot violate "a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." The protection of police officer's involvement in the FBI investigation under the First Amendment was not clearly established at the time of his discharge. Therefore, the court affirmed the dismissal of the individual defendants on the basis of qualified immunity.

***Veasey v. Abbott*, No. 14-41127 (July 20, 2016)**

The plaintiffs filed suit challenging Texas' SB 14, a voter identification law. In a complex opinion, the court of appeals: (1) remanded the case to the district court for it to reweigh the appropriate factors concerning whether SB 14 was passed with a discriminatory purpose; (2) held that SB 14 had a discriminatory effect under the Voting Rights Act; and (3) held that SB 14 did not impose a poll tax on Texas voters born in other states.[1]

In this case, the court adopted a two-part framework to evaluate disparate impact claims asserted under Section 2 of the Voting Rights Act. The framework has two elements: (1) "'the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, [and] (2) that burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.'"

With regard to the second element of the framework, the court concluded that the relevant factors in the Supreme Court's *Thornburg v. Gingles*, 478 U.S. 30 (1986) case should be considered. The *Gingles* factors include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> 4. if there is a candidate slating process, whether the members of the

[1] This case summary will only focus on the analysis of the disparate impact claim.

> minority group have been denied access to that process;
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

To these, the court recognized two additional considerations:

> 8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[; and]
> 9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Concerning the first element of the two-part framework, the court of appeals held that the district court did not clearly err in finding that SB 14 imposed a significant and disparate burden on the right to vote. Concerning the second element of the two-part framework, based on the *Gingles* factors, the court held that SB 14 has a discriminatory effect on minority's voting rights because it diminished Hispanics' and African Americans' ability to participate in the political process. In reaching this conclusion, the court considered the history of official discrimination in Texas (factor #1), the existence of racially polarized voting in the state (factor #2), the effects of past discrimination (factor #5), racial appeals in political campaigns (factor #6), the extent to which minority public officials are elected and the responsiveness of the legislature to minority needs (factors ##7-8), and the tenuousness relation between the policies underlying the law and Texas' interest in preventing fraud and increasing voter confidence in elections (factor #9).

***Doe v. United States of America*, No. 15-50331 (July 27, 2016)**

Eight female detainees, who were apprehended by the United State Immigration and Customs Enforcement ("ICE") and who were sexually assaulted while being transported from a private detention facility under contract with the county, brought action against Williamson County (the "county"), the detention facility, and its officers, claiming a violation of 42 U.S.C.A. § 1983.

Under § 1983, liability applies when a "'person' acting 'under color of' state law, deprives another of rights 'secured by the Constitution' or federal law." Here, the defendants are private actors; therefore, for § 1983 to apply, the "conduct allegedly causing the deprivation of a federal right" must be "fairly attributable to the State." The Fifth Circuit held that the private detention facility under contract with the county to house federal aliens detained by ICE was not a state actor, as required to establish a § 1983 claim. Thus, the plaintiffs cannot bring a § 1983 claim against the facility, the facility officer, and the former facility administrator.

Because the detention facility was performing a *federal* function in housing alien detainees in accordance with ICE specifications, the court also rejected plaintiffs' argument that the detention facility was acting under the color of *state* law because the state or local authorities "believed [the assaulting officer's] conduct fit within the elements of a state crime." As a result, the Fifth Circuit affirmed the district court's dismissal of the plaintiffs' § 1983 claims against the detention facility and its officers.

The Fifth Circuit further held that the county cannot be held directly liable to the plaintiffs under § 1983. To establish liability against a governmental entity under § 1983, the plaintiffs must show the existence of (1) a policy maker; (2) an official policy; and (3) causation, or a violation of rights whose moving force is the policy. Here, the county did not "delegate final policy-making authority to facility in regard to protocol for transporting detainees," and in fact, in the subcontract, the county mandated that the facility comply with ICE's transport policy. Also, the county did not act with deliberate indifference in monitoring the facility because sheriff's deputy assigned to monitor detention center took reasonable measures to abate any known or obvious consequences to detainees as soon as he became aware of the policy violations. As a result, the Fifth Circuit affirmed the district court's grant of summary judgment for the county.

***Cowart v. Erwin*, No. 15-10404 (September 13, 2016)**

A former jail detainee brought a § 1983 claim against four county jail officers, asserting claims of excessive force and bystander liability. After the officers unsuccessfully argued that the plaintiff failed to exhaust the administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), the jury found one of the officers liable for all claims and awarded both compensatory and punitive damages. The officer appealed the district court's ruling on her PLRA defense and its denial of her post-verdict motions.

The Fifth Circuit held that the detainee was not required to appeal from an interim response to a grievance in order to exhaust administrative remedies. The prison's grievance procedures, not the PLRA, define the administrative remedies that are available and that must be exhausted before a prisoner files a § 1983 action regarding prison conditions. To exhaust administrative remedies before filing a § 1983 claim, the PLRA requires that "a prisoner must not just substantially comply with the prison's grievance procedures, but instead must exhaust available remedies properly." After submitting his grievance to a jail staff member, the plaintiff properly exhausted his administrative remedies because the county jail's grievance process did not require the detainee to appeal or take any other action when he failed to receive an interim response from grievance board within fifteen days, and he was transferred to the custody of the Texas Department of Criminal Justice before the lapse of the sixty-day period for the prison board to answer the grievance.

***Aaron Brothers v. Zoss*, No. 15-51204 (September 14, 2016)**

The estate of a motorist, who sustained a serious injury when police officers forcibly removed him from his truck and later died, filed a § 1983 claim against the police officers, alleging the use of excessive force in violation of the Fourth and Fourteenth Amendments. After the district court denied the officers' motion for summary judgment based on qualified immunity to wait until "the record fully developed through trial," the officers appealed.

The Fifth Circuit held that the police officers used objectively reasonable force in forcibly pulling motorist from truck when he refused officers' lawful commands to exit the vehicle, and thus, officers did not use excessive force. As a result, the police officers are entitled to qualified immunity, and the court reversed the district court's denial of qualified immunity.

***Melton v. Phillips*, No. 15-10604 (September 14, 2016)**

The plaintiff who had been wrongfully detained in county jail for sixteen days brought a § 1983 action against a sheriff's office deputy, alleging that deputy intentionally or recklessly misidentified him as an assault assailant in an offense report, thereby leading to the plaintiff's arrest without probable cause in violation of the Fourth Amendment. After the district court denied the officer's motion for summary judgment based on qualified immunity, the officer appealed, arguing that he cannot be liable for the Fourth Amendment violation because he neither prepared nor signed the affidavit in support of an arrest warrant.

The Fifth Circuit relied on *Franks v. Delaware* where the Supreme Court held that a defendant has a right to challenge the "veracity of factual statements made in an affidavit supporting a search warrant." The exclusionary rule mandates the exclusion of evidence that was seized pursuant to a search warrant if the defendant establishes that the affiant "knowingly and intentionally, or with reckless disregard for the truth," included a false statement in the warrant affidavit that was necessary to the finding of probable cause. Thus, an officer who deliberately or recklessly provides false or misleading information for use in an affidavit can be held liable. When determining the officer's liability, the fact that the officer did not sign or draft the affidavit in support of the arrest warrant is not determinative. Furthermore, the independent intermediary doctrine does not bar the officer's liability.

Here, the district court denied the officer's motion for summary judgment and found that there was a genuine dispute of fact as to whether Phillips was reckless in identifying the plaintiff as the suspected assailant. Therefore, the Fifth Circuit held that it lacks jurisdiction to review the district court's finding that a genuine fact dispute exists with regards to the officer's recklessness. In conclusion, the court affirmed the district court's denial of qualified immunity.

***Grisham v. Fort Worth*, No. 15-10960 (September 19, 2016)**

The plaintiff, an evangelical Christian, brought a § 1983 action against Fort Worth (the "city") and the police chief, alleging a violation of his First Amendment right to hand out religious literature at a public festival and seeking nominal damages and declaratory and injunctive relief. After the parties entered into a consent decree where the city agreed to pay the plaintiff one dollar in nominal damages, and the city was prohibited from interfering with the plaintiff's free speech rights and those of others at future public events downtown, the plaintiff filed a motion for attorney fees. After the district court denied plaintiff's motion for attorney's fees, the plaintiff appealed.

The Fifth Circuit held that the plaintiff was a prevailing party, and there are no special circumstances present in this case to justify an outright denial of attorney's fees. Furthermore, the degree-of-success factor did not warrant reduction of attorney fees awarded under § 1983 to the plaintiff because the plaintiff received exactly what he asked for in the complaint, he did not seek a

large damage award, but only to obtain a modest one, and as a result, he did not cause a disproportionate amount of time and resources to be spent on unsuccessful claims. As a result, the Fifth Circuit remanded this case to the district court to reduce the amount of attorney's fees to a reasonable amount, not to deny all fees, simply because the plaintiff's counsel spent too much time on certain tasks.

***Gibson v. Kilpatrick*, No. 15-60583 (September 20, 2016)**

A municipality's former police chief brought action against the municipality's mayor, in his individual capacity, and the municipality under § 1983 and state law, claiming First Amendment violations, malicious interference with employment, and intentional infliction of emotional distress in retaliation for reporting to outside law enforcement agencies that the mayor had misused a municipal gasoline card. The only claim remaining for the purposes of this appeal was the police chief's retaliation claim, alleging a violation of his First Amendment right. After the trial court granted the municipality's motion for summary judgment, which held that the plaintiff's speech in the initial complaint was "not a matter of public concern," the plaintiff appealed.

The Fifth Circuit first noted that the police chief was acting as a citizen, not as an employee when he filed his suit because "suing one's supervisor, in his personal capacity, for discrimination surely is not part of one's job description." The plaintiff is also required to show that the subject matter at dispute was a matter of public concern, which involves speech that can "be fairly considered as relating to any matter of political, social, or other concern to the community" or when the speech "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."

The court examined three factors—content, form, and context—to determine if the speech involves a public concern. Here, the court listed multiple reasons for concluding that the police chief's speech involved a private concern, including that (1) the police chief's suit was an employment grievance; (2) his suit only requests personal relief; and (3) his original claim against the mayor was not in the mayor's official capacity but rather in his individual capacity. The court further held that the police chief failed to demonstrate that his report to the Mississippi State Auditor was a matter of public concern because the court had already determined that his speech was unprotected, and the underlying cause for this suit is an ongoing personal dispute between the mayor and the former police chief. As a result, the Fifth Circuit held that the police chief's suit was a matter of private concern and that summary judgment for the municipality was proper.

***United States v. Turner*, No. 15-50788 (October 13, 2016)**

The Fifth Circuit held that a search warrant is not required by law enforcement to swipe credit cards and gift cards to reveal the information encoded on the magnetic stripe. Here, the defendant was charged with aiding and abetting the possession of unauthorized access devices after police officers swiped gift cards found in the defendant's possession in their in-car computer. The police officers subsequently turned the seized gift cards over to the Secret Service, who determined that the gift cards had been illegally altered. After the district court denied the defendant's motion to suppress evidence of the allegedly altered gift cards and the defendant was convicted pursuant to a conditional guilty plea, the defendant appealed.

The Fifth Circuit held that the defendant had standing to challenge a police officer's seizure of gift cards under the Fourth Amendment. The court further held that the gift cards were lawfully seized because (1) they were in plain view of the officer, (2) their incriminating nature was immediately apparent, and (3) the officer had probable cause to believe that the gift cards were contraband or evidence of a crime.

The Fifth Circuit determined that it was lawful for law enforcement to scan the magnetic stripes on the gift cards to access the information coded therein. The court held that the defendant did not have a reasonable expectation of privacy for the information encoded in the magnetic stripes of the allegedly altered gift cards. Therefore, a police officer's scan of the magnetic stripes to reveal their information was not a search under the Fourth Amendment because gift cards are typically used to buy things rather than store information, the magnetic stripe only encoded a few lines of characters, and third parties, such as cashiers, commonly access the information encoded in the magnetic stripe. As a result, the Fifth Circuit affirmed the judgment of the district court.