<u>FALL 2018 NEWSLETTER</u>

U.S. SUPREME COURT CIVIL RIGHTS LAW UPDATE

By Frank Valenzuela and Caroline Sileo

On October 1, 2018, the Supreme Court of the United States began its new term. Already, there are several cases on the Court's docket that will likely result in decisions which will find their way to a future Civil Rights/Constitutional Law newsletter. As of this time, the topics covered by such cases include: the First Amendment (*Nieves v. Bartlett*), the death penalty and the Eighth Amendment (*Madison v. Alabama*, *Bucklew v. Precythe*), takings claims (*Knick v. Township of Scott, Pennsylvania*), double jeopardy and the Fifth Amendment (*Gamble v. U.S.*), the Eighth Amendment's prohibition on excessive fines and whether it should be incorporated against the states through the Fourteenth Amendment (*Timbs v. Indiana*), and the ineffective assistance of counsel and the Sixth Amendment (*Garza v. Idaho*).

<u>United States Supreme Court</u>

***Kisela v. Hughes*, 584 U.S. ___ (April 2, 2018)**

A police officer is entitled to qualified immunity in an excessive force suit when the officer fears that the individual who is caring a knife will harm another person and that individual does not obey the officer's orders.

The plaintiff brought an excessive force claim against a police officer, alleging that the police officer unlawfully shot her in front of her home while she was carrying a kitchen knife. The officer moved for summary judgment on the basis of qualified immunity, and the district court granted summary judgment to the police officer. The Ninth Circuit Court of Appeals disagreed and reversed the district court's decision, holding that the plaintiff sufficiently demonstrated that the police officer violated the Fourth Amendment and that the constitutional violation was obvious based on the court's precedent. The police officer appealed.

In a per curiam opinion, the Supreme Court held that the police officer was entitled to qualified immunity because the plaintiff was armed with a large knife, was within striking distance of another individual, ignored the officer's orders to drop the weapon, and the situation unfolded in less than a minute. The Court noted that the Ninth Circuit failed to apply the proper standard for qualified immunity and made additional errors in concluding that its own precedent clearly established that the officer used excessive force. As a result, the Supreme Court reversed the Ninth Circuit's judgment and remanded for further proceedings consistent with its opinion.

***Sessions v. Dimaya*, 584 U.S. __ (April 17, 2018)**

The definition of a "crime of violence" in the Immigration and Nationality Act (the "Act") governing an alien's removal from the United States of America is unconstitutionally vague.

A lawful permanent resident of the United States had two convictions for first-degree

burglary under California law. After his second offense, the Government sought to deport him as an aggravated felon. An immigration Judge and the Board of Immigration Appeals held that California's first-degree burglary is a "crime of violence" under 18 U.S.C. § 16(b). While the permanent resident's appeal was pending in the Ninth Circuit, the Supreme Court held that a similar residual clause in the Armed Career Criminal Act, which defined "violent felony" as any felony that "otherwise involves conduct that present a serious potential risk of physical injury to another," as unconstitutional. *See Johnson v. United States*, 576 U.S. ___ (2015).

Relying on *Johnson*, the Supreme Court held that the residual clause in 18 U.S.C. § 16(b), which provides the definition of "crime of violence" for purposes of the Act's removal provisions, is unconstitutionally vague. Under the Act, the United States is entitled to deport any alien in the United States that is convicted of an "aggravated felony." The definition of "aggravated felony" includes a "crime of violence" that has a term of imprisonment of at least one year, as defined in 18 U.S.C. § 16. The residual clause of Section 16(b) defines a "crime of violence" to include any felony that "by its nature, involves a substantial risk that physical force" that affects another person.

When applying the residual clause, courts use the categorical approach. This approach involves (1) imagining an "idealized ordinary case of the crime" and (2) determining whether that "ordinary case" exceeds some threshold level of risk. The court questioned, "[h]ow does one go about divining the conduct entailed in a crime's ordinary case? Statistical analyses? Surveys? Experts? Google? Gut instinct?" The Court also questioned how "some not-well-specified-yet-sufficiently large degree of risk?" The Court determined that these questions "have no good answers," and thus, the application of the residual clause is so unpredictable and arbitrary that it is unconstitutional. Therefore, residential clause in Section 16(b)'s "ordinary-case requirement" and an "ill-defined risk threshold" is unconstitutionally vague.

***Byrd v. United States*, 584 U.S. __ (May 14, 2018)**

Generally, a person in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list her as an authorized driver.

A driver was pulled over by police officers for driving in the left lane, which was designated for passing only. The officers requested the driver's license and rental agreement after recognizing the car as a rental car. The driver gave the officers the rental agreement, but he was not listed as an authorized driver. After running his identification for outstanding warrants, the officers asked whether the driver had anything illegal in his car and then requested consent to search the rental car. The officers allege that the driver consented to the search, but the driver disputes this contention. During the search of the rental car, the officers found heroin and body armor.

At trial, the driver moved to suppress the evidence, challenging the initial stop, the extension of the stop, and the search itself. The trial found that the violation of the traffic law justified the initial stop and that the officers' developing reasonable suspicion of criminal activity justified the extension of the stop. Because the driver maintains that he did not consent to the search, the trial court decided whether or not the driver had a reasonable expectation of privacy

in the rental vehicle, despite not being listed on the rental agreement. The trial court denied the driver's motion to suppress, and the Third Circuit affirmed because they had previously held that the unlisted drivers of rental cars do not have a reasonable expectation of privacy in the rental car.

The Supreme Court disagreed and held that drivers in lawful possession of rental cars have a reasonable expectation of privacy under the Fourth Amendment even if they are not listed on the rental agreement as authorized drivers. The Court determined that individual who "lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." The Court, relying on *Jones v. United States*, 362 U.S. 257, 259 (1960), where the Court held that a guest staying with permission in a friend's apartment had a reasonable expectation of privacy in that apartment, held that a reasonable expectation of privacy attaches whenever one has "lawful possession and control and the attendant right to exclude," and "the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." As a result, the Court reversed and remanded the case to the trial court.

***McCoy v. Louisiana*, 584 U.S. __ (May 14, 2018)**

A defendant has a Sixth Amendment right to direct the objective of his defense and to insist that defense counsel abstain from admitting guilt, notwithstanding that counsel's professional view is that confessing guilt provides the defendant the best chance to avoid the death penalty.

The criminal defendant was charged with three counts of first-degree murder. He maintained his innocence to his attorney and opposed his attorney's strategy to concede that he was guilty to ideally avoid death penalty. Before his trial, the trial court denied the criminal defendant's request to fire his attorney and represent himself. During the trial, his attorney conceded the criminal defendant's guilt against his objections, and the criminal defendant was convicted and sentenced to death. The criminal defendant sought a new trial, but the Louisiana Supreme Court affirmed the trial court's ruling that his attorney had the authority to concede guilt, despite his opposition.

The Supreme Court that the Sixth Amendment guarantees a defendant the right to insist that his counsel refrain from admitting guilt, regardless of whether counsel's belief that confessing guilt is the best strategy. The Sixth Amendment guarantees to each criminal defendant the assistance of counsel for his defense. In general, an attorney has the discretion to manage the trial strategy, but the decision to assert innocence or guilt belongs to the client. Thus, defense counsel "may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission," even if "counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty."

***Collins v. Virginia*, 584 U.S. __ (May 29, 2018)**

The automobile exception to the Fourth Amendment does not permit a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein.

After a unique-looking motorcycle evaded arrest twice, one police officer located the house where the suspected driver of the motorcycle lived. The motorcycle was covered with a tarp, so the officer lifted the tarp and confirmed that the motorcycle was in fact the motorcycle in question. Once the suspect returned home, the officer questioned the suspect, and eventually the suspect confessed that he bought the motorcycle knowing that it had been stolen. The officer arrested the suspect for receipt of stolen property.

During the trial, the criminal defendant attempted to suppress the motorcycle evidence, arguing that the police officer conducted an illegal warrantless search that led to the discovery of the motorcycle. 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. The defendant was convicted and appealed. The Virginia appeals court and Supreme Court affirmed the trial court's decision. 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 Supreme Court disagreed, holding that the Fourth Amendment's "automobile exception" does not permit an officer to enter a home or its curtilage in order to search a vehicle without a warrant. The Court noted that no case law "suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant." The automobile exception exists because vehicles are of "ready mobility" and the "pervasive regulation of vehicles capable of traveling on the public highways." The exception balances "the intrusion on an individual's Fourth Amendment interest in his vehicle and the governmental interests in an expedient search of that vehicle." The Court refused to expand the automobile exception to permit the warrantless search of a vehicle parked in the curtilage of a home because doing so "would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application." As a result, the Court remanded on the issue of whether the warrantless search at issue was reasonable on a different basis.

***Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. __ (June 4, 2018)**

The Colorado Civil Rights Commission's ("Commission") conduct in evaluating a cake shop owner's reasons for declining to make a wedding cake for a same-sex couple violated the Free Exercise Clause.

A same-sex couple went to a bakery in Colorado and requested its owner to design and create a cake for their wedding. The owner declined their request because he does not create wedding cakes for same-sex couples because of his religious beliefs. Particularly, the owner believes that decorating cakes is a form of act through which he honors God. The same-sex couple filed charges of discrimination with the Commission, alleging discrimination on the basis of sexual orientation under the Colorado Anti-Discrimination Act ("CADA"). After a notice of determination finding probable cause, the same-sex couple filed a formal complaint with the Office of Administrative Courts, alleging that the bakery discriminated against them in a place of public accommodation in violation of CADA. The administrative judge found in favor of the

same-sex couple, which was later affirmed by the Commission and the Colorado Court of Appeals. The owner appealed.

The Supreme Court held that the Commission exhibited clear and impermissible hostility against the owner. The Court noted that the "laws and the Constitution can, and in some instances must protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical objections to gay marriages are protected views and in some instances protected forms of expression." The Supreme Court stated that the CADA must be applied in a neutral manner towards religion, which the Commission failed to do. The Court pointed to specific statements made by the Commissioners which disparaged the owner's religious beliefs and specific instances which showed disparate treatment towards the owner and other Colorado bakers who refused to bake same-sex wedding cakes. The Court concluded that the owner was not given a neutral and respectful consideration of his claim, and the Commission violated his rights under the Free Exercise Clause of the First Amendment.

***Minnesota Voters Alliance v. Mansky*, 585 U.S. __ (June 14, 2018)**

A political apparel ban that applied to the inside of polling places violates the Free Speech Clause of the First Amendment.

A Minnesota statute prohibited individuals from wearing political apparel at or around polling places on primary or election days. The statute did not define "political," but election officials distributed policy materials to identify which items fell within the scope of the statute. While election officials were instructed to allow a person to vote regarding of their compliance with the statute, a misdemeanor prosecution could result if an individual refused to remove or cover-up the political apparel.

An individual, who was wearing a t-shirt with the Tea Party logo and a button that advocated for photograph identification as a requirement to vote, was temporarily prevented from voting at his polling place during the 2010 election. Various political groups filed a complaint against Minnesota's Secretary of State and various election officials, alleging that the statute violated the First Amendment, facially and as applied, and was selectively enforced, which violated their Equal Protection rights.

The district court dismissed all claims, and the Eighth Circuit affirmed as to the Equal Protection and the facial First Amendment claims, but reversed and remanded the as-applied claim. The district court eventually granted summary judgment against the political groups on the as-applied First Amendment claim. The Eighth Circuit affirmed, holding that the political groups failed to show that the ban of Tea Party apparel was unreasonable given the statute's purpose and that the groups failed to show selective enforcement. The groups then petitioned the Supreme Court to determine the correctness of the lower courts' rulings.

The Court held that the statute prohibiting individual from wearing political apparel at polling places violated the Free Speech Clause of the First Amendment. The Court determined that the polling places were nonpublic forums and that the State may place reasonable limits on speech therein. The Court determined that the statute imposed a content-based restriction on individuals, which requires that the restriction must be "reasonable and not an effort to suppress

expression" based on the speaker's viewpoint. Here, the statute did not make a distinction based on the speaker's political viewpoints; therefore, the restriction must be "reasonable." To determine if a statute's restriction is reasonable, the Court looks for the presence of "objective, workable standards" that facilitate in the enforcement of the law. The statute in this case did not define the term "political" or any key terms describing the types of apparel subject to the prohibition, and thus, the statute gave too much discretion in enforcement. As a result, the Court held that the statute was unconstitutional.

***Lozman v. Riviera Beach*, 585 U.S. __ (June 18, 2018)**

The existence of probable cause does not bar a plaintiff's claim of First Amendment retaliation by a city for prior protected speech under the circumstances of this case.

During a City Council meeting, a City resident was granted permission to speak during the non-agenda public comment portion of the meeting. The City resident began discussing corruption in the local government, and a council member instructed him to stop commenting on the matter. The City resident repeatedly ignored these instructions and was arrested by a City police officer. The City resident was charged with disturbing a lawful assembly, but the prosecuting attorney dismissed the charges because even though there was probable cause, successful prosecution was unlikely.

The City resident filed suit against the City under 42 U.S.C. § 1983, alleging retaliation by false arrest under the First Amendment, unreasonable seizure under the Fourth Amendment, and common law arrest. After a trial, the jury found in favor of the City, and the City resident filed a motion for a new trial, which was denied. The City resident appealed, arguing that the jury's findings on probable cause were against the great weight of the evidence. The Eleventh Circuit affirmed the trial court's ruling because a finding of probable cause prevents a claim for false arrest under the First Amendment, Fourth Amendment, and state common law.

The Supreme Court disagreed, holding that the existence of probable cause for an arrest did not bar a First Amendment retaliatory arrest claim in this case. The Court did not decide what precedent—*Mt. Health City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977) or *Hartman v. Moore*, 547 U.S. 250 (2006)—applies in retaliatory arrest claims because the facts in this case were so unusual that the issue need not be decided.

The Court considered the uniqueness of the facts in this case and the First Amendment rights at stake and held that the City resident did not need to prove the absence of probable cause to succeed on his retaliatory arrest claim under the First Amendment. The Court also concluded that the standard in *Mt. Health*, which requires that the plaintiff prove that the alleged constitutional violation was the but-for cause for the adverse action, was proper for determining the retaliatory arrest claim under these particular facts on remand. The Court declined to address the requirements or standard for proving a retaliatory arrest claim under the First Amendment in other contexts. As a result, the Supreme Court vacated the ruling and remanded the case back to the trial court.

***Carpenter v. United States*, 585 U.S. __ (June 22, 2018)**

The government conducts a Fourth Amendment search when it accesses historical cell

phone records that provide a comprehensive chronicle of the user's past movements, and, therefore, a warrant supported by probable cause is required to obtain the data.

Based on information from an arrested suspect, authorities applied for orders under the Stored Communications Act to obtain information, including time-stamped location points, from cell phone providers for several suspects, including Carpenter. Based in part on the location information and on Carpenter's being present in the area where four of the robberies took place he was charged and convicted.

Keeping in mind the Founding bases for prohibiting unreasonable searches, the Court considered the application of the Fourth Amendment to innovations in surveillance tools. "As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to 'assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" The Court also noted that in *Riley*, it held that police needed a warrant to access the contents of a cell phone

This case is at the intersection of two lines of precedents. One line concerns a person's expectation of privacy in his physical location and movements, and the other line of cases concerns the information that a person voluntarily gives to others. "Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology…or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell-site location information]. The location information obtained from Carpenter's wireless carriers was the product of a search."

***Currier v. Virginia*, 585 U.S. __ (June 22, 2018)**

A criminal defendant who consents to a severance of multiple charges against him and subsequently is acquitted of one of the charges but convicted of the other charge cannot assert double jeopardy.

A man was indicted and charged with burglary, grand larceny, and possession of a firearm as a convicted felon. Before his trial, the prosecution and defense agreed to sever the firearm charge from the burglary and larceny charges. After a jury trial on the burglary and grand larceny charges, the criminal defendant was acquitted of both charges. The State proceeded against the criminal defendant on the charge of felon in possession of a firearm, but the criminal defendant objected that the Double Jeopardy Clause precluded this trial. After a jury trial, the criminal defendant was tried, convicted, and sentenced for possession of a firearm as a convicted felon. The criminal defendant filed a motion to set aside the verdict, which was denied by the trial court. Both the state court of appeals and supreme court affirmed the lower court's conviction.

The Supreme Court agreed and affirmed the state supreme court's ruling. The Court held that because the criminal defendant had consented to the severance of the charges against him, his second trial, after an acquittal in his first trial, did not violate the Double Jeopardy Clause. The Double Jeopardy Clause provides that no person may be tried more than once "for the same

offence." First, the Court rejected the criminal defendant's argument *Ashe* v. *Swenson,* 397 U. S. 436, requires a ruling for him. In *Ashe*, the Court held that the Double Jeopardy Clause barred a defendant's prosecution for robbing a poker player because the defendant's acquittal in a previous trial for robbing a different poker player from the same game established that the defendant "was not one of the robbers." The Court distinguished *Ashe* from this case because the criminal defendant's second trial was not a retrial of the same offense and because the criminal defendant consented to the severance of the charges for different trials. The Court further noted that if it held differently here, it would contradict its previous precedent. Finally, the Court concluded that civil issue preclusion principals were inappropriate to apply to criminal law's Double Jeopardy Clause to prevent parties from retrying any issue or introducing any evidence about a previously tried issue.

***Abbott v. Perez*, 585 U.S. __ (June 25, 2018)**

A district court cannot disregard the presumption of good faith by the state legislature or the burden of proof standard that requires the challengers of the state's districting plans to show the state law was enacted discriminatory intent.

Individual voters and various voter organizations in Texas filed suit against the Texas legislature, challenging the congressional and state house redistricting plans enacted in 2011. The plaintiffs alleged racial gerrymandering in violation of Section 2 of the Voting Rights Act ("VRA"), Fourteenth Amendment, and Fifteenth Amendment. During this time, Texas was restricted by the preclearance requirements of Section 5 of the VRA, and thus, filed an action in the district court seeking preclearance of redistricting plans. After various rulings, the plaintiffs challenged the Texas Legislature's 2013 districting plans, alleging that the plans against violated Section 2 of the Voting Rights Act ("VRA"), Fourteenth Amendment, and Fifteenth Amendment.

Subsequently, a three-judge panel issued an interlocutory order, finding that the racially discriminatory intent and effects identified in the 2011 plans applied to the 2013 plans where the redistricting lines were identical. The panel further concluded that the legislature' adoption the court's interim plans was a litigation strategy to insulate the plans from future challenges and that the legislature had failed to engage in any deliberative process to remove the discriminatory elements of the plans before their adoption.

After an appeal of the district court's order, the Supreme Court held that 28 U.S.C. § 1253 permits direct review of three-judge panels orders that are resolving redistricting disputes when the panel's orders have the practical effect of granting or denying an injunction. Although the panel did not label its orders as "injunctions," the orders were "effectively injunctions in that they barred Texas from using the districting plans now in effect to conduct this year's elections." The Court noted that regardless of the label, the panel's orders had the "practical effect" of orders, which is dispositive for purposes of appellate jurisdiction.

The Court further held that the district court panel wrongly disregarded the presumption of legislative good faith when it required Texas to show a lack of discriminatory intent in adopting new districting plans. The district court panel erred in requiring Texas to show that the Legislature removed the discriminatory taint from their 2013 plan that occurred in the 2011

districting plan. In challenging a legislature's voter district plans, the challenger, not the State, has the burden of proof to show discriminatory intent, and there is a presumption of legislative good faith. The Court held that the district court erred in requiring Texas to prove that it was no longer discriminatory in enacting its new district plan.

Finally, the Court reversed the panel's invalidation of three districts because the districts did not improperly dilute minority votes. The Court, however, agreed with the panel that a fourth district was an impermissible racial gerrymander because Texas did not dispute that race was the predominant factor in the design of that district and failed to establish that it had legitimate reasons for manipulating the racial makeup of the district.

***National Institute of Family and Life Advocates v. Becerra*, 585 U.S. __ (June 26, 2018)**

A state's law that requires (1) licensed crisis pregnancy centers to notify women that the state provides free or low-cost services, including abortions, and give them a phone number to call, and (2) unlicensed crisis regency centers to notify women that the state has not licensed the clinics to provide medical services violate the Free Speech clause of the First Amendment. The plaintiff was likely to prevail on its First Amendment claim.

Crisis pregnancy centers are "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." "'[U]nfortunately,' the author of the FACT Act stated, 'there are nearly 200 licensed and unlicensed' crisis pregnancy centers in California." The centers "'aim to discourage and prevent women from seeking abortions.'" "The author of the FACT Act observed that crisis pregnancy centers 'are commonly affiliated with, or run by organizations whose stated goal' is to oppose abortion—including 'the National Institute of Family and Life Advocates,' one of the petitioners here." "To address this perceived problem," the Act imposes two notice requirements, one for licensed facilities and one for unlicensed facilities.

"If a clinic is a licensed covered facility, the FACT Act requires it to disseminate a government-drafted notice on site. The notice states that 'California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].' This notice must be posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in. The notice must be in English and any additional languages identified by state law. In some counties, that means the notice must be spelled out in 13 different languages."

"Unlicensed covered facilities must provide a government drafted notice stating that '[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.' This notice must be provided on site and in all advertising materials. Onsite, the notice must be posted 'conspicuously' at the entrance of the facility and in at least one waiting area. It must be 'at least 8.5 inches by 11 inches and written in no less than 48-point type.' In advertisements, the notice must be in the same size or larger font than the surrounding text, or otherwise set off in a way that draws attention to it. Like the licensed notice, the unlicensed notice must be in English and

any additional languages specified by state law. Its stated purpose is to ensure 'that pregnant women in California know when they are getting medical care from licensed professionals.'"

Concerning the notice requirement for the licensed facilities, the Court found it to be a content based restriction on speech and, therefore, subject to strict scrutiny review. In its reasoning, the Court declined, in this case, to recognize "professional speech" as a distinct category of speech for which there diminished constitutional protection, and found that the law regulates speech as speech. The Court also noted that the Court has protected professionals against content-based restrictions on speech.

Regardless, the Court reasoned that the law could not recognize intermediate scrutiny. Assuming that the stated interest, to provide low-income women information about state-sponsored services, the Court found that the licensed notice is not sufficiently drawn to achieve it because it was wildly underinclusive.

Concerning the notice requirements for unlicensed facilities, the Court noted that its precedent require disclosure requirements to remedy potentially real harms, not those that are purely hypothetical. The Court found that California did not demonstrate any justification beyond what is purely hypothetical. Even if a non-hypothetical justification had been demonstrated, the Act unduly burdened protected speech. "The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest. It requires covered facilities to post California's precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers," allowing speech by some speakers but not by others.

"The application of the unlicensed notice to advertisements demonstrates just how burdensome it is. The notice applies to all 'print and digital advertising materials' by an unlicensed covered facility. These materials must include a government-drafted statement that '[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.' An unlicensed facility must call attention to the notice, instead of its own message, by some method such as larger text or contrasting type or color. This scripted language must be posted in English and as many other languages as California chooses to require. As California conceded at oral argument, a billboard for an unlicensed facility that says 'Choose Life' would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages. In this way, the unlicensed notice drowns out the facility's own message. More likely, the 'detail required' by the unlicensed notice 'effectively rules out' the possibility of having such a billboard in the first place."

For these reasons, the plaintiff was likely to prevail on their First Amendment claim.

***Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. __ (June 27, 2018)**

It is a violation of the Free Speech clause of the First Amendment for a state to require public employees to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities, by compelling them to

subsidize private speech on matters of substantial public concern.

Illinois law required non-union members to pay an "agency fee" to the union because only unions in Illinois are allowed to engage in collective bargaining with employers. The governor of Illinois filed a lawsuit challenging the constitutionality of the statute. The governor argued that the statute violates the First Amendment because it compels employees who disapprove of unions or their positions to contribute money to them. Ultimately, the district court dismissed the claim, and the Seventh Circuit affirmed the dismissal for the same reason.

Despite its previous precedent, the Supreme Court held that Illinois's statute requiring "agency fees" from nonconsenting public sector employees violated the First Amendment. The Court recognized that it had previously upheld a similar law in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). In *Janus*, the Court overrules *Abood* because fundamental free speech rights are at stake, and *Abood* was poorly reasoned, *Abood* led to practical problems and abuse, and *Abood* is inconsistent with other First Amendment cases and recent decisions.

The Court further concluded that the statute's requirement that individuals endorse positions or ideas that they disagree with defies the principals of the First Amendment. Even if the Court analyzed the statute under a more permissive standard than strict scrutiny, the statutory scheme would still fail pass muster. The Court also rejected newly asserted state interests, which were supporting bargaining with a sufficiently funded agents and increasing workforce efficiency because unions could be effective without agency fees. As such, the Court held that states and public-sector unions' could no longer collect agency fees or other forms of payment nor attempt to collect such payments without the employee's consent. For these reasons, the Court reversed and remanded.

***North Carolina v. Covington*, 585 U.S. __ (June 28, 2018)**

A district court cannot revise electoral district that is not covered by a claim of racial gerrymandering.

After the North Carolina General Assembly redistricted voting districts within the state, a group of voters sued, alleging that the GA had racially gerrymandered their districts. The GA drew 28 state legislative districts that were compromised of a majority of black voters. After the Supreme Court vacated the district court's ruling on the district court's remedial order and ordered further remedial proceedings on remand, the district court ordered the GA to draw new maps and entered them with the court. After the GA filed new maps, plaintiffs objected to the maps, alleging that certain senate districts and house districts continued to racially segregate voters. Plaintiffs further objected to the revision of two districts because their redistricting was not justified and violated the state constitution's ban on mid-decade redistricting. The district court appointed a special master to redraw the lines of the districts to which plaintiffs objected. After receiving the special master's report, the district court adopted the special master's recommended reconfiguration.

The Supreme Court agreed with the district's order remedying the racial district in four legislative districts but disagreed with revising five additional districts that were not alleged to be racially gerrymandered. The Court held that the case was not moot because "it is the segregation

of the plaintiffs—not the legislature's line-drawing as such—that gives rise to their claims." Second, the Court rejected defendants' argument that because the GA did not look at racial data in drawing remedial districts, the GA did not engage in racial gerrymandering. The Court held that there was sufficient and significant evidence that the districts were shaped predominantly by race, including the shape of the districts. Third, the Court held that the district court did not abuse its discretion in appointing a special master to prepare an alternative remedial map, instead of giving the GA the opportunity, because the district court had a duty to remedy the illegal gerrymandering by next election cycle.

Thus, the Court affirmed the district court's order with regard to providing a court-drawn remedy for the four gerrymandered districts at issue. However, the Court reversed the district court's findings that redrew five additional districts that plaintiffs did not allege were racially gerrymandered. The Court explained that, "[s]tate legislatures have primary jurisdiction over legislative reapportionment." The district court could not override that legislative judgment without a finding that judicial intervention was required to remedy a violation of federal law. As a result, the district court only "had ensured that the racial gerrymanders at issue in this case were remedied" and after it had accomplished this, "its proper role in North Carolina's legislative districting process was at an end."