United States Court of Appeals for the Fifth Circuit

2015 Current Issues in Civil Law

FIRST AMENDMENT:

Graziosi v. City of Greeneville Mississippi

Susan Graziosi filed the underlying suit against Chief Freddie Cannon and the City of Greenville, Mississippi under 42 U.S.C. § 1983, alleging that defendants terminated her employment for engaging in protected speech, in violation of the First Amendment. Graziosi, a sergeant with the Greenville Police Department ("GPD") with over 25 years of service, was notified of her termination after publishing, or "posting," statements critical of Chief Cannon to the Mayor's Facebook page. Her statements were critical of Chief Cannon's decision that officers from the GPD would have to use their personal vehicles if they planned to attend the funeral of a police officer who was killed in the line of duty in Pearl, Mississippi. (Pearl is approximately 125 miles from Greenville). Graziosi's termination came days after she had returned from a suspension for violating multiple sections of the department's Policy and Procedure Manual during her response to a domestic disturbance call. Graziosi appealed after the District Court granted summary judgment in favor of defendants, agreeing that in posting her statements Graziosi spoke as a police officer because she identified herself as a member of the GPD by using words such as "we" and "our." The District Court further found that Graziosi did not speak on a matter of public concern because the content of her speech did not address public safety or a breach of the public trust, but rather, an internal decision of the department. Finally, the District Court found that even assuming that Graziosi spoke as a citizen on a matter of public concern, there was evidence that Graziosi's post caused actual disruption within the GPD, and therefore, Greenville's interests in maintaining discipline and good working relationships within the department outweighed Graziosi's interest in speaking as a citizen on a matter of public concern. Finally, the District Court found that even if Chief Cannon had violated Graziosi's First Amendment rights, he was entitled to qualified immunity. Graziosi's appeal argued that: (1) she spoke as a citizen rather than as a public employee; (2) she spoke on a matter of public concern to the community; and (3) her interest in speaking on a matter of public concern outweigh those of Greenville in maintaining efficiency.

As for Graziosi's first argument, the Fifth Circuit agreed that the District Court erred in finding that she spoke as a public employee rather than as a citizen. Here, it was undisputed that making public statements was not ordinarily within the scope of Graziosi's employment. Whereas Greenville argued on appeal, and the District Court found, that Graziosi spoke as a public employee because she invoked her status as a police officer by using words such as "we" and "our" to identify herself as a police officer, the Court corrected that identifying oneself as a public employee does not forfeit one's ability to claim First Amendment protections. *Pickering v. Bd. of Ed.*, 391 U.S. 563, 576 (1968) (affording First Amendment protections to a public employee's statements in a letter to the editor despite the public employee identifying himself as a "teach[er] at the high school"). Thus, emphasizing that it was undisputed that making these statements was not within the ordinary scope of Graziosi's duties as a police officer, the Court held that her statements on Facebook were speech made as a citizen. Turning to Graziosi's second argument, the Court assessed whether the District Court erred in finding that she spoke on a matter of public concern. Finding that it had not, the Court upheld the District Court's finding that her speech involved a dispute over an intra-departmental decision. The Court first determined that the content of Graziosi's speech weighed against finding that she spoke on a matter of public concern. And while it recognized that Graziosi's posts started by addressing subjects that could be "fairly considered as relating to any matter of political, social, or other concern to the community," *Connick v. Myers*, 461 U.S. 138, 146 (1983), the Court observed that "her posts quickly devolved into a rant attacking Chief Cannon's leadership and culminating with the demand that he 'get the hell out of the way.'" Second, the Court stressed that the form of Graziosi's speech, a public post on the Mayor's Facebook page – which served as a community bulletin board – weighed in favor of finding that she spoke on a matter of public concern. Finally, the Court did find that the context weighed against a

finding that Graziosi's spoke on a matter of public concern, mainly because she made the posts immediately after returning to work from an unrelated suspension. But, even though the Court found that her speech was made within the context of a private employee-employer dispute, it weighed the content, form, and context of Graziosi's speech to conclude that her speech was not entitled to First Amendment protection.

Proceeding under the assumption that Graziosi spoke as a citizen on a matter of public concern, the Court explained that she nevertheless failed to demonstrate that her interests outweighed those of Greenville. The Court countenanced Greenville's articulated interest that it justifiably dismissed Graziosi to prevent insubordination within the department.

Bell v. Itawamba County School Board

Taylor Bell, a high school student and aspiring rapper, and his mother, Dora Bell, filed suit against the Itawamba County School Board, its Superintendent, and the school's Principal, after Bell was suspended and transferred to an alternative school for his off-campus posting on the Internet of a rap song criticizing, with vulgar and violent lyrics, two named male athletic coaches for sexually harassing female students at his school. Bell composed the song off campus and recorded it at a professional studio unaffiliated with the school. He then posted it on his Facebook page and on YouTube using his personal computer. In the complaint, Bell alleged a violation of the his freedom of speech under the First Amendment, and his mother claimed a violation of her substantive due process right to parental authority under the Fourteenth Amendment. Bell admitted that he did not report these complaints to school authorities because, in his view, the school officials generally ignored complaints by students about the conduct of teachers and coaches. Bell did not use any school resources in creating or recording the song and, according to him, he believed that if he wrote and sang about the incidents, somebody would listen to his music and that it might help remedy the problem of teacher-on-student sexual harassment. Upon cross-motions for summary judgment, the District Court rendered summary judgment for the School Board and its officials. The Bells appealed.

The Fifth Circuit's panel opinion was released December 12, 2014, (BARKSDALE, **DENNIS**, and GRAVES). The Fifth Circuit framed the principal issue presented by this case as being whether a public high school violated the First Amendment by punishing a student for his off-campus speech, *viz.*, his rap song posted on the Internet that criticized two male coaches for their improper conduct toward minor female students. A panel majority resolved that they had. The majority noted that this case did not involve speech that took place on school property or during a school-approved event off campus. Nevertheless, the District Court, interpreting T*inker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), as applying directly to students' off-campus speech, as well as their on-campus speech, held that the School Board had authority to regulate and punish Bell's speech because the evidence established that his rap song had "in fact" substantially disrupted the school's work and discipline and that it was "reasonably foreseeable" that the song would cause such a disruption. Noting that the Fifth Circuit has "left open the question of whether the *Tinker* 'substantial-disruption' test can apply to off-campus speech," the majority saw no need to "resolve that consequential question because the School Board did not demonstrate that Bell's song caused or reasonably could have caused a substantial disruption." Thus, even assuming *arguendo* that the *Tinker* "substantial-disruption" test could be applied to a student's off-campus speech, the majority determined that the summary-judgment evidence established that no substantial disruption ever occurred, nor did it "demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. Reiterating that point, the Court elaborated: "Viewing the evidence in the light most favorable to the School Board, there was no commotion, boisterous conduct, interruption of classes, or any lack of order, discipline and decorum at the school, as a result of Bell's posting of his song on the Internet. []Indeed, the School Board's inability to point to any evidence in the record of a disruption directly undermines its argument *and* the district court's conclusion that the summary-judgment evidence supports a finding that a substantial disruption occurred or reasonably could have been forecasted."

The panel majority next addressed the School Board's "alternative[] and erroneous[]" attempts to invoke the Fifth Circuit's decision in *Ponce v. Socorro Independent School District*, 508 F.3d 765 (5th Cir. 2007), in arguing that Bell's off-campus, but on-line, rap was not protected by the First Amendment. In *Ponce*, the Court narrowly held that a student's notebook which contained his plans to commit a coordinated "Columbine-style" shooting attack on his high school and other district schools was not protected by the First Amendment. Whereas *Ponce* involved particularly egregious facts: a student brought to campus a notebook containing numerous violent and disturbing descriptions of campus violence evocative of the school shootings that have taken place across the country in recent years, the majority here distinguished that "[Bell's] song amounts only to a rhetorical threat – not a genuine one – and does not come close to the catastrophic facts threatened in *Ponce*." Finally, the majority addressed and rejected as meritless the School Board's additional argument that Bell's rap song fell within the "true threat" exception to the First Amendment. The majority again emphasized that "Bell's rap was not a plainspoken threat delivered directly, privately, or seriously to the coaches but, rather, was a form of music or art broadcast in a public media to critique the coaches' misconduct and also in furtherance of Bell's musical ambitions." The majority affirmed that qualified immunity precluded liability against the superintendent and the principal in their individual capacities.

Judge BARKSDALE respectfully, but vigorously, dissented. Although he took no issue with the majority's holding that the substantive-due-process claim by Taylor Bell's mother was waived and that qualified immunity precluded liability against the superintendent and principal in their individual capacities, Judge BARKSDALE dissented from the majority's ruling on Bell's First Amendment claim against the school board. With due deference, Judge BARKSDALE regarded the majority's decision to vacate summary judgment for the school board on that claim and render summary judgment for Bell on it as "absurd." To Judge BARKSDALE's mind, there was "no question that an objectively reasonable person would interpret the rap recording as a true threat.

A member of the Court requested a poll on the Itawamba County School Board's petition for rehearing en banc. A majority of the Circuit Judges in regular active service and not disqualified voted in favor. Accordingly, the Court, on February 19, 2015, ordered that the case would be reheard by the Court en banc.

Writing for the en banc majority this time, Judge BARKSDALE first explained that based on its own precedent and guided by that of its sister Circuits, *Tinker* indeed applies to off-campus speech in certain situations. He next addressed the question under what circumstances may off-campus speech be restricted. Precedent on this point has been less developed. In the light of the summary-judgment record, the majority found it unnecessary to adopt a specific rule. Rather, it was content to hold that Bell's admittedly intentionally directing at the school community his rap recording containing threats to, and harassment and intimidation of, two teachers permitted *Tinker's* application in this instance. In holding *Tinker* applied to the off-campus speech in this instance, because such determinations are heavily influenced by the facts in each matter, the majority declined to adopt any rigid standard in this instance; or to adopt or reject approaches advocated by other Circuits. Having held *Tinker* applied in this instance, the next question was whether Bell's recording either caused an actual disruption or reasonably could be forecast to cause one. According to the majority, there was no genuine dispute of material fact that the school board's finding the rap recording threatened, harassed, and intimidated the two coaches was objectively reasonable.

As to whether the school board's disciplinary action against Bell, based on its finding he threatened, harassed, and intimidated two coaches, satisfied *Tinker*, the majority alluded to the fact that a student's threatening, harassing, and intimidating a teacher inherently portends a substantial disruption, might make feasible a *per se* rule in that regard. Declining to decide that question, however, the majority again was content to hold that, in the light of this summary-judgment record, Bell's conduct reasonably could have been forecast to cause a substantial disruption. Viewing the evidence in the requisite light most favorable to Bell,

including his assertions that he wanted only to raise awareness of alleged misconduct by two teachers, the majority determined that the manner in which he voiced his concern—with threatening, intimidating, and harassing language—must be taken seriously by school officials, and reasonably could be forecast by them to cause a substantial disruption. Affirming summary judgment for the school board under *Tinker*, the majority found it unnecessary to decide whether Bell's speech also constituted a "true threat" under *Watts v. United States*, 394 U.S. 705 (1969) (holding hyperbolic threats on the President's life are not "true threats").

Hines v. Alldredge

Ronald Hines, a Texas-licensed veterinarian, practiced professionally since the mid-1960s. His work was mainly in the area of traditional veterinary practice until he retired in 2002. After his retirement, he founded a website and began to post articles about pet health and care. At first, these writing were general in scope, but evolved to the point that Hines began "to provide veterinary advice to specific pet owners about their pets." This advice was given via email and telephone calls, and Hines "never physically examine[d] the animals that are the subject of his advice," though he did review veterinary records provided by the animal owners. Hines charged a flat fee of fifty-eight dollars for his veterinary advice, though he would waive his fee if a pet owner could not afford to pay. He did, however, refuse to give advice if he felt that a physical examination was required, and he did not prescribe medication. No one disputed that Hine's remotely provided services constituted the practice of veterinary medicine. This was problematic inasmuch as Texas law provides that "[a] person may not practice veterinary medicine unless a veterinarian-client-patient relationship exists." That "relationship exists if the veterinarian:"

> (1) assumes responsibility for medical judgments regarding the health of an animal and a client, who is the owner or other caretaker of the animal, agrees to follow the veterinarian's instructions;
> (2) possesses sufficient knowledge of the animal to initiate at least a general or preliminary diagnosis of the animal's medical condition; and
> (3) is readily available to provide, or has provided, follow-up medical care in the event of an adverse reaction to, or a failure of, the regimen of therapy provided by the veterinarian.
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> Tex. Occ. Code. § 801.351(a).

In order to "possess[] sufficient knowledge of the animal" the veterinarian must have "recently seen, or [be] personally acquainted with, the keeping and care of the animal by: (1) examining the animal; or (2) making medically appropriate and timely visits to the premises on which the animal is kept." That examination must be in person, as the statute is explicit that "[a] veterinarian-client-patient relationship may not be established solely by telephone or electronic means." *Id.* § 801.351(c).

In 2012, the Texas Board of Veterinary Medical Examiners informed Hines that by providing veterinary advice without a physical examination, he had violated Texas law. Hines eventually agreed to: abide by the relevant state laws, including the physical examination requirement, one year of probation; a stayed suspension of his license; a $500 fine; and to retake the jurisprudence portion of the veterinary licensing exam. Hines, however, did file suit in Federal Court, seeking declaratory and injunctive relief. His complaint insisted that the physical examination requirement violated his First Amendment right to free speech as well as his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Board moved to dismiss under Rule 12(b)(6).

The District Court granted the Board's motion in part and denied it in part. Apropos the equal protection claim, the District Court concluded that because the law did not discriminate on the basis of any suspect classification, the count was evaluated pursuant to rational basis review – and held that the physical examination requirement passed that deferential standard. It likewise dismissed Hines's substantive due process claim for similar reasons. As for the First Amendment claims, however, the District Court denied the Board's motion to dismiss. The District Court recognized that states have broad power to regulate

professionals, but determined that because the physical examination requirement "regulate[s] professional speech itself," it was subject to the First Amendment. In reliance on the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992) (plurality op.), the District Court concluded that "[r]egulations on speech by licensed professionals in the context of a professional relationship must [] be more than merely rational, they must be 'reasonable.'" Judged against this standard, the District Court held that Hines had stated a plausible claim that the Board had infringed his First Amendment rights. The District Court certified its order for interlocutory appeal, and the Fifth Circuit granted the Board's timely petition for appeal.

Reviewing the statute at issue in this case for what it was, the Fifth Circuit decisively noted that the challenged state law prohibited the practice of veterinary medicine unless the veterinarian has first physically examined either the animal in question or its surrounding premises. It did not regulate the content of any speech, require veterinarians to deliver any particular message, or restrict what could be said once a veterinary-client-patient relationship is established. Hence, Texas's requirement that veterinarians physically examine an animal or the animal's premises before treating it fell squarely within the long-established authority of states' "broad power to establish standards for licensing practitioners and regulating the practice of professions." *Gade v. Nat'l Solid Waste Mgm't Ass'n*, 505 U.S. 88, 108 (1992) (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)). Consequently, Texas's regulation did not offend the First Amendment, and the Court reversed that aspect of the District Court's ruling. The Court, in short order, affirmed the District Court's dismissal of Hines's equal protection and due process claims, agreeing that the physical examination challenge was rationally related to a legitimate government interest.

Phillips v. City of Dallas

In 2011, Micah Phillips—then a 12-year veteran of the Dallas Fire Department—announced his candidacy in the Democratic primary for a seat on the Dallas County Commissioners Court. At that time, city laws prevented city employees from seeking office in any county overlapping the city of Dallas, which Dallas County does. The city of Dallas notified Phillips that he had violated the Dallas City Charter and the Dallas City Code of Ethics by "fail[ing] to forfeit [his] position with the City after becoming a candidate for Dallas County Commissioner." Two days later, the City formally discharged Phillips. The provision of the Dallas City Charter under which the City terminated Phillips states: "If any employee of the city becomes a candidate for nomination or election to any elective public office within Dallas County [] the employee shall immediately forfeit his or her place or position with the city." Dallas City Charter, Ch. 3, § 17(c). The ethics provision, interpreting § 17(c), limits its application to partisan office-seekers and further implements that section. It states that an "employee of the city immediately forfeits employment with the city if the employee [] becomes a candidate for nomination or election in a partisan election for public office within a county in which the city of Dallas resides []." Dallas Code of Ethics, § 12A-10(b).

The City denied Phillips's internal appeal. He then brought the underlying 42 U.S.C. § 1983 suit on allegations that the City violated his First Amendment rights. Relying on *Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 550–51 (1973) (upholding Federal legislation preventing Federal executive branch employees from "tak[ing] an active part in political management or political campaigns"), the District Court granted the City's Federal Rule of Civil Procedure 12(c) motion for judgment on the pleadings and dismissed Phillips's claims with prejudice. *Letter Carriers* articulated four governmental interests supporting laws limiting public employees' political rights. First, Federal employees "should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party." 413 U.S. at 564–65. Second, and relatedly, employees should also not "appear to the public" to be influenced by politics. *Id.* Third, employees "should not be employed to build a powerful, invincible, and perhaps corrupt political machine." *Id.* Finally, these laws serve to protect Federal employees, allowing them to be free "from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their

superiors rather than to act out their own beliefs." *Id.* at 566. Phillips appealed, maintaining his challenge that the Charter is facially overbroad and unconstitutional as applied to him.

The Fifth Circuit began with the recollection that while "public employers may not condition employment on the relinquishment of constitutional rights," (citations omitted), the Supreme Court has acknowledged that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). The test for balancing an employee's claimed speech interest against the government's interests derives from *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Under *Pickering's* two-step analytical framework, the first inquiry is into whether the employee spoke as a citizen on a matter of public concern. A negative answer ends the inquiry as the employee has no First Amendment cause of action. An affirmative answer, however, implicates the second inquiry, which is whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. The Fifth Circuit agreed with the District Court's holding that "becoming a candidate for political office is within the First Amendment's ambit" and therefore constitutes speech on a matter of public concern. The Court rejected the City's protestations that the issue of whether a First Amendment interest inheres in candidacy is an open question in the Circuit, and made a clear pronouncement that "candidacy alone constitutes speech on a matter of public concern." The Court next evaluated whether Phillips's interests were outweighed by those of the City. Concluding that the Government "came out ahead," the Fifth Circuit succinctly remarked, the "governmental interest in fair and effective operation of the [] government justifies regulation of partisan political activities of government employees." John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 16.52(a) (8th ed. 2010).

Walker v. Texas Division, Sons of Confederate Veterans, Inc.

The Texas Division of the Sons of Confederate Veterans ("Texas SCV") appealed the District Court's grant of summary judgment in favor of Victor T. Vandergriff, Chairman of the Texas Department of Motor Vehicles Board on claims that the Board violated its First Amendment right to free speech when the Board denied Texas SCV's application for a specialty license plate featuring the Confederate battle flag. Texas SCV filed suit under 42 U.S.C. § 1983 asserting violations of the First and Fourteenth Amendments after the Board unanimously voted against issued Texas SCV's specialty plate. The Board's resolution explaining its decision stated: "The Board [] finds it necessary to deny [Texas SCV's] plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." In granting the Board's motion for summary judgment, the District Court first found that the specialty license plates were private, not government, speech. It then analyzed Texas SCV's claims under the First Amendment and found that (1) the specialty license plate program was a nonpublic forum; (2) the Board's rejection of Texas SCV's plate "was a content-based restriction on speech, rather than a viewpoint-based limitation"; and (3) the content-based regulation was reasonable. Thus, the District Court concluded that the Board had not violated Texas SCV's rights under the First Amendment and entered judgment for the Board. Texas SCV appealed.

The Fifth Circuit (SMITH, **PRADO**, and ELROD) released a divided opinion on July 14, 2014, in which a panel majority decided to reverse the judgment of the District Court. Although neither party argued that the Fifth Circuit lacked jurisdiction, the Court discharged its duty to consider its subject matter jurisdiction *sua sponte*. In *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), the Court was called upon to decide whether Louisiana's specialty license plate program discriminated against pro-choice views in violation of the First Amendment. Instead of reaching the merits, the Court held that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, barred the suit, and thus it vacated and remanded with instructions for the District Court to dismiss the case for lack of jurisdiction. Under the TIA, "[t]he district courts shall not enjoin, suspend or

restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Although this case involved a seemingly similar fact pattern, the Court first considered whether the TIA barred the instant case. The Court resolved that the TIA did not bar this suit because this case fell under the *Hibbs* exception. *Hibbs v. Winn*, 542 U.S. 88 (2004) opens the doors to Federal Court where the TIA might otherwise bar the suit if "(1) a third party (not the taxpayer) files suit, and (2) the suit's success will enrich, not deplete, the government entity's coffers."

As for the merits, the majority determined that the speech on specialty license plates was private speech, and that the Board's decision to reject Texas SCV's specialty license plate was impermissible viewpoint discrimination. In *Pleasant Grove City, Utah v. Summum*, 555 U.S. 467, 467–68 (2009), the Supreme Court held that Pleasant Grove City, Utah ("the City") had not violated the First Amendment free speech rights of Summum, a religious organization, when the City refused to erect a permanent monument that Summum had tried to donate and place in a public park. The Court held there was no First Amendment violation because "the City's decision to accept certain privately donated monuments while rejecting [Summum's] is best viewed as a form of government speech." Considering the emphasis on context and the public's perception of the speaker's identity in *Summum*, the majority in this case thought the proper inquiry was "whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige." The differences between permanent monuments in public parks and specialty license plates on the back of personal vehicles convinced the majority that a reasonable observer would understand that the specialty license plates are private speech. Thus, *Summum* did not dictate that specialty license plates are government speech. That conclusion was consistent the majority of other Circuits that have considered the issue. *See Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *Arizona Life Coal. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008); and *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008). The majority explained that the Sixth Circuit's decision in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), where it was held that a specialty license plate was government speech, was the "sole outlier among our sister circuits."

The majority next agreed with Texas SCV and held that the Board engaged in impermissible viewpoint discrimination and violated Texas SCV's rights under the First Amendment. In explaining its denial of Texas SCV's application, the Board stated it denied the plate, "specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive." The majority was convinced that by rejecting the plate because it was offensive, the Board discriminated against Texas SCV's view that the Confederate flag is a symbol of sacrifice, independence, and Southern heritage. "The Board's decision implicitly dismissed that perspective and instead credited the view that the Confederate flag is an inflammatory symbol of hate and oppression." In light of Texas's history of approving veterans plates and the reasons the Board offered for rejecting Texas SCV's plate, it appeared to the majority that the only reason the Board rejected the plate is the viewpoint it represented. The majority clearly understood that some members of the public find the Confederate flag offensive, but emphasized that that fact did not justify the Board's decision. The majority forcefully declared, "this is exactly what the First Amendment was designed to protect against."

In dissent, Judge SMITH acknowledged that this was a "jurisprudentially difficult case that can be conscientiously decided in a number of different ways," and that "[t]he majority has chosen a respectable approach: Applying a 'reasonable observer test,' it reverses a summary judgment for the state after holding that Texas's specialty license plates are not 'government speech.'" Though he agreed with much of the cogent and well-written majority opinion, Judge SMITH did not discern a "reasonable observer test" in the applicable caselaw and was unable to distinguish *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). Elaborating, Judge SMITH wrote: "In sum (pun intended), none of the differences between this case and *Summum* are differences in principle, and none offers a defensible justification for why Pleasant Grove City was entitled to a judgment in its favor in *Summum* but Texas is not so entitled here. The attempt to distinguish *Summum* ultimately devolves to manifesting a conclusion in search of a reason. However

insignificant one might find the dispute before us, the law entitles Texas to a judgment in its favor. I respectfully dissent."

The Chairman of the Texas Department of Motor Vehicles Board timely filed a petition for writ of certiorari. The petition was granted on December 5, 2014, and the case was argued on March 23, 2015.

In an opinion released on June 18, 2015, by a vote of 5 to 4, the Supreme Court reversed the Fifth Circuit. The majority held that Texas's specialty license plate designs constituted Government speech, and thus Texas was entitled to refuse to issue plates featuring SCV's proposed design. The majority explained that same analysis the Court used in *Summum*—to conclude that a city "accepting a privately donated monument and placing it on city property" was engaging in government speech, 555 U. S., at464—leads to the conclusion that government speech is at issue here. The majority made clear that the determination that Texas's specialty license plate designs are government speech did not mean that the designs did not also implicate the free speech rights of private persons. In fact, the Court has acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. *See Wooley v. Maynard*, 430 U. S. 705, 717, n. 15. Moreover, the Court has recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. So, the majority drove home the point that just as Texas cannot require SCV to convey "the State's ideological message," SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.

Justice ALITO, joined Chief Justice ROBERTS, and Justices SCALIA and KENNEDY, dissented, disavowing the majority's decision as passing off private speech as government speech and, in doing so, establishing a precedent that threatens private speech that government finds displeasing. Regarding the majority's decision to categorize private speech as government speech, and thereby strip it of all First Amendment protection, as unfortunate, the dissent proposed a test. "Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver. As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says 'Rather Be Golfing' passed by at 8:30 am on a Monday morning, would you think: 'This is the official policy of the State—better to golf than to work?'" The dissent distinguished that "the Texas specialty plate program has none of the factors that were critical in *Summum*, and the Texas program exhibits a very important characteristic that was missing in that case: Individuals who want to display a Texas specialty plate, instead of the standard plate, must pay an increased annual registration fee."

BANKRUPTCY:

Barron & Newburger, P.C. v. Texas Skyline

This case concerned a fee award to a debtor's counsel under 11 U.S.C. § 330. In a prior state court proceeding, the debtor, Clifford Woerner, was sued by an investor because Woerner misappropriated partnership funds for personal use. A fter a bench trial, the state court ruled in favor of the investor and set a remedies hearing. The night before the remedies hearing, Woerner, represented by the firm of Barron and Newburger (B&N), filed a voluntary petition for Chapter 11 bankruptcy relief, resulting in an automatic stay of the state court proceedings. B&N represented Woerner for the next eleven months. Its services included filing an original and amended disclosure statements, schedules, and statements of financial affairs. It also unsuccessfully defended Woerner in adversary proceedings brought by the investor and another creditor and

helped Woerner negotiate with creditors. It investigated the concealment of some of Woerner's assets and amended his financial disclosures to include assets previously undisclosed. This concealment prompted a creditor to move to convert the case to a Chapter 7 trustee-administered liquidation. B&N unsuccessfully litigated Woerner's attempts to have a settlement approved and to oppose the motion to convert. The Bankruptcy Court denied the motion to approve settlement and granted the motion to convert. Its services terminated, B&N filed an application for fees of more than $130,000 and expenses of $5,793.37. The trustee and investor both objected. After a hearing, the Bankruptcy Court disallowed most of the fees due to B&N's lack of success. It awarded only $19,409 in fees and all of the expenses. The District Court affirmed, noting that the proceeding was doomed at the outset and arguably could not have been filed in good faith under Chapter 11.

On appeal, a panel of the Fifth Circuit affirmed. It rejected B&N's argument that the lower Courts applied the wrong standard for awarding fees under § 330 by using a so-called "hindsight" test based on *Pro-Snax Distributors, Inc.,* 157 F.3d 414 (5th Cir. 1998). In *Pro-Snax*, although with little analysis or explanation, the Court adopted the "hindsight" or "material benefit" measure of fees, which considers whether the legal services at issue resulted in an identifiable, tangible, and material benefit to the bankruptcy estate. The Court explained that it was bound by this precedent, which was the governing standard. The Bankruptcy Court had not applied the wrong standard and thus did not abuse its discretion. The Court also rejected B&N's complaint that it was not rewarded for necessary activity, including amending schedules and statements of financial affairs. The lower Courts had not abused their discretion in denying those fees.

Judge PRADO specially concurred. Joined by the other members of the panel, Judge PRADO explained that *Pro-Snax* appeared to conflict with the language and legislative history of § 300, diverged from decisions of other Circuits, and had sown confusion in the Circuit. The panel urged reconsideration of the *Pro-Snax* standard by the Court en banc.

By order dated November 5, 2014, the Court announced that a majority of the Circuit Judges in regular active service and not disqualified voted in favor of rehearing this case en banc. The Court's order indicated that the case would be reheard en banc without oral argument.

A unanimous en banc Fifth Circuit recognized that the retrospective, "material benefit" standard enunciated in *Pro–Snax* conflicted with the language and legislative history of § 330, diverged from the decisions of other Circuits, and had sown confusion in its own Circuit. Correspondingly, the Court overturned *Pro–Snax's* attorney's-fee rule and adopted the prospective, "reasonably likely to benefit the estate" standard endorsed by its sister Circuits. Concluding that § 330 embraces the "reasonable at the time" standard for attorney compensation endorsed by its colleagues in the Second, Third, and Ninth Circuits, the Court agreed that the text and legislative history of § 330 contemplate a prospective standard for the award of attorney's fees relating to bankruptcy proceedings—one that looks to the necessity or reasonableness of legal services at the time they were rendered. Thus, the Court explained that "[u]nder this framework, if a fee applicant establishes that its services were "necessary to the administration' of a bankruptcy case or 'reasonably likely to benefit" the bankruptcy estate "at the time at which [they were] rendered,' *see* 11 U.S.C. § 330(a)(3)(C), (4)(A), then the services are compensable."

Insofar as *Pro–Snax* precluded resort to this prospective analysis, the Court overruled those portions of the opinion. It did recognize, however, that *Pro–Snax's* principal holding remained valid, observing that its current ruling was not intended to limit Courts' broad discretion to award or curtail attorney's fees under § 330, "taking into account all relevant factors," 11 U.S.C. § 330(a)(3). Having articulated a new standard, the Court next considered whether remand was warranted in order for the Bankruptcy Court to assess B & N's attorney's-fee application under the appropriate standard. Because its ruling announced a new legal rule, the Court, out of an abundance of caution given the complex facts of the case, opted to remand this matter for

the Bankruptcy Court to evaluate whether B & N is entitled to fees under the prospective, "reasonable at the time" standard.

Specially concurring, Judge JOLLY was "pleased to concur in [Judge Prado's] fine opinion." He wrote separately to "synthesize" the newly adopted legal standard. To that end, he offered: "A bankruptcy court's analysis of attorney fee awards ordinarily should begin and end by applying the statutory language in 11 U.S.C. § 330. This analysis usually can be reduced as follows: (1) a court is permitted, but not required, to award fees under § 330 for services that could reasonably be expected to provide an identifiable, material benefit to the estate at the time those services were performed (or contributed to the administration of the estate); and (2) courts may consider all other relevant equitable factors, as stated in § 330(a)(3), including as one of those factors, when appropriate, whether a professional service contributes to a successful outcome."

Harris v. Viegelahn

Charles Harris filed a bankruptcy petition under Chapter 13, made regular payments from his wages to the trustee under a confirmed Chapter 13 plan, and eventually converted his case to Chapter 7. Singularly at issue in this appeal was whether the undistributed payments held by the Chapter 13 trustee at the time of conversion (in this case, $4,319.22) should be returned to the debtor or distributed to creditors under the Chapter 13 plan. The District Court held that payment funds in the possession of the Chapter 13 trustee that had not been distributed to creditors at the time of conversion must be returned to Harris.

A panel of the Fifth Circuit (BENAVIDES, CLEMENT, and **GRAVES**) noted that this question has divided Courts for thirty years, and only one Appellate Court has squarely answered it. *See In re Michael*, 699 F.3d 305 (3rd Cir. 2012) ("*Michael II*") (holding that the undistributed funds must be returned to the debtor). In holding that the debtor has a greater right than his creditors to undistributed funds held by the trustee at the time of conversion, the Third Circuit's opinion in *Michael II* relied heavily upon 11 U.S.C. § 1327(b), which states that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." The Fifth Circuit acknowledged the fact that under §§ 1306(b) and 1327(b), a post-confirmation Chapter 13 debtor generally retains possession of, and a vested interest in, his property, including post-petition wages. But the Fifth Circuit concluded that *Michael II* erred by ignoring the clear exception to this general rule: "except as otherwise provided in the plan or the order confirming the plan." The Court theorized that if the plan requires the debtor to make payments to the trustee that will be distributed to creditors, then the debtor could not retain possession of these payments. Likewise, the Court contemplated, "it would seem that the confirmation order specifically divests the debtor of any interest he may have in the payments made to the trustee." In the end, the Court held that the payments had to be distributed to the creditors, and accordingly reversed and remanded the District Court's judgment.

On December 12, 2014, the Supreme Court granted certiorari to answer the question: "Whether, when a debtor in good faith converts a bankruptcy case to Chapter 7 after confirmation of a Chapter 13 plan, undistributed funds held by the Chapter 13 trustee are refunded to the debtor (as the Third Circuit held in In re Michael, 699 F.3d 305 (2012)) or distributed to creditors (as the Fifth Circuit held below)."

A unanimous Supreme Court, in holding that a debtor who in good faith converts to Chapter 7 is entitled to return of any postpetition wages not yet distributed by the Chapter 13 trustee, reversed the judgment of the United States Court of Appeals for the Fifth Circuit. Justice GINSBURG authored the Court's opinion and explained that absent a bad-faith conversion, 11 U.S.C. §348(f) limits a converted Chapter 7 estate to property belonging to the debtor "as of the date" the original Chapter 13 petition was filed. And, because postpetition wages do not qualify under that rubric, undistributed wages collected by a Chapter 13 trustee ordinarily do not become part of a converted Chapter 7 estate. Thus, the Supreme Court reasoned that by excluding postpetition wages from the converted Chapter 7 estate (absent a bad-faith

conversion), §348(f) removes those earnings from the pool of assets that may be liquidated and distributed to creditors. In consequence, allowing a terminated Chapter 13 trustee to disburse the very same earnings to the very same creditors is incompatible with that statutory design. Reinforcing its holding, the Supreme Court theorized that because Chapter 13 is a voluntary alternative to Chapter 7, a debtor's postconversion receipt of a fraction of the wages he earned and would have kept had he filed under Chapter 7 in the first place would not provide the debtor with a "windfall."

Baker Botts, L.L.P. v. ASARCO, L.L.C.

Baker Botts, L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C., served as debtor's counsel to ASARCO during its Chapter 11 bankruptcy. In that connection, the two firms helped ASARCO confirm a reorganization plan that paid all of its creditors in full. The firms were well compensated pursuant to 11 U.S.C. § 330(a) for their fees and expenses for representing ASARCO. Important to this appeal, however, were lodestar enhancements based on the "rare and exceptional" results achieved by Baker Botts and Jordan Hyden in successfully prosecuting complex fraudulent transfer claims to recover ASARCO's controlling interest in Southern Copper Corporation. ASARCO had transferred its controlling interest to its parent company two years prior to the commencement of its bankruptcy case. The judgment against ASARCO's parent, valued at between $7 and $10 billion, was the largest fraudulent transfer judgment in Chapter 11 history. In consequence of the result obtained, in their final fee applications, Baker Botts and Jordan Hyden sought lodestar fees, expenses, a 20% fee enhancement for the entire case, and fees and expenses for preparing and litigating their final fee applications. ASARCO challenged the fees on a large scale (a challenge that included a discovery request covering every document Baker Botts produced during the 52-month bankruptcy, resulting in the production of 2,350 boxes of hard copy documents and 189 GB of electronic data). After a six-day fee trial, the Bankruptcy Court rejected all of ASARCO's objections to the core fee request and awarded more than $113 million to Baker Botts and $7 million to Jordan Hyden for core fees and expenses. Approving percentage fee enhancements only for the work they performed on the Southern Copper Corporation Litigation (rather than, as requested, on the entire case), the Bankruptcy Court awarded lodestar enhancements of an additional $4.1 million to Baker Botts and over $125,000 to Jordan Hyden. The Court found that the standard rates charged by Baker Botts were approximately 20% below the appropriate market rate. Furthermore, the Bankruptcy Court authorized fees and expenses for the firms' litigation in defense of their attorneys' fee claims, resulting in another $5 million (plus expenses) to Baker Botts and over $15,000 to Jordan Hyden. On appeal to the District Court, ASARCO abandoned its objections to the Baker Botts core fee award, and the fee enhancements were affirmed. The District Court also held, however, that attorneys' fees were improperly awarded for Baker Botts's pursuit of its fee enhancement. Thus, it remanded to the Bankruptcy Court for a determination of whether any of the firm's $5 million defense-fee award related to the enhancement. On remand, the Bankruptcy Court concluded that all of the defense-fee award compensated Baker Botts for defending core fees incurred in connection with the case. On appeal of that decision, the District Court affirmed the final award, and also held that the firms' appellate fees were permissible, but premature. ASARCO appealed.

Two fee-related issues had to be decided by the Fifth Circuit on appeal: (1) whether the Bankruptcy Court abused its discretion in authorizing a 20% premium to Baker Botts and 10% premium to Jordan Hyden for their unusually successful fraudulent transfer litigation; and (2) whether the Bankruptcy Court was authorized, consistent with 11 U.S.C. § 330, to award attorneys' fees to the firms for defending their fee applications in Court.

The Fifth Circuit (STEWART, Chief Judge, HIGGINBOTHAM, and **JONES**), in an opinion released on April 30, 2014, affirmed the awards of fee enhancements, but reversed the awards of fees for litigating the firms' fee applications. The Court explained that § 330(a)(3) of the Bankruptcy Code provides the non-exclusive list of factors that bear on a Court's determination of the reasonable compensation for actual, necessary services and expenses rendered by attorneys and other Court-supervised bankruptcy

professionals. *See* 11 U.S.C. § 330(a)(1)(A). ASARCO's primary argument was that the Supreme Court decision in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010) prohibits Court awarded fee enhancements subject to only three exceptions, and that neither law firm's enhancement request satisfies any of the exceptions. Whereas *Perdue* dealt with fee-shifting in civil rights cases, the Fifth Circuit's decision in *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 660–67 (5th Cir. 2012), explicitly stated that *Perdue* did not overrule Fifth Circuit bankruptcy precedent authorizing fee enhancements under other, albeit limited circumstances pursuant to Section 330(a). Although ASARCO pointed to the "relevant distinguishing factor" that in *Pilgrim's Pride* the debtor's board recommended paying the enhancement, while in this case ASARCO's board did not, the Court explained that this was "an inconsequential distinction," emphasizing that "*Pilgrim's Pride* was controlling in bankruptcy fee matters, at least where a reorganization plan pays creditors' claims in full." The Court next decided that ASARCO's contention that the judgment the firms achieved in the fraudulent transfer litigation was not "rare and exceptional" fell flat, echoing the District Court's effusive proclamation that "[a] seven billion dollar judgment, which is recoverable, which saves a company, and funds a 100% recovery for all concerned is a once in a lifetime result."

As for the Bankruptcy Court's award of counsel fees for counsel's defense of their fees for representing the debtor, the Court concluded that, "correctly read, Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." The Court stressed that § 330 states twice, in both positive and negative terms, that professional services are compensable only if they are likely to benefit a debtor's estate or are necessary to case administration, and the primary beneficiary of a professional fee application, of course, is the professional.

Baker Botts and Jordan Hyden timely filed a petition for a writ of certiorari. The petition was granted on October 2, 2014, and the case argued on February 25, 2015.

In an opinion released on June 15, 2015, the Supreme Court affirmed. The majority held that § 330(a)(1) does not permit Bankruptcy Courts to award fees to § 327(a) professionals for defending fee applications, and that the American Rule provided the "'basic point of reference'" for awards of attorney's fees: "'Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.'" *Hardt v. Reliance Standard Life Ins. Co.* , 560 U. S. 242, 252–253. The majority reasoned that Congress did not depart from the American Rule in §330(a)(1)for fee-defense litigation, recalling that § 327(a) professionals are hired to serve an estate's administrator for the benefit of the estate, and §330(a)(1) authorizes "reasonable compensation for actual, necessary services rendered." Noting that the word "services" ordinarily refers to "labor performed for another," Webster's New International Dictionary 2288, the majority interpreted the phrase "'reasonable compensation for services rendered'" to necessarily imply "loyal and disinterested service in the interest of" a client. *Woods v. City Nat. Bank & Trust Co. of Chicago*, 312 U. S. 262, 268 (1941). Accordingly, the majority resolved that time spent litigating a fee application against the bankruptcy estate's administrator cannot be fairly described as "labor performed for"—let alone "disinterested service to"—that administrator. The majority theorized that had Congress wished to shift the burdens of fee-defense litigation under § 330(a)(1), it could have done so, as it has done in other Bankruptcy Code provisions, *e.g.*, § 110(i)(1)(C). The majority explained that the law firms' view—that fee-defense litigation is part of the "services rendered" to the estate administrator—not only suffers from an unnatural interpretation of the term "services rendered," but would require a particularly unusual deviation from the American Rule, as it would permit attorneys to be awarded fees for unsuccessfully defending fee applications when most fee-shifting provisions permit awards only to "a 'prevailing party,'" *Hardt*, at 253. The Government's argument was also deemed unpersuasive. Its theory—that fees for fee-defense litigation must be understood as a component of the "reasonable compensation for [the underlying] services rendered" so that compensation for the "actual [] services rendered" will not be diluted by unpaid time spent litigating fees—could not be reconciled with the relevant text.

Justice BREYER, joined by Justices GINSBURG and KAGAN dissented. The dissent reasoned that the Bankruptcy Code authorizes a Court to award "reasonable compensation for actual, necessary services rendered by" various "professional person[s]," including "attorneys," whom a bankruptcy "trustee [has] employ[ed] [] to represent or assist the trustee in carrying out the trustee's duties." 11 U. S. C. §§ 327(a), 330(a). While the dissent agreed with the Court that a professional's defense of a fee application is not a "service" within the meaning of the Code, it also agreed with the Government that compensation for fee-defense work "is properly viewed as part of the compensation for the underlying services in [a] bankruptcy proceeding." Consequently, in the dissent's view, when a Bankruptcy Court determines "reasonable compensation," it is allowed to take into account the expenses that a professional has incurred in defending his or her application for fees.

Janvey v. The Golf Channel, Inc.

For nearly two decades, Stanford International Bank, Limited operated a multi-billion dollar Ponzi scheme through more than 130 affiliated entities. To sustain the scheme, Stanford promised investors exceptionally high rates of return on certificates of deposit, and sold these investments through advisors employed at the affiliated entities. Some early investors received the promised returns, but, as was later discovered, these returns were merely other investors' principal. Prior to the scheme's collapse, Stanford had raised over $7 billion selling these fraudulent CDs. Beginning in 2005, Stanford developed a plan to increase awareness of its brand among sports audiences. In that connection, it targeted this group because of its large proportion of high-net-worth individuals, the people most likely to invest with Stanford. In furtherance of its plan, Stanford became a title sponsor of the Stanford St. Jude's Championship, an annual PGA Tour event held in Memphis, Tennessee. Upon hearing of Stanford's sponsorship, The Golf Channel, Inc., which broadcasted the tournament, offered Stanford an advertising package to augment its marketing efforts. Stanford entered into an agreement with Golf Channel for a range of marketing services including but not limited to commercial airtime (682 commercials per year). In total, Stanford had paid at least $5.9 million to Golf Channel pursuant to the agreement.

After uncovering Stanford's Ponzi scheme, the SEC filed a lawsuit in the Northern District of Texas against Stanford and related entities requesting the District Court to appoint a receiver over Stanford. In the process of investigating Stanford's accounts, the receiver discovered the payments to Golf Channel and filed suit under the Texas Uniform Fraudulent Transfer Act ("TUFTA") to recover the full $5.9 million. The parties filed cross-motions for summary judgment. Despite the fact that Golf Channel's failure to offer any evidence to show how its services benefitted Stanford's creditors, the District Court granted Golf Channel's motion and denied the receiver's motion. Although it determined that Stanford's payments to Golf Channel were fraudulent transfers under TUFTA, the District Court resolved that Golf Channel was entitled to judgment as a matter of law on its affirmative defense that it received the payments in good faith and in exchange for reasonably equivalent value, namely the market value of advertising on The Golf Channel. In reaching its decision, the District Court explained, "Golf Channel looks more like an innocent trade creditor than a salesman perpetrating and extending the Stanford Ponzi scheme." The receiver appealed.

TUFTA allows creditors to void fraudulent transfers made by a debtor and force the transferee to return the transfer to the debtor's estate. Tex. Bus. & Com. Code § 24.008. However, TUFTA provides an affirmative defense that transferees may use to prevent creditors from voiding transfers. Even where a transfer is fraudulent under TUFTA, a creditor cannot void the transfer if the transferee proves two elements: (1) that it took the transfer in good faith; and (2) that, in return for the transfer, it gave the debtor something of "reasonably equivalent value." Bus. & Com. § 24.009(a). Here, because the undisputed fact that Stanford was engaged in a Ponzi scheme, the parties stipulated that the $5.9 million dollar transfer to Golf Channel was fraudulent. Additionally, the District Court held, and the receiver did not challenge on appeal, that Golf Channel took the transfer in good faith. Therefore, the precise issue facing the Fifth Circuit was whether Golf Channel had proven the second element of its affirmative defense—that its advertising services

provided "reasonably equivalent value" as defined under TUFTA. "Value" is defined in TUFTA as "property []transferred or an antecedent debt []secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." Tex. Bus. & Com. Code § 24.004(a). With that in mind, the Court, in an opinion released on March 11, 2015, found that Golf Channel failed to prove the second element of its affirmative defense, emphasizing that it put forward no evidence that its services preserved the value of Stanford's estate or had any utility from the creditors' perspective. Rather, Golf Channel only brought forth evidence showing the *market* value of its services. That, the Court found, was insufficient to satisfy its burden under TUFTA of proving value *to the creditors*. Moreover, Golf Channel's services did not, as a matter of law, provide any value, not even a speculative economic benefit, to Stanford's creditors. Consequently, the Court reversed the District Court's judgment and rendered judgment in favor of the receiver.

The Golf Channel filed a petition for panel rehearing and a petition for rehearing en banc, requesting, in the alternative, that that the Fifth Circuit certify a question to the Supreme Court of Texas given "the lack of any Texas case law [] interpreting TUFTA's definition of 'value' in the context of a good faith transferee of a Ponzi scheme." The Fifth Circuit, in an opinion released June 30, 2015, granted panel rehearing, vacated the original opinion. A panel majority voted to substitute a new opinion certifying a question to the Supreme Court of Texas, saying "[g]iven the possible tension within TUFTA with respect to the perspective from which to measure 'reasonably equivalent value,' that this is a question of state law that no on-point precedent from the Supreme Court of Texas has resolved, that the Supreme Court of Texas is the final arbiter of Texas's law, and that the meaning of 'reasonably equivalent value' is central to this case as well as other pending cases filed by Stanford's receiver, we believe it is best to certify the question at issue." Thus, Court certified the following question:

"Considering the definition of 'value' in section 24.004(a) of the Texas Business and Commerce Code, the definition of 'reasonably equivalent value' in section 24.004(d) of the Texas Business and Commerce Code, and the comment in the Uniform Fraudulent Transfer Act stating that 'value' is measured 'from a creditor's viewpoint,' what showing of 'value' under TUFTA is sufficient for a transferee to prove the elements of the affirmative defense under section 24.009(a) of the Texas Business and Commerce Code?"

The Court noted that the Golf Channel had argued for the first time in its petition for rehearing that Stanford's payments were in exchange for reasonably equivalent value because they satisfied antecedent debt obligations owed pursuant to the advertising contract. It did not argue this point before the District Court, in its response brief to the Fifth Circuit, or raise it at oral argument. Therefore, under Circuit rules regarding forfeiture, the Court deemed this argument forfeited. *United States v. Scroggins*, 599 F.3d 433, 446–449 (5th Cir. 2010); *Haubold v. Intermedics, Inc.*, 11 F.3d 1333, 1336 (5th Cir. 1994); *Zuccarello v. Exxon Corp.*, 756 F.2d 402, 407 (5th Cir. 1985). Nevertheless, the Court did not presume to restrict the Supreme Court of Texas from discussing on certification the meaning and applicability of the antecedent debt clause in TUFTA's definition of "value."

STANDING:

Zente v. Credit Management, L.P.

This case arose from Credit Management, L.P.'s debt-collection phone calls to Joseph Zente. Zente's attorney filed an action for Zente in the Western District of Texas for violations of the Fair Debt Collection Practices Act, the Telephone Consumer Protection Act, and the Texas Debt Collection Act. Zente's suit alleged that Credit Management harassed him with automated telephone calls to which he did not consent, and continued to call him after he requested that the calls cease. On July 1, 2014, after information and audio recordings were produced in discovery, Zente filed a motion for dismissal with prejudice. On July 14, Credit Management responded to the motion to dismiss by requesting sanctions against Zente's counsel

under Federal Rule of Civil Procedure 11, asserting that counsel knew the allegations in the complaint were false and that the case was frivolous. Three days later, before Zente's counsel responded to the request for sanctions, the District Court granted the motion to dismiss with prejudice. It denied the request for Rule 11 sanctions, holding that sanctions were unavailable because counsel filed the motion to dismiss first, and thus obviously within twenty-one days of knowing that Credit Management was seeking Rule 11 sanctions. *See* Fed. R. Civ. P. 11(c)(2). In that same order, however, the District Court stated that: "In addition, the undersigned will forward a copy of this file to the Admissions Committee of the Western District of Texas for a review and appropriate action, if any, regarding [Zente's counsel's] license to practice in the Western District of Texas." The District Court denied Zente's counsel's motion for reconsideration, explaining that its referral was intended to allow the Admissions Committee to conduct an "objective review" of the parties' contentions. Zente's counsel filed a notice of appeal nominally on behalf of Zente, yet the appeal was taken on counsel's own behalf, challenging the portion of the District Court's order that referred counsel's conduct to the Admissions Committee of the Western District of Texas, and its denial of reconsideration of that action.

The Fifth Circuit disposed of the appeal by negatively answering the threshold question of whether Zente's counsel had standing to appeal the challenged orders. Setting up its analysis, the Court adverted to the following legal precepts. "It is a central tenet of appellate jurisdiction that a party who is not aggrieved by a judgment of the district court has no standing to appeal it." *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 603 (5th Cir. 2004) (citing *Matter of Sims*, 994 F.2d 210, 214 (5th Cir. 1993)). "Thus, a prevailing party generally may not appeal a judgment in its favor." *Id.* Moreover, for the Fifth Circuit to have appellate jurisdiction, the District Court's referral to the Admissions Committee "must amount to a sanction sufficiently injurious" to counsel to confer standing to appeal. *Teaford v. Ford Motor Co.*, 338 F.3d 1179, 1181 (10th Cir. 2003). "Most courts agree that mere judicial criticism of an attorney's conduct is insufficient to constitute a sanction which would support standing." *Adams v. Ford Motor Co.*, 653 F.3d 299, 304 (3d Cir. 2011). "On the other hand, most circuits, including ours, have allowed appeal where the district court made a finding that a lawyer engaged in misconduct, even if the court did not impose tangible sanctions." *See Walker v. City of Mesquite, Tex.*, 129 F.3d 831, 832-33 (5th Cir. 1997). The Court next recognized that the Eleventh Circuit has agreed that a referral is not a reviewable sanction. *Adkins v. Christie*, 227 F. App'x 804, 806 (11th Cir. 2007) (unpublished). By contrast, the Second and Third Circuits have held that a District Court's referral of an attorney's conduct to a disciplinary committee, which included specific findings of attorney misconduct, constitutes an appealable sanction. *See Adams*, 653 F.3d at 305-06; and *In re Goldstein*, 430 F.3d 106, 111-12 (2d Cir. 2005). In accordance with the cases from its sister Circuits, the Fifth Circuit held that a referral of attorney conduct to a disciplinary committee, absent a specific finding of misconduct, is not a sanction that confers standing to appeal; and in the circumstances of this case, it further concluded that the District Court made no finding of misconduct. Accordingly, the Court dismissed the appeal for lack of standing.

CIVIL RIGHTS:

Curran v. Aleshire

Nearly seven years ago, a St. Tammany Parish sheriff's deputy, Phillip Aleshire, confronted 15-year-old high school sophomore April Curran over her violation of a school rule banning cell phones on campus. Their interaction lasted only ten minutes, but that was long enough for Curran to ultimately be convicted of battery of an officer, and for Aleshire to be named in a Federal lawsuit for violating Curran's constitutional rights. This appeal was taken from Curran's Federal civil rights case. Aleshire had moved for summary judgment, in part based on the theory that his actions were shielded by qualified immunity. His interlocutory appeal followed the District Court's ruling that fact issues precluded summary judgment on the excessive force claims. On appeal, Aleshire argued that he was entitled to qualified immunity, even assuming the existence of disputed facts, because none was material to whether his actions were objectively unreasonable in light of clearly established law. Essentially, Aleshire contended that reasonable officers could disagree about

whether the force allegedly used on Curran was lawful under the circumstances suggested by Curran's evidence.

The Fifth Circuit dismissed the appeal for want of jurisdiction. The Court explained that because its jurisdiction in such an interlocutory appeal is limited to a review of the materiality of any factual disputes found by the District Court, and not whether those disputes exist, it was without jurisdiction to entertain Aleshire's appeal. The Court forcefully reminded: "As we have put it a number of times, when conducting an interlocutory review of a qualified immunity ruling we '"review the *materiality* of any factual disputes, but not their *genuineness*."' *Wagner v. Bay City, Tex.*, 227 F.3d 316, 320 (5th Cir. 2000) (emphasis in original). Curran tried to fit his appeal within the confines of the Court's limited review by arguing that both uses of force against Curran were justified in light of certain undisputed facts. He contended that his first use of force was justified because Curran battered him, and his second use of force was justified because video and photographic evidence showed Curran taking a "long stride as if to escape." Unpersuaded, the Court concluded that neither Curran's battery conviction nor the photographic and video evidence conclusively resolved the factual disputes identified by the District Court, and these factual disputes were material to Aleshire's entitlement to a qualified immunity defense.

Trent v. Wade

Defendants pursued this appeal after the District Court denied their motion for summary judgment on qualified immunity grounds. The plaintiffs were members of the Trent family—Roger (father), Vickie (mother), Richard, and Randal (two sons). At all times relevant, the defendants were police officers in Rowlett, Texas—Steven Wade a patrol officer and Matthew Walling the Chief of Police. The Trents filed their lawsuit pursuant to 42 U.S.C. § 1983, alleging, *inter alia*, violations of their Fourth Amendment rights to be free from unreasonable searches and seizures. Particular to their appeal, their claims against Wade, in his individual capacity, involved a nighttime vehicle chase that concluded with: (1) Wade entering and searching the Trents' home without knocking and announcing his presence; and (2) Wade seizing and impounding the Trents' all-terrain vehicle ("ATV"). Their claim against Walling was not premised upon his actions the night of the chase, but instead on allegations that Walling, in his official capacity as a policymaker for Rowlett, was liable under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

Several years prior to the night in question, some "friction" developed between the Trents and the police department in Rowlett. Roger Trent spearheaded the effort to defeat a referendum aimed at obtaining civil service status for the police department. Roger also was arrested for (but was never convicted of) stealing campaign signs associated with that referendum. Furthermore, Roger supported a particular mayoral candidate who, the Trents contended, was disfavored by the police department. In their complaint, the Trents alleged that members of the police department, in response to Roger's political activism, engaged in "harassment and intimidation against the Trents, culminating in an illegal middle-of-the-night raid into their home." That alleged raid was the subject of the dispute on appeal. Wade, who was on patrol in Rowlett after receiving reports of criminal activity, spotted two ATVs racing southbound on a closed portion of the President George Bush Turnpike. He turned on his emergency lights in an attempt to make a traffic stop. One of the drivers (later identified as Richard Trent) steered past Wade's cruiser, turned into an open pasture, and accelerated off-road. Wade pursued the ATV, and Wade and Richard both arrived at the Trents' home. Richard parked the ATV and ran to an exterior door of the home, which was several feet from the parked ATV. In turn, Wade pulled up and parked his cruiser within several feet of the ATV. Approximately ten seconds after Richard ran into the home, Wade walked up to the house, opened the same door, and—without hesitation and without knocking or announcing his presence—stepped across the threshold of the Trents' home. Upon entry into the home, Wade yelled: "Get out here." After standing inside the door for approximately ninety seconds, Wade went outside to meet the backup officers, who arrived in a matter of minutes. Wade then marched back into the home through the same door, gun drawn, and shouted back to the officers: "They're upstairs." Again, Wade did not knock and announce his presence. Two other officers

followed behind through the same door; neither knocked or announced his presence. Moving farther into the home, the officers encountered the other members of the Trent family. Wade and the other officers soon discovered Richard inside the home. Richard was arrested for evading on a vehicle and taken out of the home. Wade ultimately had the ATV towed and impounded. A grand jury "no billed" Richard on charges related to evading arrest that night.

Based on those facts, the Trents sued. The Trents asserted § 1983 claims against Wade for: (1) an unconstitutional search, alleging that Wade entered the home without knocking and announcing his presence and searched the home without a warrant; (2) unconstitutional seizures, alleging that Wade seized Richard and the ATV without a warrant; and (3) First Amendment retaliation, alleging that Wade's actions were retaliation for Roger's political activism. The Trents asserted one claim against Walling, alleging that, as the "final policymaker" for Rowlett, Walling implemented unconstitutional policies and failed to properly supervise his officers. The District Court granted in part and denied in part the defendants' motion for summary judgment on qualified immunity grounds. As for the first claim, the District Court granted the motion with respect to the warrantless search, reasoning that Wade was in "hot pursuit," but denied the motion with respect to the no-knock entry, concluding that genuine issues of material fact remained. As for the second claim, the District Court granted the motion with respect to the seizure of Richard but denied the motion with respect to the seizure of the ATV because genuine issues of material fact remained. As for the third claim, the District Court granted the motion. The District Court further concluded that the motion for summary judgment with respect to Walling was "premature," stating in a footnote: "As the Court has stayed all discovery related to sovereign immunity, summary judgment in favor of Chief Walling is denied but may be re-urged after sufficient discovery on the issue of sovereign immunity." Wade and Walling filed a single notice of interlocutory appeal, asserting that "the Court's order denie[d] Summary Judgment predicated upon Qualified Immunity."

The Fifth Circuit affirmed the District Court's denial of the motion for summary judgment as to the Trents' claim against Wade for the no-knock entry. The Court's opinion provided an excellent overview of an officer's authority to enter a home, and the general rule that an officer must knock and announce his presence and authority prior to entering a home. But, as is the case with other aspects of Fourth Amendment law, the Court was mindful that the knock-and-announce rule is defined by its exceptions. Relevantly, the Supreme Court has explicitly identified several justifications for "dispensing with the knock-and-announce requirement":

> "In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."

Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

Following *Richards*, the Fifth Circuit has required officers to "at least articulate" the reasonable suspicion justifying the no-knock entry. *United States v. Cantu*, 230 F.3d 148, 152 (5th Cir. 2000). And while the "futility justification" has not appeared frequently in the case law, those cases that that have discussed the justification have supported the Fifth Circuit's straightforward interpretation of the Supreme Court's decisions. Whereas "futility" justifies a no-knock entry only when the officer has a reasonable suspicion that the occupants of the residence to be searched are already aware of the officer's presence, the Court agreed, after viewing the facts in the light most favorable to the Trents, that Wade violated the knock-and-announce rule without justification.

Rejecting Wade's contention that the District Court's conclusion that Wade was in "hot pursuit" justifies any violation of the rule, the Court concluded that hot pursuit—unless accompanied by one of the specific justifications enumerated in *Richards*—does not justify a no-knock entry. Because no blanket hot

pursuit justification exists, Wade had to articulate his reasonable suspicion that the occupants of the Trents' home were already aware of his presence before he opened the door and walked in unannounced. This he could not do, and in fact, the Court resolved that at the summary judgment stage, the Trents were required to demonstrate, and did demonstrate, genuine issues of material fact about whether such reasonable suspicion existed. In light of the genuine issues of material fact regarding whether Wade violated clearly established Fourth Amendment rights when he entered the Trents' home without knocking or announcing his presence, the Court affirmed that the District Court was correct to deny qualified immunity on this ground. The Court reversed, however, the District Court's denial of qualified immunity to Wade on the Trents' claim for the seizure of the ATV. The Court concluded that the seizure did not violate clearly established law because no Supreme Court or Fifth Circuit case has directly addressed whether police may effectuate a warrantless seizure of a vehicle under the circumstances present in this case, and the two lines of cases most relevant to the question did not clearly establish that Wade's conduct violated the Fourth Amendment.

In a substituted opinion dated January 29, 2015, the Fifth Circuit *sua sponte* withdrew its prior panel opinion of January 9, 2015. The Court's substituted opinion again affirmed the District Court's denial of the motion for summary judgment as to the Trents' claim against Wade for the no-knock entry, emphasizing that "[i]t is clearly established that there is no per se hot pursuit exception to the knock and announce rule." Because the District Court was correct in ruling that hot pursuit does not automatically excuse an officer from knocking and announcing, the Court reaffirmed with respect to the knock-and-announce claim.

The Court's resolution of the Trents' claim against Wade for the seizure of the ATV was slightly different. The District Court had found genuine issues of fact with respect to the ATV seizure. But, because Wade did not violate clearly established law, even on the Trents' version of the facts, the Fifth Circuit reversed and rendered judgment in favor of Wade as to the ATV claim.

Elaborating the proper standard of review, the Court offered the following detailed explanation: "Whenever the district court denies an official's motion for summary judgment predicated upon qualified immunity, the district court can be thought of as making two distinct determinations, even if only implicitly. First, the district court decides that a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law. Second, the court decides that a genuine issue of fact exists regarding whether the defendant(s) did, in fact, engage in such conduct. According to the Supreme Court, as well as our own precedents, we lack jurisdiction to review conclusions of the second type on interlocutory appeal. Stated differently, in an interlocutory appeal we cannot challenge the district court's assessments regarding the sufficiency of the evidence—that is, the question whether there is enough evidence in the record for a jury to conclude that certain facts are true." *Kinney v. Weaver*, 367 F.3d 337, 346–47 (5th Cir. 2004) (en banc) (internal quotation marks and citations omitted). Because, in an interlocutory appeal the Court lacks the power to review the District Court's decision that a genuine factual dispute exists, the Court here clarified that it was not applying the standard of Rule 56, but instead limited its review to the consideration of only whether the District Court erred in assessing the legal significance of the conduct that the District Court deemed sufficiently supported for purposes of summary judgment.

Under the clarified standard, the Court again concluded that because Texas law allowed Wade to seize the ATV, and because Wade was lawfully present on the Trents' property when he effected the seizure, he did not violate clearly established law when he seized the ATV. As such, he was entitled to qualified immunity with respect to the seizure of the ATV. As for Walling's appeal, the Court's substituted opinion was unchanged, and resulted in a dismissal based on the Court's *sua sponte* finding that it was without jurisdiction.

The Fifth Circuit was polled at the request of one of its members, and a majority of the Judges who were in regular active service and not disqualified not having voted in favor, rehearing en banc was denied. In the en banc poll, Judges JONES, SMITH, CLEMENT, OWEN, and GRAVES voted in favor of rehearing.

Chief Judge STEWART and Judges JOLLY, DAVIS, DENNIS, PRADO, ELROD, SOUTHWICK, HAYNES, HIGGINSON, and COSTA voted against rehearing.

DEFAULT JUDGMENT:

Wooten v. McDonald

Eddie Wooten filed suit against his former employer, McDonald Transit Associates, Inc., under the Age Discrimination in Employment Act. Wooten's complaint alleged discrimination and retaliation. McDonald Transit never answered or defended the suit. The clerk entered a default against McDonald Transit, and, after holding a hearing on damages in which Wooten provided live testimony, the District Court entered default judgment for Wooten. Wooten's complaint contained very few factual allegations, but his testimony at the damages hearing provided evidence on the elements of his claim that were absent from his pleadings. F ollowing the entry of default judgment against it, McDonald Transit filed a motion to set it aside. The District Court denied that motion, whereafter McDonald Transit appealed. Neither party disputed that entry of default was appropriate. They, however, did disagree over whether the District Court was permitted to consider evidence presented at the hearing in addition to the allegations in supporting default judgment and the sufficiency of Wooten's allegations.

In deciding McDonald Transit's appeal, the Fifth Circuit originally confronted the question it left open in *Nishimatsu Construction Co., Ltd. v. Houston National Bank*, 515 F.2d 1200 (5th Cir. 1975): May fatally defective pleadings be corrected by proof taken at a default-judgment hearing? In an opinion released on January 2, 2015, a panel majority concluded that that evidence adduced at a default-judgment "prove-up" hearing could not cure a deficient complaint, and therefore vacated the District Court's entry of default judgment. The majority held that Wooten's complaint, standing alone, failed to meet either the Rule 12(b)(6) "plausibility" standard or the broadly similar standards announced by the Second and Ninth Circuits. The majority noted that Wooten's few factual allegations were "inextricably bound up with legal conclusions," and that when read in its entirety, his complaint merely "parrot[s] the language" of the ADEA. Thus, the majority concluded that Wooten's complaint was not "well-pleaded" for default-judgment purposes. Although the majority did find that Wooten's live testimony provided sufficient evidence of each of the elements of his ADEA cause of action to support the entry of default, it resolved that such testimony could not cure fatally deficient pleadings for the purpose of entering a default judgment.

Convinced that the majority's opinion "sen[t] the wrong message to the district courts of this circuit and, more troubling, that it w[ould] eviscerate the role of default judgments in the efficient administration of civil litigation," Judge WIENER was compelled to dissent. Concerned over the practical consequence of the majority's decision, Judge WIENER's dissent laid out the ways in which he foresaw that the majority's ruling would "unnecessarily prolong that process and likely eliminate the positive role played in it by default judgments."

In response to the dissent's concerns regarding the "practical consequence" of its decision, the majority, in a footnote, emphasized that its ruling did not require District Courts to engage in a *sua sponte* Rule 12(b)(6) analysis in every default-judgment case.

Treating Wooten's petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing was granted. Whereas the Court had previously issued an opinion assessing whether evidence adduced at a default-judgment "prove-up" hearing can cure a facially deficient complaint, a question left open forty years ago in *Nishimatsu Construction Co. v. Houston National Bank*, 515 F.2d 1200 (5th Cir. 1975), the Court, upon reconsideration, withdrew its prior opinion in its entirety, *see Wooten v. McDonald Transit Assocs., Inc.* , 775 F.3d 689 (5th Cir. 2015), and replaced it with a new opinion.

The Court's new opinion examined the sufficiency of the pleadings to support the judgment, and concluded that Wooten's complaint, although admittedly light on factual details, advanced a colorable claim for relief and provided McDonald Transit with the requisite notice to satisfy Rules 8 and 55. Content that the complaint itself met the minimum standards of Rule 8, the Court then decided that the testimony at the prove-up hearing served the limited purpose of "establish[ing] the truth of [the] allegation[s] by evidence," Fed. R. Civ. P. 55(b)(2)(C), and therefore was capable of be considered in assessing the entry of default judgment without implicating the *Nishimatsu* quandary. Despite announcing that a default judgment must be "supported by well-pleaded allegations" and must have "a sufficient basis in the pleadings," the *Nishimatsu* Court did not elaborate on these requirements. In the present case, nothing in the record or the parties' briefs discussed how to determine what is "well-pleaded" or "sufficient," and the Court could find no guidance in its own cases. Nevertheless, the Court drew meaning from the case law on Rule 8, which sets forth the standards governing the sufficiency of a complaint. The Court concluded that the allegations contained in Wooten's complaint, "while perhaps less detailed than McDonald Transit would prefer, are nevertheless sufficient to satisfy the low threshold of Rule 8." As such, the Court found that Wooten's complaint was "well-pleaded" for default-judgment purposes. Accordingly, the Court had no difficulty in finding that the evidence received at the damages prove-up hearing served a permissible purpose under Rule 55(b)(2)—to "establish the truth of any allegation by evidence" or "investigate any other matter." The Court thus deemed *Nishimatsu's* complaint-supplementation hypothetical inapplicable. The Court's new opinion went on to reject McDonald Transit's renewed arguments for setting aside the judgment under Federal Rule of Civil Procedure 60(b)(1) and (b)(6). The District Court had concluded that McDonald Transit's default was willful based on two facts: (1) Wooten properly executed service of process on McDonald Transit and (2) McDonald Transit offered no answer or other defense. Addressing Rule 60(b)(1) grounds for setting aside the judgment, the Court was not persuaded that McDonald Transit did not default willfully, nor did it find that it met its burden to show that its default was excusable. Finally, the Court determined that McDonald Transit failed to establish "extraordinary circumstances" justifying relief under Rule 60(b)(6). Accordingly, the Court affirmed the judgment of the District Court.

IMMIGRATION:

Thomas v. Lynch

Jermaine Amani Thomas petitioned for review of an order that he be removed from the United States pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii) and (iii). Thomas, did not dispute that he was deportable as an aggravated felon, but instead argued that because he born in a military hospital located on a U.S. military base in Frankfurt, Germany, he was not removable inasmuch as he was a United States citizen by virtue of the Fourteenth Amendment. Thomas's father was a United States citizen and his mother was a citizen of Kenya. Thomas was admitted to the United States as a lawful permanent resident in July 1989. His visa form listed his nationality as Jamaican. The Immigration Judge had found that Thomas's birth in Germany gave rise to a rebuttable presumption of alienage. The BIA agreed with the IJ that Thomas's birth at the military hospital in Germany, to only one United States citizen parent, gave rise to a rebuttable presumption of alienage. The BIA rejected Thomas's claim that his birth on a military base in Germany rendered him a birthright citizen by virtue of the Fourteenth Amendment. Therefore, the BIA concluded that Thomas was removable and it dismissed his appeal. His petition to the Fifth Circuit followed.

The Fifth Circuit had to determine whether a United States military base located within what is now Germany was "in the United States" for purposes of the Fourteenth Amendment. The answer was decisive to the resolution of Thomas's petition because the Fourteenth Amendment grants birthright citizenship to "[a]ll persons born [] in the United States, and subject to the jurisdiction thereof." U.S. Const. amend. XIV, § 1. If Thomas derived birthright citizenship from the Fourteenth Amendment, the Court would have been compelled to grant his petition for review because only aliens can be deported. *See* 8 U.S.C. § 1227(a). If, however, he in fact was not a citizen, the petition for review was due to be denied because it is undisputed

that he was otherwise deportable as an aggravated felon. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). After a careful review of the decisions of the Supreme Court, other Circuit Courts of appeals, and its own Court, the Fifth Circuit held that Thomas was not a citizen, because the United States military base where he was born, which is located in modern-day Germany, was not "in the United States" for purposes of the Fourteenth Amendment. Thus, the Court denied Thomas's petition for review.

FRAUD/INSURANCE:

Rigsby v. State Farm Fire & Casualty Co.

Cori and Kerri Rigsby brought this qui tam action under the False Claims Act on claims that State Farm Fire and Casualty Company submitted false claims to the United States Government for payment on flood policies arising out of damage caused by Hurricane Katrina. At trial, the Rigsbys prevailed on a single bellwether false claim under the FCA. The District Court subsequently denied their request to conduct further discovery, and denied State Farm's motions for a new trial and judgment notwithstanding the verdict. Each side appealed. While the Rigsbys' appeal sought review of the District Court's discovery ruling, State Farm's principally challenged the jury's verdict.

On August 29, 2005, Hurricane Katrina struck the Gulf Coast. Gulf Coast residents whose homes were damaged or destroyed looked to their insurance companies for compensation. Many of these homeowners were covered by at least two policies, often provided by the same insurance company: a flood policy excluding wind damage, and a wind policy excluding flood damage. A private insurance company would frequently administer both policies, but wind policy claims were paid out of the company's own pocket while flood policy claims were paid with government funds. This arrangement generated the conflict of interest that drove this case: the private insurer has an incentive to classify hurricane damage as flood-related to limit its economic exposure.

Shortly after Katrina struck, State Farm set up an office in Gulfport, Mississippi, to address claims involving its policies. Alexis "Lecky" King was one of two primary Gulfport supervisors and a catastrophe coordinator with substantial experience adjusting claims. According to Rigsby's trial testimony, a meeting was convened soon after Katrina during which State Farm trainers, including King, told its adjusters that "[w]hat you will see is, you will see water damage. The wind wasn't that strong. You are not going to see a lot of wind damage. If you see substantial damage, it will be from water." Prior to Katrina, State Farm's general policy was to conduct line-by-line and item-by-item estimates of home damages using a program called Xactimate. In the wake of Katrina, and because of the immense number of claims, FEMA authorized WYO insurers—through FEMA directive W5054—to use an expedited procedure to pay two particular types of claims: 1) claims in which a home "had standing water in [it] for an extended period of time" and 2) claims in which the home was "washed off its foundation by flood water." The Rigsbys presented evidence at trial that State Farm failed to comply with that directive.

After Katrina, State Farm—rather than using Xactimate to generate a line-by-line printout of flood damages to a home—often used a program called Xactotal, which estimates the value of a home based on square footage and construction quality. State Farm told its adjusters that any time damage to a home appeared to exceed the flood policy's limits, the adjuster should use Xactotal. There was also evidence that State Farm officials told adjusters to "manipulate the totals" in Xactotal to ensure that policy limits were reached. A few weeks after Katrina, Rigsby and Cody Perry, another State Farm adjuster, inspected the home of Thomas and Pamela McIntosh ("the McIntoshes") in Biloxi, Mississippi. T he McIntoshes had two insurance policies with State Farm: a SFIP excluding wind damage, and a homeowner's policy excluding flood damage. Using Xactotal, and thereby foregoing a line-by-line estimate, Rigsby and Perry presumed that flooding was the primary cause of damage to their home. The McIntoshes received a maximum payout of $350,000 ($250,000 for the home, $100,000 for personal property) under FEMA's Standard Flood Insurance

Policy. State Farm later retained an engineering company, Forensic Analysis Engineering Corporation to analyze the damage. Forensic engineer Brian Ford ("Ford") concluded that the damage was primarily caused by wind. The Rigsbys presented evidence that after State Farm received it, the company refused to pay Forensic and withheld the Ford Report from the McIntosh NFIP file. A note on the Ford Report from King read: "Put in Wind [homeowner's policy] file – DO NOT Pay Bill DO NOT discuss." State Farm commissioned a second report, written by another Forensic employee, John Kelly. His report determined that while there had been wind damage, water was the primary cause of damage to the McIntosh home. There was evidence that King pressured Forensic to issue reports finding flood damage at the risk of losing contracts with State Farm. Ford was subsequently fired. These events led the Rigsbys to believe State Farm was wrongfully seeking to maximize its policyholders' flood claims to minimize wind claims. Hence, they brought suit under the FCA. The Government declined to intervene.

The District Court focused discovery and the subsequent trial on the McIntosh claim, rather than permitting the Rigsbys to seek out and attempt to prove other claims, in order to "protect the interests of both parties." The jury concluded that the McIntosh residence sustained no compensable flood damage and that the Government therefore suffered damages of $250,000 under the FCA as a result of State Farm's submission of false flood claims for payment on the McIntosh property. The jury also found that State Farm submitted a false record. The District Court denied State Farm's motions for judgment notwithstanding the verdict and for a new trial. The Rigsbys moved after trial for additional discovery to seek out other instances of false claims that were part of the alleged general scheme, but were denied on the basis that they had failed to plead sufficient facts about claims unrelated to the McIntosh claim. The District Court did award the Rigsbys the maximum possible share under the FCA for relators pursuing claims without the Government as a party—30 percent of $758,250 (the District Court trebled damages on the $250,000 false claim and added a civil penalty of $8,250), or $227,475. *See* § 3730(d). It further awarded the Rigsbys $2,913,228.69 in attorney's fees and expenses. This appeal followed.

The Fifth Circuit reversed the denial of further discovery into potential instances involving the alleged same scheme. Declining to analyze the ruling in the context of Rule 9(b), a pleading rule that "would almost always come into play in pre-trial proceedings," the Court explained that the Rigsbys' allegations and trial evidence—which extended far beyond the realm of the McIntosh claim—entitled them to at least some additional discovery. The Court noted, "[a]t a minimum, the trial record supports a high probability that State Farm submitted more than one false claim." Yet, the Court emphasized that its decision hinged "in large part on the idiosyncratic nature of this case—seldom will a relator in an FCA case present an already-rendered jury verdict in her favor while seeking further discovery."

The Court next took up State Farm's argument that the Rigsbys' violations of the FCA's seal requirement independently warranted dismissal. The FCA requires that a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the government." 31 U.S.C. § 3730(b)(2). The complaint must be filed in camera and remain under seal until the Court orders it served on the defendant. *Id.* State Farm alleged that the Rigsbys' prior counsel disclosed the existence of the lawsuit to several news outlets by emailing copies of the evidentiary disclosures and engineering reports, sometimes including the case caption. Although this was an issue of first impression in the Fifth Circuit, other Circuits have addressed the consequences of an FCA seal violation and come to divergent conclusions. The Ninth Circuit has determined that no provision in the FCA explicitly authorizes dismissal as a sanction for a seal violation. By contrast, the Sixth Circuit held that any violation of the seal requirement, no matter how trivial, requires dismissal. While cognizant of the justification for and the merits of a *per se* rule, the Fifth Circuit concluded that a seal violation does not automatically mandate dismissal, and affirmed the District Court ruling that the Rigsbys' alleged violations of the FCA's seal requirement did not independently warrant dismissal.

Finally, the Court affirmed the jury's verdict in favor of the Rigsbys. Concluding that a reasonable jury could have rendered these verdicts, the Court recounted that there was evidence that adjusters were effectively told to presume flood damage instead of wind damage. Additionally, there was evidence that State Farm knowingly violated W5054, concealed evidence of wind damage, and strong-armed an engineering firm to change its reports.

SANCTIONS:

Waste Management of Washington, Inc. v. Kattler

This appeal arose from a contempt proceeding ancillary to the merits of the underlying case. Michael A. Moore, the attorney for Dean Kattler, the defendant in the proceedings below, challenged the District Court's imposition of sanctions following a finding that Moore was in civil contempt. In the underlying litigation, Waste Management, Inc. (WM) sued Kattler, a former employee, for misappropriating confidential business information, and for violating the terms of his employment agreement by accepting a job with Emerald Services, Inc. (Emerald), an alleged WM competitor. Shortly after the commencement of this litigation, WM sought a temporary restraining order to enjoin Kattler from disclosing WM's confidential information, and requiring Kattler to produce images of all electronic devices that might contain such information. The District Court issued a TRO directing Kattler to "produce to Waste Management images of all electronic devices used by Kattler [] except for the electronic devices *used and/or owned by Kattler at Emerald*," and to "produce to a third-party forensics expert, to be agreed upon by the Parties, images of all electronic devices *used by Kattler [] at Emerald*." Eight days later, the District Court issued a preliminary injunction that modified the TRO by requiring Kattler to produce all personal devices to WM within two days, and expanded the definition of "personal devices" to include all of Kattler's devices, except those devices "*provided to Mr. Kattler by Emerald*." This enlargement occurred despite the fact that the parties had discussed with the Court the importance of preventing the disclosure of attorney-client-privileged information present on devices that were now to be produced directly to WM. Because the order failed to address the attorney-client-privilege concerns, it was Moore's position that Kattler should not be compelled to produce certain devices. After it became clear Kattler would not produce those devices, WM moved for a show-cause hearing as to why Kattler should not be held in contempt. The District Court granted this motion and ordered "that Defendant appear for a hearing" to be held on January 22, 2013. At the hearing, an important issue was whether Kattler was required to produce his iPad for inspection. Moore argued that Kattler complied with the orders despite not producing the iPad because it was a personal device and because it contained information protected by the attorney-client privilege. The District Court disagreed that the iPad could be considered "personal" under the preliminary injunction, and ordered that the device be produced to WM. Notably, the District Court spoke in terms of the device itself, rather than an image of its content.

The District Court recognized Moore's valid privilege concerns and stated Kattler would not waive the privilege by producing the iPad, but indicated Kattler still had to produce it. Moore also represented to the Court that Kattler could not produce the SanDisk thumb drive WM was requesting because Kattler had never owned such a drive. The District Court declined to hold Kattler in contempt but did issue an order requiring that all parties comply with his orders, "whether written or pronounced from the Bench." Following the hearing, Kattler informed Moore that he now recalled owning at least one SanDisk thumb drive. Moore consulted a professional responsibility expert and, on January 28, informed Kattler he would no longer serve as counsel. Kattler, now represented by new counsel, produced the image of the iPad to WM, but the image contained no relevant information. The responsive documents were stored in a restricted portion of the iPad's memory that was not included in the image because that portion of the memory was technologically inaccessible at the time the device was imaged. WM demanded Kattler produce the iPad itself so that recently-developed "jailbreaking" software could be used to access the device's restricted memory. Kattler refused, and WM filed a renewed motion for Kattler to show cause as to why he should not be found in contempt for refusing to produce the iPad itself. Following this hearing, the District Court found both

Kattler and Moore in contempt on grounds that they: (1) misled the Court as to the existence of a SanDisk-brand USB thumb drive, (2) failed to produce an image of Kattler's iPad, and (3) failed to produce the iPad device itself. Moore appealed, maintaining that he was not afforded procedural due process and that the District Court abused its discretion by finding him in contempt. Moore contended that, while he was aware he might be the subject of a future contempt hearing, he was not provided with adequate notice that a contempt finding could be entered against him after the show-cause hearing. He further argued that, on the merits, he did not aid or abet any attempt to mislead the District Court as to the existence of the thumb drive, and that his failure to comply with the orders concerning the iPad was excusable because he was attempting to assert the attorney-client privilege.

The Fifth Circuit began by noting that Moore's allegedly contumacious conduct occurred outside the Courtroom. While his conduct was discussed at the second show-cause hearing, the District Court did not find him in contempt based on any disruptive behavior occurring at that particular proceeding. Therefore, the Court explained that the District Court's contempt finding could not stand if Moore was not afforded adequate notice. Adequate notice typically takes the form of a show-cause order and a notice of hearing identifying each litigant who might be held in contempt. Here, the District Court published a notice of an evidentiary hearing to address WM's motion that referred to WM's request that "Defendant Dean Kattler should again be ordered to show cause as to why he is not in contempt of the Court's orders." This notice, the Fifth Circuit found, did not signal to Moore that he could be found in contempt because it identified Kattler alone as the party whose contempt liability was to be adjudicated. Therefore, the Court vacated the contempt order as it pertained to Moore. Notably, WM contended that its pleadings provided Moore with sufficient notice he might be held in contempt at the second show-cause hearing. Specifically, it argued the Court's decisions in *American Airlines, Inc. v. Allied Pilots Association*, 228 F.3d 574 (5th Cir. 2000), and *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234 (5th Cir. 1990), stand for the proposition that a movant's pleadings alone put all potential contemnors on notice that their liability could be adjudicated at a show-cause hearing, not just those named in the show-cause motion. The Fifth Circuit was not persuaded.

The Court went on to conclude that the District Court abused its discretion when it found Moore in contempt. Viewing the record as a whole, the Court found there to be "abundant evidence that Kattler deceived Moore as to the existence of the SanDisk thumb drive until late January and no evidence that Moore knew of its existence until that time." Consequently, the Court decided that the District Court's finding that Moore participated in an attempt to mislead the Court as to the existence of the SanDisk thumb drive was clearly erroneous. The Court explained that while Moore clearly failed to comply with the terms of the December 20 preliminary injunction by not producing the iPad image directly to WM by December 22, his failure was excusable because the order required Moore to violate the attorney-client privilege. It was clear to the Court that the iPad contained privileged information, and that Moore indeed vigorously asserted it on behalf of Kattler at every opportunity. Finally, whereas the District Court found Moore in contempt because of his failure to produce the iPad itself, the Court explained that no contempt liability may attach if a party does not violate a "definite and specific order of the court." Prior to the first show-cause hearing, the parties only discussed producing images of the devices, not the devices themselves; and the resulting order required Kattler to produce an image of the device only, not the device itself.

Supreme Court October Term 2015

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Fisher v. University of Texas at Austin (II) (King, Higginbotham, and Garza) (Sparks)

The Supreme Court's prior decision in "*Fisher I*" reaffirmed that traditional strict scrutiny applies when a university's use of racial preferences in its admissions process is challenged. The Fifth Circuit's initial ruling instead deferred to the University of Texas at Austin ("UT"). The Supreme Court vacated that ruling and remanded the case to the Fifth Circuit to determine whether UT had offered sufficient record evidence to satisfy that exacting standard. A divided panel of the Fifth Circuit decided that it had. The case returns to the Supreme Court on the question of whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under the Supreme Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) ("*Fisher I*")?

Dollar General Corporation v. Mississippi Band of Choctaw Indians

In *Montana v. United States*, 450 U.S. 544, 565 (1981), the Supreme Court held that generally "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." The Supreme Court recognized as an exception to that rule that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members." *Id.* The Supreme Court later recognized in *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001), that it has "never held that a tribal court had jurisdiction over a nonmember defendant" in any context, so that it remains an "open question" whether tribal courts may ever exercise civil jurisdiction over nonmembers. In *Dollar General*, a divided panel of the Fifth Circuit held that tribal courts possess that jurisdiction. Five Judges dissented from the denial of rehearing en banc. The case accordingly presents the Supreme Court with the issue it left open in *Hicks*: Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members?