The following is a compendium of research materials and case law that may be of interest to our AG offices working on affirmative and defensive civil rights matters. Neither the National Association of Attorneys General nor the National Attorneys General Training & Research Institute expresses a view as to the accuracy of any listed articles nor as to the position expounded by the authors of any hyperlinked articles.

JULY-AUGUST 2015

FEDERAL CASE LAW

U.S. SUPREME COURT—DECIDED

Pretrial Detainees and Excessive Force Claims


In Kingsley, the Supreme Court clarified the standard that pretrial detainees must meet when alleging excessive force at the hands of law enforcement. Kingsley v. Hendrickson, No. 14-6368, 2015 U.S. LEXIS 4073 (U.S. June 22, 2015). Petitioner Michael Kingsley brought suit under 42 U.S.C. § 983, alleging that while he was a pretrial detainee, jailhouse officers used excessive force against him in violation of the Fourteenth Amendment’s Due Process Clause. Both parties acknowledged that force was used, but accounts differ as to whether it was in fact excessive. The officers claimed that they exerted the precise amount of force they intended to use against Kingsley, and therefore subsequently moved for summary judgment; however, the lower court denied their motion on the grounds that a jury reasonably could have determined that the officers acted with malice and harmed Kingsley intentionally. Kingsley, 2015 U.S. LEXIS 4073 at 6-7. The jury returned a verdict in favor of the officers. On appeal before the 7th Circuit, Petitioner argued that the lower court instructed jurors using the incorrect standard, claiming that an objective reasonableness standard was appropriate. The 7th Circuit found in favor of the officers, holding that a subjective standard is correct because one must consider the officer’s actual state of mind. Id. at 8. Moreover, evidence must exist that the officers actually intended to violate the detainee’s protected rights. Id.

A detailed description of the facts have been included for the benefit of members who advise correctional facilities and state law enforcement officers, particularly given an increase in court cases involving use of force claims involving tasers and court opinions on permissible versus impermissible uses. Kingsley was arrested
on a drug charge and subsequently detained at a county jail in Wisconsin. While detained, Kingsley covered a light fixture with a piece of paper and refused to remove it despite repeated orders to do so. Kingsley was informed that he would be moved to a different cell temporarily so that officers could remove the paper. Following this, Kingsley was issued a command to stand, back up to the door and keep his hands behind him; he refused to comply with this order. Subsequently, officers handcuffed him, forcibly removed him from his cell and took him to another, and placed him face down on the bed with his hands still handcuffed behind his back. The parties disagreed as to the series of events that followed, where officers claimed that Kingsley refused to permit officers to remove his handcuffs. Kingsley denies resisting and claims that, after an officer placed his knee in his back, the officers banged his head into a concrete bunk. The officers only agree to having placed a knee in Kingsley’s back and vehemently deny the head incident. Ultimately, the parties agree that an officer followed a senior’s directive to apply a taser to Kingsley for five seconds. Kingsley was then left him alone in his cell for 15 minutes before officers returned and removed his handcuffs.

Presented with such facts, the Court answered whether pretrial detainees must show that officers purposely or knowingly used unreasonably excessive force under an objective or subjective standard. In reaching its decision, the Court contemplated two states of mind questions, concerning defendants’ states of mind with respect to their physical acts and whether the force was, in fact, excessive. In weighing excessive force claims, the Court noted that certain factors should be considered, such as the relationship between the need for force and the actual amount used, the injury to the detainee, officer efforts extended to minimize the amount of force, the nature of the security risk posed to the detainee and the officer, and consideration of a detainee’s resistance. Id. at 12-13.

Justice Breyer issued the Court’s decision, ultimately holding that an objectively unreasonable showing is the correct standard to be applied in these cases. The Court also noted that numerous aspects must be contemplated in conjunction with the government’s responsibility to manage and keep a correctional facility secure. Relying upon precedent as set forth in Bell, the Court noted that a pretrial detainee may prevail on a claim of a due process violation if evidence is presented that the government’s disputed activity “is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.” Bell v. Wolfish, 441 U.S. 520 (1979). According to the Court, applying an objective standard also protects an officer acting in good faith. Id. at 16. Rejecting the officers’ claims that discipline was appropriate, the Court noted that, at the pretrial level, punishment is prohibited and unconstitutional. Instead, the prison’s focus must be to simply provide safe custody prior to any conviction. The Court also found that the jury instruction was issued erroneously since it suggested that the jury should consider the officers’ subjective reasons behind the extent of force used. The Court remanded after vacating the 9th Circuit decision.

Justice Scalia dissented with Chief Justice Roberts and Justice Thomas joining, and Justice Alito issued a separate dissenting opinion. Justice Scalia dissented on the grounds that intentionally inflicting force that is “objectively unreasonable” without any additional factors or activity, does not rise to the level of being excessive or amount to punishment. He notes that officers make such decisions hastily and under pressure without the benefit of hindsight and measured thinking. Justice Alito dissented on the grounds that the Court should have never heard granted cert since it had never decided first whether a pretrial detainee has a right to bring a Fourth Amendment excessive force claim. Until such a case has been decided by the Court, Justice Alito believes that this case and others similarly situated should be dismissed because reliance upon substantive due process would not be necessary, and granting cert in such instances would be careless.
Use of Medication in Administering the Death Penalty


Twenty-one death row inmates filed a 42 U.S.C. §1983 case, alleging that permitting the use of midazolam—a sedative drug used to administer the death penalty—violated the 8th Amendment clause against cruel and unusual punishment because it failed to render them free from pain before the next course of medications was dispensed. The State of Oklahoma followed a customary three-drug protocol to administer the death penalty and switched to using midazolam as the initial drug following the unavailability of two previously and widely used drugs, pentobarbital and thiopental. Although the inmates approved using pentobarbital and thiopental, these drugs eventually became unavailable to the government after death penalty opponents’ pressured manufacturers to stop producing them or making them available for purchase in the United States.

In an effort to halt the death penalty from being carried out in Oklahoma, four inmates sought a preliminary injunction that would have prevented officials from using midazolam. The district court denied the motion, finding that the inmates failed to provide an alternative method of execution that would lessen the severe risk of pain or show that midazolam in fact created a severe risk of pain. The 10th Circuit affirmed the district court’s decision. The Supreme Court, where Justice Alito delivered the majority opinion, affirmed the lower court decisions on two primary grounds that: 1) Petitioner inmates failed to meet their burden required in all 8th Amendment cases, and 2) the district court did not err in finding that Petitioners failed to show that administering a massive dose of midazolam during the protocol would constitute “a substantial risk of severe pain.” Glossip, 2015 U.S. LEXIS 4225, at 7-8. The Court took steps to note first, however, that the death penalty is permissible and therefore a mechanism to carry it out is constitutionally protected and must be available. However, the 8th Amendment does not require that all pain during its administration be eliminated because that would essentially render the death penalty void altogether. Id. at 11.

Relying upon Baze as its authority, the Court noted that the law requires that inmates identify an alternative medication that is readily available and one that has been shown to actually significantly reduce a substantial risk of pain. Baze v. Rees, 553 U.S. 35 (2008). Simply showing a “slightly or marginally safer alternative” will not suffice. Id. at 23. Baze involved a death penalty challenge to Kentucky’s three-drug protocol where inmates argued that improper administration of the first drug created a significant risk of harm in violation of the 8th Amendment; however, the inmates argued that this risk would be eliminated if Kentucky adopted a one-drug protocol with trained personnel continuously monitoring inmates. Id. at 22-23. The Court ruled against the inmates in Baze, holding that they must first show that a severe risk of pain exists and that this risk is substantial when compared to accessible alternatives. Id. at 23-24. This same burden was applied to Petitioners in Glossip to show that Oklahoma’s lethal injection protocol created an unacceptable risk of pain, but the Court concluded that they could not make such a showing. Glossip, 2015 U.S. LEXIS 4225, at 24-15. The Court also considered Oklahoma’s efforts in attempting to secure the two previous dispensed and acceptable medications and determined that the State extended a good-faith effort to obtain and utilize them to no avail.

Justices Scalia and Thomas agreed with the majority opinion but prepared separate concurring opinions in response to Justice Breyer’s lengthy dissent questioning whether the death penalty should be abolished entirely. Justice Scalia, with whom Justice Thomas joined, noted that Petitioners were convicted murderers who had been adequately afforded all of their constitutionally-protected rights and exhausted all available
legal remedies to challenge their convictions and sentences. He then went on to explain that the 5th Amendment and historical legal jurisprudence permit administration of the death penalty. Justice Thomas, with whom Justice Scalia joined, questioned the reliability of various empirical studies that Justice Breyer cited as a justification to reconsider the death penalty as a valid punishment. Moreover, Justice Thomas highlighted that the Court’s attention should instead focus on the fact that the Constitution permits the death penalty and that legal scholars should not deny families the right to such punishment when considering the crimes of various death row inmates, some of whom were spared execution by the Court on what he described as unfounded claims.

Justice Breyer issued a very lengthy dissent that Justice Ginsburg joined, whereby he mainly questioned whether the death penalty actually violates the Constitution on the grounds that one must measure cruel and unusual punishment utilizing modern standards and not those set forth centuries ago. Specifically, Justice Breyer noted what appear to be four constitutional defects occurring within the last forty years, including reliability issues; arbitrary application as to who receives the death penalty; the extensive delay it takes to actually carry out the death penalty, thereby reducing its actual purpose to punish; and the fact that most U.S. states have eliminated its practice. Justice Sotomayor also dissented for which Justices Ginsburg, Breyer, and Kagan joined. Justice Sotomayor gave validity to Petitioners’ claims that the use of midazolam in fact causes substantial and unconstitutional risks with exposure to severe pain that is consistent with a burning sensation. For this reason primarily, Justice Sotomayor disagreed with the Court’s decision to reject a stay of execution that would have permitted Petitioners to prove that midazolam is in fact inadequate for its intended purpose.

**Constitutional Right of Same-Sex Couples to Marry**


In what may have been the Supreme Court’s most publicized decision this term, the Court held that same-sex couples have a protected liberty interest to marry under the Due Process Clause of the Fourteenth Amendment. The relevant facts of *Obergefell v. Hodges* have been covered previously and are fairly straightforward: several same-sex couples desired to marry, but the states in which they resided forbade such marriages. Some couples traveled to other states to get married, but these marriages subsequently were not recognized in their home states. In the eyes of the law, therefore, all of these couples remained legally unmarried because of state laws forbidding same-sex marriage. The couples filed suit, arguing that the liberty protected by the Due Process Clause included the freedom to marry an individual of one’s own sex. The Sixth Circuit disagreed. The couples appealed, and a closely divided Supreme Court reversed the Sixth Circuit’s decision. The Court’s majority opinion was written by Justice Kennedy, joined by Justices Breyer, Ginsburg, Sotomayor, and Kagan. Each of the four dissenting justices—Roberts, Scalia, Thomas, and Alito—filed a dissenting opinion.

The Court’s opinion began by emphasizing the “transcendent importance of marriage” throughout human history, while also noting that the traditional “understanding that marriage is a union between two persons of the opposite sex.” Slip op. at 3–4. Yet, the opinion continued that marriage “has not stood in isolation from developments in law and society.” Slip op. at 6. It then traced some changes that had taken place in the institution of marriage, such as the disappearance of arranged marriages and the abolition of the law of coverture. Finally, it sketched out the controversies regarding same-sex marriage that have appeared in the legislatures and courts, culminating with the circuit split in the wake of *United States v. Windsor*, 133 S. Ct. 2675 (2013).
Having examined the history of same-sex marriage, the majority opinion turned to the legal arguments raised by those challenging the state laws. The liberty protected by the Due Process Clause includes “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” Obergefell, slip op. at 10. As the Court made clear in Loving v. Virginia, 388 U.S. 1 (1967), one of the personal choices protected by the Due Process Clause is the choice of whom to marry. However, the Court cases involving the right to marry had “presumed a relationship involving opposite-sex partners.” Slip op. at 11. In order to determine whether the right to marry also included the right of same-sex couples to marry, the Court looked at the “essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond.” Slip op. at 12.

The majority opinion identified “four principles and traditions” that made the right to marry a fundamental right. It then asked whether these principles and traditions applied with equal strength to same-sex marriage. First, the Court stated that the right to personal choice involving marriage is “inherent in the concept of individual autonomy.” Id. The Court held that this interest was present “for all persons, whatever their sexual orientation.” Slip op. at 13. Second, the Court recognized that “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.” Id. Drawing on Lawrence v. Texas, 539 U.S. 558 (2003), the Court stressed that same-sex couples have “the same right as opposite-sex couples to enjoy intimate association.” Obergefell, slip op. at 14. Although Lawrence was limited to one particular “dimension of freedom . . . it does not follow that freedom stops there.” Id. Instead, the freedom secured by Lawrence includes the right for same-sex couples to “define themselves by their commitment to each other.” Id.

The third reason to protect the right to marry is that the right “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.” Id. “Without the recognition, stability, and predictability marriage offers, [the children of same-sex couples] suffer the stigma of knowing their families are somehow lesser.” Slip op. at 15. The Court held that the challenged laws “harm and humiliate the children of same-sex couples,” and that the third rationale therefore also suggested that the Due Process Clause includes a right to marry for same-sex couples. Id. The fourth and final reason the Court gave for recognizing that marriage is a fundamental right was that “marriage is a keystone of our social order.” Slip op. at 16. The states have placed marriage “at the center of so many facets of the legal and social order,” such as taxation, property rights, and hospital access. Slip op. at 17. By then excluding same-sex couples from marriage, the states “teach[] that gays and lesbians are unequal in important respects.” Id. The Court thus concluded that all four factors suggested that the right to marry extended to same-sex couples, and that states could not deprive same-sex couples of that right.

The Court went on to state that, in addition to violating the Due Process Clause, state restrictions on same-sex marriage violate the Equal Protection Clause as well. The Due Process Clause and the Equal Protection Clause “are connected in a profound way.” Slip op. at 19. The Court held that the states’ marriage laws were “in essence unequal,” as same-sex couples were denied the benefits of marriage. Slip op. at 22. “Especially against a long history of disapproval of their relationships,” the Court continued, “this denial to same-sex couples of the right to marry works a grave and continuing harm.” Id. The Court then explicitly overruled Baker v. Nelson, 409 U.S. 810 (1972) that rendered a one-line holding that same-sex marriage did not present a substantial federal question.

The Court declined to accept the states’ argument that allowing same-sex marriage would decrease the number of opposite-sex marriages. Calling this argument “counterintuitive,” the Court noted that the states
failed to justify its conclusion that allowing same-sex couples to marry would cause any harm to opposite-sex couples. Slip op. at 26. On the contrary, in the Court’s view the cases “involve[d] only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.” Slip op. at 27.

By the time the Court reached the second question on which it had granted certiorari—whether the states had to recognize same-sex marriages performed out-of-state—the question was essentially answered. As the Court had already held that there was no lawful basis to prevent same-sex couples from becoming married, there was likewise “no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.” Slip op. at 28.

The four dissenting Justices took issue with various aspects of the Court’s opinion. The primary dissent—written by Chief Justice Roberts—criticized the Court for taking an activist role in the debate instead of allowing the democratic process to conclude.

**Constitutionality of Independent Redistricting Commissions**


The Supreme Court addressed the meaning of the Elections Clause this month in *Arizona State Legislature v. Arizona Independent Redistricting Commission*. In 2000, Arizona voters adopted Proposition 106, which vested redistricting authority in the Arizona Independent Redistricting Commission. The Arizona State Legislature challenged this law in court, asserting that Proposition 106 violated the Elections Clause of the United States Constitution. The Elections Clause provides that, “the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .” The Legislature argued that the term “Legislature” in the Elections Clause refers only to the “representative body which makes the laws of the people.” Slip op. at 2. The Commission countered that the term “encompasses all legislative authority conferred by the State Constitution, including initiatives adopted by the people themselves.” Slip op. at 2–3. Justice Ginsburg—joined by Justices Kennedy, Sotomayor, Kagan, and Breyer—delivered the opinion for the Court, siding with the Commission.

The Court’s opinion begins by tracing the history of direct lawmaking, noting that putting legislative power directly into the hands of citizens was “virtually unknown” when the Constitution was drafted. Slip op. at 3. This began to change in the late 19th century, as states began allowing voters to legislate directly via initiatives or referenda. Arizona followed this trend, and its state constitution establishes the electorate as a “coordinate source of legislation on equal footing with the representative legislative body.” Slip op. at 5.

After examining the history of the balance of legislative power within states, the Court turned to the first question presented: whether the Legislature had standing to bring the suit. The Court held that the Legislature had standing, as Proposition 106 “would completely nullify any vote by the Legislature” to adopt an alternative redistricting plan. Slip op. at 14. Prior to Proposition 106, the Legislature could have adopted its own redistricting plan. After Proposition 106, even a unanimous Legislature could not adopt a redistricting plan. “[L]egislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.” Slip op. at 14 (quoting *Raines v. Byrd*, 521 U.S. 811,
Here, the Court held that the Legislature’s vote was “completely nullified” by Proposition 106. Therefore, the Legislature had suffered a concrete injury that gave it standing to sue.

Having decided that the Legislature could bring its case, the Court moved on to the merits. The Court first distinguished a state’s lawmaking function from “instances in which the Constitution calls upon state legislatures to exercise a function other than lawmaking.” Slip op. at 17. Specifically, state legislatures perform three non-lawmaking functions: (1) an “electoral” function when choosing Senators (prior to the Seventeenth Amendment), (2) a “ratifying” function when deciding on proposed constitutional amendments, and (3) a “consenting” function in relation to the acquisition of lands by the federal government under Article I, Section 8, paragraph 17 of the Constitution. Id. A state legislature’s lawmaking function stands apart from these three functions and “must be in accordance with the method which the State has prescribed for legislative enactments.” Id. The Court stated that the Constitution thus uses the term “Legislature” in two different ways. When the term refers to the body that performs an electoral, ratifying, or consenting function, it means only the representative body of the state. On the other hand, when “Legislature” refers to the body that makes a state’s laws, it includes all parties involved in “the method which the State has prescribed for legislative enactments.” Id. After examining precedent, the court held that redistricting is a lawmaking function. Therefore, just like all other lawmaking functions, redistricting has to follow the rules that a State itself has prescribed. If a State chooses to include participants other than the state’s representative body in its redistricting process, the term “Legislature” in the Elections Clause respects that choice. Id. One of these participants can be the electorate. Slip op. at 19.

The Court next considered whether 2 U.S.C. Section 2a(c) had any bearing on the validity of Proposition 106. Prior to 1911, the decennial Congressional Apportionment Acts provided that states must follow federally proscribed procedures for redistricting unless “the legislature” of a state drew district lines. Slip op. at 19–20. This language changed in 1911, when Congress eliminated the reference to “the legislature,” and instead directed that a state must use federally-mandated redistricting procedures “until such State shall be redistricted in the manner provided by the law thereof.” Slip op. at 20. The Court, spurred by the 1911 Act’s context and legislative history, interpreted this change as leaving “the question of redistricting to the laws and methods of the States. If they include an initiative, it is included.” Slip op. at 21 (quotations omitted). Congress then used language “virtually identical” to the 1911 Act when it enacted Section 2a(c). Slip op. at 21. Therefore, as long as a state has redistricted “in the manner provided by the law thereof,” the resulting redistricting plan “becomes the presumptively governing map” under Section 2a(c). Slip op. at 22. As “Congress itself may draw a State’s congressional-district boundaries,” an argument might be made that Congress had used this power to allow redistricting by voter initiative by enacting Section 2a(c). Slip op. at 23. However, the Court’s holding that the Elections Clause itself permitted redistricting by initiative “left[ft] no arguable conflict between Section 2a(c) and the first part of the Clause.” Id.

Chief Justice Roberts wrote the primary dissent, joined by Justices Scalia, Thomas, and Alito. The dissent took issue with the majority’s reading of the term “Legislature,” accusing the Court of “gerrymander[ing] the Constitution.” Slip op. at 2 (Roberts, C.J., dissenting). The Chief Justice would instead have read “Legislature” to mean only “the representative body which makes the laws of the people.” Slip op. at 3 (Roberts, C.J., dissenting). Justice Scalia, joined by Justice Thomas, filed a separate dissent, arguing that the Legislature lacked standing to bring its case. Slip op. at 1 (Scalia, dissenting). Nonetheless, Scalia joined the Chief Justice’s dissent because he regarded the majority’s opinion as “outrageously wrong.” Slip op. at 6 (Scalia, J., dissenting). Justice Thomas also penned a dissent, joined by Justice Scalia. Thomas opined that the
Court had typically displayed a “lack of respect for ballot initiatives” and called the majority’s current approach “faux federalism.” Slip op. at 2, 4 (Thomas, J., dissenting).

Disparate Impact Claims Cognizable Under the Fair Housing Act

_Texas Department of Housing and Community Affairs v. Inclusive Communities Project, No. 13-1371 (U.S. June 25, 2015)_

The Supreme Court clarified this month that disparate impact claims can be brought under the Fair Housing Act (FHA). The FHA provides tax credits to real estate developers who build low-income housing. These credits are distributed through state agencies. The Texas Department of Housing and Community Affairs (Department) had adopted a mix of federally-mandated and state-specific criteria for deciding who gets these credits. In 2008, The Inclusive Communities Project (Project) brought a disparate impact suit against the Department under Sections 804(a) and 805(a) of the FHA. The Project alleged that the Department had granted too many tax credits in predominantly black inner-city neighborhoods. It wanted the Department to modify its selection criteria to encourage construction companies to build more low-income housing in suburban areas. The district court found that the Project successfully established a prima facie case of disparate impact. The district court then placed the burden on the Department to prove that it had no less discriminatory alternatives to advance its proffered interests. In the view of the district court, the Department failed to make this showing. The Department appealed, and the Fifth Circuit held that disparate impact claims were cognizable under the FHA. However, the circuit court reversed the claim on the merits, holding that the district court erred by placing the burden on the Department to show that there were no less discriminatory alternatives. The Department appealed the disparate impact question, and the Supreme Court granted certiorari.

Section 804(a) of the FHA prevents an individual from refusing to sell, rent, or negotiate for, or from “otherwise mak[ing] unavailable or deny[ing] a dwelling to any person because of race . . . .” Section 805(a) similarly makes it unlawful for anyone who deals in real estate as a business “to discriminate in making available [a real estate transaction], or in the terms or conditions of such a transaction, because of race . . . .” To determine whether these two statutes allowed disparate impact claims, the Court looked to its prior disparate impact cases, which were decided in the employment context. These cases instructed that “antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.” Slip op. at 10. Moreover, even when disparate impact claims can be brought, these claims must be “limited” so that individuals and public entities can continue to make practical business or policy decisions. _Id._ Therefore, before a court rejects a proffered business justification, the plaintiff must show “an available alternative . . . practice that has less disparate impact and serves the entity’s legitimate needs.” _Id._ (quotations omitted).

Justice Kennedy wrote the opinion for the Court’s five-member majority. The Court began by holding that the first indicator that disparate impact claims should be allowed—the use of results-oriented language—was present here. By using the phrase “otherwise make unavailable,” Congress was referring to the consequences of an action rather than the actor’s intent. Slip op. at 11. Although the Department argued that the use of the phrase “because of race” implied purpose and thus precluded disparate impact liability, the Court rejected this argument. In prior cases, the Court had allowed disparate impact liability even for statutes that used identical “because of . . .” language. Additionally, Congress amended the FHA in 1988, after all nine Courts
of Appeals had held that the FHA included disparate impact liability. Yet Congress did not amend the relevant statutory language. The Court called this “convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability [existed].” Slip op. at 14. Moreover, the 1988 amendments “included three exemptions from liability that assume the existence of disparate-impact claims.” Id. The Court viewed this as an indication that Congress presupposed disparate impact liability under the FHA.

The Court then moved on to the FHA’s “central purpose”: “eradicat[ing] discriminatory practices within a sector of our Nation’s economy.” Slip op. at 17. Disparate impact liability, the Court said, allows private developers to achieve the FHA’s objectives by preventing municipalities from enforcing ordinances that are, in effect, discriminatory. Discriminatory impact liability also provides an avenue for uncovering discriminatory intent. As (1) the statutory text of the FHA referred to the consequences of actions and (2) disparate impact liability furthers the purposes of the FHA, the Court held that discriminatory impact liability exists under the statute.

Having established that the FHA permits disparate impact liability, the Court commented on the merits of the case before it. Calling the Project’s theory of liability “novel,” the Court emphasized that housing authorities and private developers must be given “leeway to state and explain the valid interest served by their policies.” Slip op. at 18. These parties must “be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.” Slip op. at 19. Therefore, “a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity.” Slip op. at 19–20. “A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.” Slip op. at 20. If, on remand, the Project “cannot show a causal connection between the Department’s policy and a disparate impact—for instance, because federal law substantially limits the Department’s discretion—that should result in dismissal of this case.” Slip op. at 21.

Two justices wrote dissents. Justice Thomas wrote for himself, arguing principally that Griggs v. Duke Power Co., 401 U.S. 424 (1971), should be restrained, if not overruled. Griggs was the case in which the Court ruled that Title VII of the Civil Rights Act allowed disparate impact claims. Justice Alito also dissented, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas. These dissenters would have held that the language of the FHA does not create disparate impact liability.

Validity of Facial Challenges to Statutes Under the Fourteenth Amendment


This case is being included primarily for those who advise law enforcement agencies and officials, or any other agencies that typically encounter Fourth Amendment issues while carrying out their duties.

The Supreme Court issued an important ruling on how Fourth Amendment challenges can be brought, striking down a Los Angeles ordinance that required hotel operators to turn guest records over to police officers. Los Angeles Municipal Code (LAMC) Section 41.49(2) required hotel operators to keep records of guests’ names, vehicle information, and party size. A separate part of the ordinance, Section 41.49(3)(a), further required hotel operators to turn these records over to police upon request. A group of hotel operators sued the City, arguing that Section 41.49(3)(a) violated the Fourth Amendment. The Ninth Circuit, sitting en banc, ruled in favor of the hotel operators. The circuit court held that Section 41.49(3)(a) was
facially unconstitutional because it authorized inspections without affording a hotel an opportunity for judicial review before penalties were imposed for refusing to comply. In an opinion by Justice Sotomayor, the Court affirmed.

Justice Sotomayor began her opinion by noting that facial challenges under the Fourth Amendment are not categorically barred or especially disfavored. On the contrary, the Supreme Court has repeatedly allowed facial challenges under the Fourth Amendment. The City had argued that a facial challenge could not proceed because—even if a statute is generally unconstitutional—there must be some instances where a search under the statute is justified by an exception to the Fourth Amendment (for example, by an exigent circumstance). The Court squarely rejected this argument. When evaluating the facial validity of a statute authorizing searches, the proper scope of inquiry encompasses only “searches that the law actually authorizes, not those for which it is irrelevant.” Slip op. at 8. Therefore, searches that would have been legal even without the law need not be considered.

After concluding that a facial challenge to the City’s ordinance was permissible, the Court moved on to the constitutional merits of the hotel operators’ claims. In order for an administrative search to be valid (absent consent or exigent circumstances), the subject of the search must have an opportunity for pre-compliance review. Section 41.49(3)(a) gave hotel operators no such opportunity. The Court thus held that the ordinance was invalid.

The Court noted several other arguments raised by the City that failed. Specifically, both the City and a dissent by Justice Scalia argued that hotels were “closely regulated,” and searches of them were therefore evaluated under a relaxed standard. The Court noted that several unique regulations do apply to hotels, but that the same could be said for almost any business. To classify hotels as closely regulated “would permit what has always been a narrow exception to swallow the rule.” Slip op. at 14.

Even if hotels were subject to the relaxed standards of closely regulated businesses, the Court stated that it still would have struck down the ordinance as unnecessary. The City claimed that it needed the ordinance to prevent hotel owners from falsifying records after they had become aware of an impending search. However, this concern alone failed to justify the law. Less constitutionally concerning statutory alternatives are available: an officer could obtain an ex parte warrant or guard a hotel operator’s registry while the operator went through pre-compliance review. Therefore, the ordinance was not necessary and would have failed to pass muster even under the relaxed standard that applies to closely regulated businesses.

**OTHER FEDERAL CASES—DECIDED**

**Post-9/11 Detention of Immigrants and Equal Protection**


The Second Circuit allowed several plaintiffs to proceed with their case against a group of government officials alleging illegal detentions that were carried out in the wake of 9/11. The complaint alleges that, after 9/11, then-Attorney General John Ashcroft developed a policy mandating the arrest of any Muslim or Arab man who was encountered during the investigation of a tip received in the 9/11 terrorism investigation and who was a non-citizen who had violated the terms of his visa. Ashcroft also implemented the “hold-until-cleared” policy, requiring that individuals arrested in the 9/11 investigation not be released from custody until
they were cleared of terrorist ties. Slip op. at 11. The complaint refers to men held under these two policies as “9/11 detainees.” The plaintiffs here were detained as a result of these policies and held at the Metropolitan Detention Center (MDC). MDC placed the 9/11 detainees in “a particularly restrictive type” of administrative separation called ADMAX SHU. Slip op. at 12. ADMAX segregation included physical and psychological abuse, as well as living conditions far inferior to those in a regular prison. The plaintiffs sued the DOJ and MDC officials who they claimed had responsibility for their detentions. The district court dismissed the claims against the DOJ officials but allowed claims to proceed against MDC officials under several legal theories, including (1) a substantive due process conditions of confinement claim, (2) an equal protection conditions of confinement claim, (3) a free exercise claim (for depriving them of copies of their religious texts), (4) an unreasonable strip search claim, and (5) a conspiracy claim. Slip op. at 25. MDC appealed this decision and the plaintiffs cross-appealed the dismissal of the suit against the DOJ officials.

With the exception of the conspiracy claim, all of the plaintiffs’ legal arguments were grounded in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Second Circuit follows a two-step process to determine whether a *Bivens* remedy is available. First, the court asks if the underlying claims extend *Bivens* into a “new context.” Slip op. at 29. If the answer is yes, the court then considers (1) whether there is an alternative remedial scheme available to the plaintiff, and (2) whether special factors recommend hesitation in creating a *Bivens* remedy. Slip op. at 29.

In order to determine what the “context” of the plaintiffs’ claims was, the court looked to “the rights injured and the mechanism of the injury.” Slip op. at 30. By doing so, the court rejected the defendants’ argument that the proper context was “the nation’s response to an unprecedented terrorist attack.” *Id.* Instead, the court viewed the context of the claims as “federal detainee Plaintiffs, housed in a federal facility, allege that individual federal officers subjected them to punitive conditions.” Slip op. at 31–32. This claim stood firmly within the traditional *Bivens* context. The plaintiffs’ conditions of confinement claims could thus proceed. Similarly, the strip search claim fell squarely within *Bivens* traditional context. However, for the free exercise claim, the circuit court noted that the Supreme Court had “declined to extend *Bivens* to a claim sounding in the First Amendment.” Slip op. at 36 (quotations omitted). The court therefore dismissed the plaintiffs’ free exercise claim but found that plaintiffs could at least state a cause of action under *Bivens* for their other claims.

Having found that the plaintiffs could state a cause of actions under *Bivens*, the court moved to the question of whether the plaintiffs had stated a cause of action. The court turned first to the due process argument against the DOJ defendants, acknowledging that those defendants “did not create the particular conditions in question.” Slip op. at 40. The complaint did allege, however, that the DOJ defendants chose to merge a list of illegal aliens in New York who were being confined without suspicion of terrorist ties with an Immigration and Naturalization Services list of illegal aliens who were suspected of having terrorist ties. This caused those on the New York list to remain in punitive confinement, even though the DOJ knew that they had no ties to terrorism. The second circuit concluded that this “plausibly plead[ed] punitive intent” was necessary to state a due process claim. Slip op. at 42. The court then considered whether the plaintiffs also had a claim against the MDC defendants. The plaintiffs did have such a claim, the court concluded, because the defendants housed the 9/11 detainees “for extended periods of time in highly restrictive conditions without ever obtaining individualized information that would warrant this treatment.” Slip op. at 74.

The court next considered the plaintiffs’ equal protection claims. The court held that the DOJ’s “condonation of the New York FBI’s discriminatory formulation of the New York list,” resulting in the 9/11 detainees being arrested and subject to harsh prison conditions, sufficed to infer a discriminatory intent. Slip
op. at 85. For the MDC defendants, the complaint included allegations that those defendants falsely certified that the 9/11 detainees were terrorist suspects when, in fact, they were not. The court held that this too gave rise to an inference of discriminatory intent. The complaint also successfully alleged that the MDC defendants subjected the plaintiffs to unnecessary strip searches.

Finally, the court reached the conspiracy claim. The MDC defendants claimed that they were legally incapable of conspiring with the DOJ because all of them were “part of the same governmental entity.” Slip op. at 103. At this stage of the litigation, the court rejected this claim because the defendants “had varied responsibilities and functions.” Slip op. at 104.

Prisoners’ Rights to Practice Religion Under RLUIPA


The Ninth Circuit was called upon to resolve the tension between a state prison’s housing policy created under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the Equal Protection Clause of the Fourteenth Amendment. Dennis Walker was incarcerated in a California state prison and is also a “devout racist.” Slip op. at 3. This racism found expression in his religion—Odinism—which forbids its followers from interacting with other races. Slip op. at 4. In addition, the practice of Odinism requires a “warding ritual” that cannot be performed in front of non-white individuals. California employs a prison housing policy that provides a strong presumption that prisoners are “racially eligible,” meaning that they can be housed with members of other races. When Walker went to prison, the prison classified him as racially eligible. Walker was assigned a non-white cellmate. He subsequently refused this assignment, contending that having a non-white cellmate would prevent him from performing his religious warding ritual. This refusal led to disciplinary action. Walker sued the prison, claiming the housing policy rendered him unable to practice his religion and thus violated his rights under the First Amendment and RLUIPA. The district court dismissed Walker’s claim, and he appealed to the Ninth Circuit.

Plaintiffs who proceed under RLUIPA must show (1) that they take part in a “religious exercise,” and (2) that the State’s actions have substantially burdened that exercise. Slip op. at 12. If a plaintiff makes this showing, the State must then show that its actions were the least restrictive means of furthering a compelling state interest. *Id.* The circuit court’s opinion begins by considering whether Walker’s warding ritual is a valid “religious exercise” under RLUIPA. *Id.* The court succinctly found that the ritual was a “prototypical religious exercise” as a “physical act intended to bring about communication with a deity.” Slip op. at 12–13. The court then went on to consider whether the State’s classification of Walker as racially eligible substantially burdened his religious exercise. Walker claimed that a prison regulation impaired his ability to perform his religious ritual. He then accepted prison discipline instead of conforming to the regulation. This discipline included “a rules violation report and placement in administrative segregation.” Slip op. at 14. These punishments “placed [Walker] under pressure to conform,” and therefore burdened his religious exercise. Slip op. at 14–15.

As Walker had made the required showings under RLUIPA, the burden shifted to the State to show that its classification scheme was the least restrictive means of furthering a compelling government interest. The State asserted “only a single compelling interest: complying with constitutional restrictions on race-conscious action.” Slip op. at 15. The court held that this interest sufficed. In *Johnson v. California*, 543 U.S. 499 (2005), the Supreme Court held that California’s previous race-conscious prison housing policy that included express racial qualifications was subject to strict scrutiny. California responded by changing its housing policy to the
one Walker challenged here. The State argued that exempting Walker from the policy “would undermine the policy’s efficacy and potentially violate the equal protection rights of non-white inmates.” Walker, slip op. at 16. The court acknowledged that compliance with the Constitution could be a compelling state interest. However, the court declined to determine “the exact probability of constitutional harm” necessary to give the State a compelling interest. Slip op. at 17. The court instead noted that the State had shown an “objectively strong legal basis” for believing that exempting Walker would violate equal protection. Id. This qualified as a compelling interest for refusing to provide Walker with an exemption. The court further held that Walker had provided no alternative to an exemption, and as such the State had no other less-restrictive means to choose from to accomplish its compelling interest. Although the government must prove that its policy is the least-restrictive means, “it is under no obligation to dream up alternatives that the plaintiff himself has not proposed.” Slip op. at 18 (quotations omitted). While the court admitted that it may be possible for the State to maintain its race-neutral housing policy and offer some accommodation for Walker, Walker had proposed no such accommodation. As such, the State’s actions were the least restrictive means of furthering its compelling interest. Walker therefore failed to state a claim under RLUIPA.

Having disposed of Walker’s RLUIPA claim, the court moved on to consider his First Amendment claim. Under the Free Exercise Clause, the State can only abridge a prisoner’s exercise of religion if that abridgement is “reasonably related to legitimate penological interests.” Slip op. at 20. Potential legal liability may constitute such an interest. The court also listed several other concerns that weigh against giving Walker an exemption. First, the connection between avoiding liability and denying Walker’s exemption was “substantial,” given the relationship between the Johnson ruling and California’s prison housing reform. Walker, slip op. at 21. Second, exempting Odinists from the policy without providing exemptions to inmates of other races and religions might “exacerbate tensions within California prisons and endanger guards.” Id. Lastly, Walker offered no alternatives to the exemption that would mitigate the liability concern. Id. Taking into account all of these issues, the court held that the State had a legitimate penological interest in refusing Walker’s exemption. As such, Walker had failed to state a claim under the First Amendment.

**Application of General Statutes to Native American Tribes**


The Sixth Circuit issued two opinions this month that may prove informative to offices that regularly deal with Native American tribes. Both cases involved essentially the same question: Does the National Labor Relations Act (NLRA) apply to Native American casinos?

In the first case, _NLRB v. Little River Band_, the court held that the NLRA did apply to these types of casinos. The Little River Band of Ottowa Indians is a federally recognized Indian tribe with lands in the state of Michigan. In 2005, the Band’s Tribal Council enacted a Fair Employment Practices Code, which regulates collective bargaining. This Code applied to all employees of a casino owned by the tribe. Most of these employees did not work for the tribe. Some provisions of the Code purported to prohibit employee strikes, boycotts, and other actions. Eventually, the NLRB challenged the Code, alleging that certain sections of it violate the NLRA. The Band appealed to the Sixth Circuit.
The court began its analysis with *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), in which the Supreme Court held that a general statute typically applies to Indians and their property interests. *Little River Band*, slip op. at 5 (quotations omitted). The Ninth Circuit, in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), later noted three exceptions to this general rule. Under the *Coeur d'Alene* framework, general statutes do not apply to Indian tribes if (1) the law touches exclusive rights of self-government in purely intramural matters, (2) application of the law would abrogate treaty rights, or (3) the statutory language or legislative history prove that Congress did not mean to apply the law to Indian tribes. *Little River Band*, slip op. at 5.

In *Little River Band*, the Sixth Circuit adopted the *Coeur d'Alene* framework. The court noted that tribal sovereignty “is subject to complete defeasance by Congress.” Slip op. at 15. The *Coeur d'Alene* framework, the court reasoned, recognizes “a stark divide between tribal power to govern the identity and conduct of its membership, on the one hand, and to regulate the activities of non-members, on the other.” Slip op. at 17. The presumption that generally applicable statutes apply to Indian tribes “reflect[s] Congress's power to modify or even extinguish tribal power to regulate the activities of members and non-members alike.” Slip op. at 18. When a tribe is affected by a statute, the tribe can then show that the statute should not apply to it. Having found the *Coeur d'Alene* framework appropriate, the court determined that the NLRA did not fall within one of the three outlined exceptions and therefore applied to the Band. One judge dissented, arguing that the majority’s adoption of *Coeur d'Alene* accommodated neither tribal sovereignty nor Congressional authority over Indian affairs.

The second case, *Soaring Eagle Casino and Resort v. NLRB*, came just a few weeks after *Little River Band*. Again, the question concerned whether the NLRA applied to tribal casinos. The Saginaw Chippewa Indian Tribe of Michigan owned the Soaring Eagle Casino and Resort. The Tribe implemented a no-solicitation policy at the Casino that the NLRB claimed violated the NLRA. The Tribe appealed to the Sixth Circuit.

The panel of judges that heard *Soaring Eagle* acknowledged that it was “bound by” the holding in *Little River Band*. Therefore, the panel felt itself constrained to “conclude in this case that the Casino operated by the Tribe on trust land falls within the scope of the NLRA.” *Soaring Eagle*, slip op. at 17. Yet the panel did not stop there; it went on to note its disagreement with the *Little River Band* majority’s adoption of *Coeur d'Alene*. The panel thus set out its own analytical approach to determining whether a general statute applies to an Indian tribe—an approach it believed was “most consistent with Supreme Court precedent and Congress's supervisory role over the scope of Indian sovereignty.”

Although the *Little River Band* panel began with *Tuscarora*, the *Soaring Eagle* panel began with *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, the Supreme Court established the general rule that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, when such activity occurs on land not owned by a member or held in trust for the tribe.” *Soaring Eagle*, slip op. at 20 (quotations omitted). The Supreme Court also set out two exceptions to this general rule: (1) regulation of nonmembers who enter into consensual relationships with the tribe, and (2) regulation of nonmembers whose actions have “some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* In these two circumstances, a tribe can regulate nonmembers even on non-tribal lands.

The *Soaring Eagle* panel set out the following framework, which it believed *Montana* mandated. When a statute of general applicability affects Indian tribes, the court must first “determine whether Congress has demonstrated a clear intent that a statute of general applicability will apply to the activities of Indian tribes.”
Slip op. at 23. If Congress has demonstrated this intent, the inquiry ends. Congress has the authority to legislate for the Indian tribes in all matters. If Congress has not demonstrated this intent, the court moves on to determining whether the general statute impinges on the “[t]ribe’s control over its own members and its own activities.” *Id.* If the answer to this question is yes, the statute does not apply against the Tribe. On the other hand, a statute that does not impinge on this tribal sovereignty causes the *Montana* presumption—that tribal authority does not extend to non-tribal members on non-tribal lands—to arise. The tribe may then show that one of the two exceptions to the *Montana* rule applies. If one of these two exceptions applies, the statute does not apply to tribal conduct.

The *Soaring Eagle* panel then applied the *Montana* framework to the case before it. The NLRA was “a statute of general applicability,” and Congress had not specifically demonstrated an intent to include or exclude Indian tribes. Slip op. at 24. Furthermore, the employee at question did not belong to the Tribe, and therefore the case did not involve the “Tribe’s control over its own members.” *Id.* The panel then considered whether either of the two *Montana* exceptions existed. It concluded that, “under an appropriate analytical framework,” the “consensual commercial relationship” exception should apply to this case. *Id.* Had the panel been “writing on a clean slate,” it would have concluded that the Tribe’s inherent sovereign authority allowed it to set the conditions of employment with nonmembers working at “a purely tribal enterprise located on trust land.” Slip op. at 27. Yet the panel was not writing on a clean slate. It thus turned to the *Little River Band* majority opinion.

At this point, the panel identified several errors that it believed were inherent in the *Coeur d’Alene* framework. The panel suggested that this framework “unduly shifts the analysis away from a broad respect for tribal sovereignty,” based only upon a “single sentence from *Tuscarora.*” Slip op. at 32. The panel “doubt[ed] *Tuscarora* can bear the weight placed upon it by the *Coeur d’Alene* framework,” noting that even the *Coeur d’Alene* court accepted that the sentence “may be dictum.” Slip op. at 32–33. In the panel’s view, the *Coeur d’Alene* framework “create[d] an analytical dichotomy between ‘core’ tribal concerns and those lying on the ‘periphery’ of tribal sovereignty.” Slip op. at 34. This dichotomy “distorts the crucial overlap between tribal commercial development and government activity that is at the heart of the federal policy of self-determination.” *Id.* Taking into account these perceived flaws, the panel concluded that, if it had a choice, it would “choose not to adopt [*Coeur d’Alene*].” *Id.* Nonetheless, bound as it was by *Little River Band*, the court affirmed that the NLRA does indeed apply to casinos operated on tribal land that employ non-tribal members.

**Sex Discrimination in Hiring Prison Officials**


The Ninth Circuit permitted the State of Washington’s practice of female-only staffing of some guard positions in female prisons in *Teamsters Local Union No. 117 v. Washington Department of Corrections*. In order to reduce the potential for sexual abuse, the Washington Department of Corrections designated a number of guard-post assignments in prisons that were exclusively female. A group of male prison guards filed a suit challenging this designation as a violation of the Equal Protection Clause of the Fourteenth Amendment. The district judge who heard the case granted summary judgment to the Department, reasoning that the gender was a bona-fide occupational qualification (BFOQ) of several guard positions in female prisons. The male prison guards appealed, and the case came before the Ninth Circuit.
Title VII of the Civil Rights Act generally prohibits employment practices that discriminate on the basis of sex. However, a facially discriminatory practice may stand if sex is a BFOQ. To qualify for the BFOQ exception, an employer must show (1) that the qualification justifying the discrimination is “reasonably necessary to the essence of [the employer's] business,” and (2) that sex is a “legitimate proxy” for determining whether an employee has the necessary job qualifications. Slip op. at 14. Although the Ninth Circuit called this legal test “demanding,” it noted that the unique context of prison employment gives prison officials slightly more leeway in developing sex-based employment classifications. In order for the Department to qualify for the BFOQ exception, it had to show an “objective basis in fact for its belief that gender discrimination is ‘reasonably necessary’—not merely reasonable or convenient—to the normal operation of its business.” Slip op. at 16 (internal quotations omitted). When evaluating the Department’s decision, the court emphasized that deference is due to prison officials as long as their decisions are the result of “reasoned decision making.” As the Department had hired experts, consulted with other states, reviewed relevant caselaw, documented and investigated misconduct allegations, and sought advice from the Human Rights Commission, its “exhaustive process fit[] well within the rubric of ‘reasoned decision making.’ ” Slip op. at 17. Therefore, the Ninth Circuit gave “some deference” to the Department’s decision.

The question of deference did not end the court’s inquiry. Moreover, the court moved on to the BFOQ analysis. First, the court examined whether the sex-based classification was “reasonably necessary” to run a prison. The Department put forward several “interrelated objectives” for its policy: preventing sexual abuse, ensuring security of inmates and staff, and protecting inmate privacy. The Ninth Circuit held that all of these were reasonably necessary to the essence of operating Washington’s women’s prisons. Slip op. at 23. Having answered the first prong of the BFOQ analysis, the court went on to consider whether sex was an “objective, verifiable job qualification” for the position. Slip op. at 25. Under Ninth Circuit precedent and Washington law, male guards could neither (1) conduct non-emergency strip searches of inmates, nor (2) observe inmates while showering, toileting, dressing, or collecting urine samples. This meant that men were unable to conduct many of the tasks necessary to the positions that the Department had designated as female-only. Being female was thus an “objective, verifiable job qualification” for these positions. The Department had shown that sex was a BFOQ of the positions that were designated female-only, and the Ninth Circuit therefore affirmed the district judge’s grant of summary judgment to the Department.

**Applicability of ADA to Short-Term Impairments**


The Third Circuit, in an unpublished opinion, held that the ADA Amendments Act (ADAAA) extended the definition of a disability under the ADA to include temporary injuries. Chaka Matthews, a prisoner in Pennsylvania, began experiencing ankle pain in 2011. A doctor at the prison diagnosed Matthews with Achilles tendonitis. Eventually, Matthews received crutches and a cast for his ankle. Matthews then asked for a wheelchair and to be moved to a lower bunk, but both of these requests were denied. Matthews’s complaint claimed that this limited his participation in activities, forced him to miss meals, and led to a fall down the stairs. He subsequently sued the Pennsylvania Department of Corrections under the ADA, alleging that the Department failed to make reasonable accommodations for his disability. The district court (adopting the report and recommendation of a magistrate) dismissed the case, holding that Matthews had not suffered a “disability” under the ADA because his injury “was both minor in its restrictions and lasted only a few months.” Slip op. at 5. Matthews subsequently appealed.
The ADA and the Rehabilitation Act define a “disability” as “a physical or mental impairment that substantially limits one or more major life activities.” 42 U.S.C. Section 12102(1)(A). The case thus turned on whether Matthews’s injury “substantially limit[ed]” a “major life activity.” Before the ADAAA, the Supreme Court and the EEOC had interpreted the term “disability” to only encompass long-term or permanent impairments. However, in 2008 Congress passed the ADAAA, clarifying that the term “disability” should be liberally construed. The court therefore found that temporary impairments may qualify as “disabilities,” eschewing a categorical approach in favor of “an individualized assessment of the effect of the impairment on the life of Matthews.” Here, the court emphasized its generous interpretation of Matthews’s complaint, noting that it read the complaint to indicate that Matthews was at times immobilized by his injury and thus unable to attend meals or travel to a phone. This allegation sufficed to state a claim that Matthews suffered a “disability.” Matthews’s complaint also claimed that prison officials could have accommodated his injury by moving him to a lower bunk on the lower level of the prison but that they failed to do this. Because Matthews alleged that his injury caused a substantial impairment in major life activities and that the Department failed to provide reasonable accommodation, his ADA claim survived the Department’s motion to dismiss.

Adverse Employment Actions in the Educational Context


The Second Circuit held that denying tenure to an employee can qualify as an adverse employment action, even if that denial is accompanied by an offer to keep the employee on staff for an extended probationary period. The plaintiff in _Tolbert v. Smith_, Rickey Tolbert, taught culinary classes at John Marshall High School. The School imposed a three-year probationary period on hired teachers. During this probationary period, Tolbert received several adverse evaluations that he claimed were based upon his race. At the end of his probation, Tolbert was not offered tenure—again, according to his complaint, for racial reasons. However, the School did offer him an extra year of probation. Tolbert refused the School’s offer and sued for employment discrimination. The district court dismissed Tolbert’s claim, holding that he had failed to allege an adverse employment action. Tolbert appealed, and the case was heard before the Second Circuit.

Tolbert sought to show discriminatory intent through indirect evidence via the framework established in _McDonnell Douglas Corp. v. Green_, 411 U.S. 792 (1973). To establish a prima facie case of discrimination under _McDonnell Douglas_, Tolbert had to show that (1) he belonged to a protected class, (2) he was qualified for the position he held, (3) he suffered an adverse employment action, and (4) the adverse employment action occurred in circumstances giving rise to an inference of discriminatory intent. The district court held that Tolbert did not suffer an adverse employment action because his denial of tenure was accompanied by an additional year of probation. As the conditions of Tolbert’s employment would not have materially changed had he accepted the school’s offer (he just would have spent an additional year in exactly the same spot he was before), the district court reasoned that extending the probationary period was not an adverse employment action. However, the Second Circuit held that this analysis was flawed.

Under Second Circuit precedent, a denial of tenure alone constitutes an adverse employment action. By intertwining the denial of tenure with an offer of a fourth year of probation, the School exposed Tolbert to one more year in which he could be terminated “for any lawful reason.” _Tolbert_, slip op. at 15. Although this offer did not leave Tolbert worse off than he was in the previous year, it did leave him worse off than he would have been had he received tenure. Tenured teachers can only be fired “for cause.” Slip op. at 16.
Therefore, by denying Tolbert tenure, the School denied Tolbert the same level of job security that he would otherwise have had. The Second Circuit noted that, if it accepted the defendant’s interpretation of “adverse employment action,” any claim alleging the denial of an employment benefit (such as a failure-to-promote claim) would become non-actionable. Slip op. at 16. Taken as a whole, the School’s action left Tolbert in a worse position than he would have been had he received tenure. Therefore, the Second Circuit held, if this action was taken for a discriminatory reason, it was unlawful. Slip op. at 18. For this determination to be made as to the discrimination claim, the court remanded for further proceedings.

Voting Rights Act—Vote Dilution


Although a district court in Louisiana found “substantial ground to support a conclusion . . . [of] *de facto* discrimination” in a Louisiana state districting system, the court ruled against the plaintiffs in a suit under the Voting Rights Act (VRA). Five judges serve the City of Baton Rouge. Each judge runs for one of five judicial spots: A, B, C, D, and E. A judge can only run for one spot, and each spot is occupied by the judge who receives the most votes for that position. The current districting scheme splits the City into two voting sections. Election Section 1 chooses judges B and D, while Election Section 2 chooses judges A, C, and E. The state legislature enacted the current scheme in 1993; since that date, all candidates elected in Election Section 1 have been black and all candidates elected in Election Section 2 have been white. This means that the City’s judiciary has consistently been composed of two black judges and three white judges since 1993. However, the population demographics have changed drastically in that time. As of 1990, the City was 43.9% black and 53.9% white. Slip op. at 5. Now (or at least as recently as the 2010 census), the city is 54.5% black and 39.4% white. *Id.* Nonetheless, the racial makeup of the judiciary remains the same. A group of plaintiffs brought suit against the State of Louisiana and several state officials, arguing that the current districting system violates Section 2 of the VRA.

Courts apply a two-step framework when analyzing claims under Section 2. First, plaintiffs must satisfy the test set forth by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). To do so, plaintiffs must show: “(1) the affected minority group is sufficiently large and geographically compact to constitute a voting age majority in a district; (2) the minority group is politically cohesive; and (3) the majority group votes sufficiently as a bloc that it is able—in the absence of special circumstances—usually to defeat the minority group's preferred candidate.” *Hall*, slip op. at 7–8. If plaintiffs can meet the *Gingles* test, they then have an opportunity to show—by a preponderance of the evidence—that because of the totality of the circumstances, the challenged plan results in a denial of the right to vote based on color or race. Slip op. at 9–10.

The court proceeded to apply the *Gingles* test to the plaintiffs’ case here. *Gingles* first requires that plaintiffs show that their minority group is large and geographically compact enough to constitute a voting age majority in a district. The plaintiffs provided two alternative districting plans that created a majority-minority district, and the court found that the districts created by the plans were “compact and reasonably shaped and sized single-member district[s] that retain[ed] a natural sense of community, in which African Americans would constitute a majority of the voting age population.” Slip op. at 12. The plaintiffs had thus satisfied the first prong of *Gingles*.

The court then moved on to the second and third prongs of *Gingles*, involving the voting behavior of the majority and minority group members. The court first noted that no strict doctrinal test exists for determining whether a racial group votes as a bloc. Furthermore, there is no “strict minimum” of elections a
court must consider to complete the *Gingles* analysis. Slip op. at 13. Nonetheless, at some point the number of election results plaintiffs present is too small to allow the court to determine whether racial bloc voting exists. The plaintiffs in this case had introduced the results from three elections concerning the challenged offices (so-called “endogenous” elections): two primaries and a runoff, all in the same 2012 election. The fact that all three results came from the same election “weigh[ed] heavily against their probativeness,” especially because all three contests occurred within a roughly one-month period. Slip op. at 14. These three contests, standing alone, did not present a sufficient body of evidence to fulfill the second and third prongs of *Gingles*.

As the endogenous election data alone did not fulfill *Gingles*, the court went on to consider data from elections in which the same voters chose other judicial officers (“exogenous” judicial elections). Specifically, the court considered how the City voters behaved in the state court of appeals and state supreme court elections. The plaintiffs’ expert testified that these—along with the three endogenous elections—were the only recent biracial elections proper to the *Gingles* analysis. The court agreed to an extent: it admitted that exogenous judicial elections carried more probative value than other kinds of elections (for example, those for senators). However, the four exogenous elections the plaintiffs offered were “just as temporally limited as the endogenous races.” Slip op. at 16. Once again, all of these results came from the same 2012 election. Therefore, even the endogenous election data and exogenous judicial election data together did not show the racial bloc voting necessary for *Gingles*. The court thus found it proper to consider exogenous non-judicial election results. These results included the voters’ choices for mayor, constable, and president.

Both parties’ experts testified that African Americans voted cohesively, and the court had little trouble adopting that conclusion. Slip op. at 20. The second prong of *Gingles* was therefore satisfied. However, the evidence diverged on whether white voters also voted as a bloc. To determine whether white voters tended to vote as a racial bloc, the defendant’s expert used a threshold approach. In this approach, white voters only voted as a bloc if at least 60% of them chose a non-African American candidate in a two-person election. The court rejected this classification rule, instead noting that non-minority voters need only vote “sufficiently as a bloc to usually defeat the minority group’s candidate of choice” in order to satisfy the third prong of *Gingles*. Slip op. at 23 (emphasis in original). This analysis focuses on the defeat itself; it does not matter exactly what percentage of majority voters created this defeat.

Using this analytical framework, the court considered whether minority voters’ candidates of choice were typically defeated by majority voters within the City. Although all of the endogenous elections resulted in the minority candidates’ defeat, the exogenous judicial elections resulted in one defeat and one victory. Moreover, all of the other exogenous elections that the defendants pointed to resulted in a victory for the minority’s candidate of choice. The court thus found that, in the sixteen contests before it, “in only three contests was the African American candidate of choice defeated within the City of Baton Rouge.” Slip op. at 26. The plaintiffs failed to show that white voters are *usually* capable of defeating the minority’s candidate of choice, and had therefore failed to prove their claim under Section 2.

The court concluded by analyzing the plaintiffs’ claims directly under the Fourteenth and Fifteenth Amendments, but found that the plaintiffs had similarly failed to prove these claims. Indeed, the court called it a “rare case” where a plaintiff can prove a case directly under the Constitution without proving a Section 2 claim. However, in closing, the court stated that its conclusion “though legally sound, leads to a troubling practical result.” Slip op. at 43. The plaintiffs had, in the court’s view, successfully established “a history of discrimination,” “a depressed socioeconomic status,” and a “decrease in . . . voting strength” for African
Americans within the City. Slip op. at 43–44. Nonetheless, the court could not—based on the evidence the plaintiffs had offered—ascibe a discriminatory purpose to this “troubling” result. Id.

**OTHER FEDERAL CASES—PENDING**

*Simpson v. CVS Pharmacy, Inc., et al., 15-CV-04261 (New York, June 3, 2015)*

Four former loss prevention investigators hired to conduct security for CVS Pharmacy stores in New York City have filed a racial discrimination, class-action lawsuit against the employer and various supervisory managers. Three of the plaintiffs are African-American and one is Hispanic. The investigators were hired to serve as covert Market Investigators (MIs) and responsible for investigating and preventing loss and theft. However, they allege that at least two loss prevention regional managers from CVS stores in Manhattan and Queens and other supervising store managers directed them to racially profile against Black and Hispanic customers, claiming that these customers were more inclined to steal and considered them to be thieves and criminals. Moreover, the plaintiffs allege that these same managers also discriminated against them directly on the basis of their race and referred to them and other Black and Hispanic customers in a disparaging way, often using racial epithets.

The complaint further alleges that the managers would demand that the MIs trail African-American and Hispanic customers throughout the store and monitor them on the security camera, even when there was no apparent indication that they had stolen anything or were about to steal something. Moreover, these customers were arrested when they actually stole items, but the same treatment did not apply to white customers. Instead, the four MIs plaintiffs allege that they were never told to treat white customers similarly by monitoring them in the store or following them; the MIs also allege that management informed them to release white customers without arrest when they were found to have stolen merchandise.

Plaintiffs further allege that they voiced their complaints describing the systemic pattern of racial profiling and discriminatory practices to the head of the Loss Prevention Department at CVS and to Human Resources, but no responsive action was taken. Alternatively, three of the four plaintiffs claim that they were constructively discharged and/or were retaliated against for lodging a discrimination complaint. The four plaintiffs brought suit for the discriminatory practices under Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. Section 1981, the New York State Human Rights Law, New York Executive Law, and the New York City Human Rights Law, N.Y.C. Administrative Code. A copy of the complaint can be found [here](#).

**Violation of the Fair Housing Act**


Following the Supreme Court’s recognition of disparate impact claims under the FHA in housing discrimination matters, a summary of a recent consent order entered into between the U.S. Department of Justice (DOJ) and private parties has been included to offer guidance to assistant attorneys general to use during settlement discussion talks or when advising agency clients on similar matters. In *Townsend*, the DOJ filed suit against various defendants, *inter alia*, for discriminating against individuals on the basis of race and familial status in violation of numerous sections of the FHA.

Specifically and most pertinently, DOJ alleged that the owner, onsite manager and rental agent, and an assistant to the onsite manager (both of whom acted on the owner’s behalf at the Four Seasons Estates
Mobile Home Park (Four Seasons), refused to permit an African-American resident to become a valid leaseholder on an existing rental lease, but previously permitted a white resident in the same household to be added. Additionally, the complaint alleged that one of the onsite managers subjected the African-American resident to racially derogatory treatment and harassment during his temporary two-month stay. The white leaseholders and African-American tenant subsequently notified a local housing organization about their experiences at the Four Seasons, resulting in a complaint being lodged with the U.S. Department of Housing and Urban Development (HUD) and bringing the matter to DOJ’s attention. DOJ subsequently conducted fair housing testing at the Four Seasons. DOJ’s testing found that defendants discriminate against African-American home seekers and tenants in a multitude of ways and treat similarly situated white home seekers differently by not requiring the same scrutiny, such as including but not limited to, quoting African-Americans higher estimated move-in costs; informing one potential tester that her move into the complex would result in her being the first African-American and that she may have difficulties with other residents until they grew accustomed to her; requiring that African-American applicants fill out rental applications before they could be approved but making no such requirement for white applicants; and requiring African American home seekers to have their mobile homes inspected prior to moving in but not requiring the same treatment for white applicants.

Defendants did not admit liability as to DOJ’s claims, but they did agree to various non-discriminatory and injunctive provisions, including: being enjoined from discriminating against potential or existing renters on the basis of race or familial status with respect to available units and services (which applied to all the rental units the owner legally possesses); implementing a non-discrimination policy that applies to the owner’s employees and agents with notice to all existing tenants and the public; participating in in-person training on the FHA; submitting uniform standards and procedures that inform potential renters about available dwellings and maintain records of visitors seeking units and phone logs recording information; monitoring of and notice to DOJ concerning future complaints related to discriminatory practices, change in practices, or acquisition of additional properties or change in ownership; and paying monetary damages to the original tenants who initiated the complaint and were subjected to discriminatory practices at the Four Seasons and a civil penalty to DOJ. The consent order will expire on July 28, 2019, but there is an option for DOJ to extend it for noncompliance or in the interest of justice.

STATE CASE LAW

STATE COURT CASES—DECIDED

Definition of “Public Facilities” for State Disability Laws

Beeman v. Livingston, 58 Tex. Sup. J. 1414 (June 26, 2015)

The Texas Supreme Court held this month that prisons did not qualify as “public facilities” within the Texas Human Resources Code (THRC), and that deaf inmates therefore could not bring a suit for the Texas Department of Criminal Justice’s (TDCJ’s) failure to accommodate their disability in prison. Chapter 121 of the THRC gives persons with disabilities “the same right as persons without disabilities to the full use and enjoyment of any public facility in the state.” Slip op. at 2. Beeman is a deaf inmate housed at a state prison. She alleged that her access to many prison services was limited because of her disability, and she sued Brad Livingston (the executive director of the TDCJ) under Chapter 121. The trial court found that the TDCJ had
discriminated against Livingston and ordered that certain changes be made in the prison. The appellate court overturned this ruling, instead holding that prisons were not “public facilities” within the meaning of Chapter 121. Slip op. at 4. Beeman appealed this decision to the Texas Supreme Court.

Chapter 121 gives several definitions for a “public facility,” including “a public building maintained by any unit or subdivision of government.” Slip op. at 6. The issue here boiled down to whether “public building” meant a building “belonging to or used by the public for the transaction of public . . . business” or a building “open to common use.” Slip op. at 7–8. If the term “public building” referred to any building used by the public for public business, then a prison would fall within the statute. On the other hand, if the term meant any building open to public use, then a prison would not qualify. The court found dictionary evidence inconclusive and thus looked to the term’s “use in the context of the statute.” Slip op. at 8. The court noted that, in other places in the statute, “public” meant “open and accessible to the public.” Slip op. at 9. Therefore, the term “public” for a “public building” had the same meaning. Id. This conclusion was bolstered by the fact that the legislature specifically included “a college dormitory or other educational facility” as an alternative definition of “public facility.” Beeman contended that these facilities were not open to the public, and thus the legislature meant to include facilities that were not open to the public in the definition of “public facilities.” The court disagreed: dormitories and educational facilities were the exception, not the rule. The fact that the legislature specifically included those two types of facilities indicated that they qualify “regardless of their accessibility and openness to the general public.” Id. If the legislature had intended to include prisons, “it could have easily said so, just as it specifically included dormitories and educational facilities.” Id. The court concluded that, as prisons are not “public facilities” within the meaning of Chapter 121, the chapter does not apply to them. It therefore affirmed the judgment of the court of appeals.

Causation Standard for Governmental Tort Immunity


The Michigan Supreme Court issued a decision on the tort immunity of state officials that may prove useful to other states when interpreting their own tort claims acts. William Beals was 19 years old and had been diagnosed with autism and a learning disability. In 2009, Beals was swimming in a pool at the Michigan Career and Technical Institute (MCTI). MCTI provides vocational and technical training for individuals with learning disabilities. The lifeguard on duty during this time was both an employee and student of MCTI. He also suffered from attention deficit disorder. Beals dove underwater at some point during his swim and did not resurface. No one at the pool noticed for eight minutes, until another student wearing goggles put his head underwater and saw Beals’ body. During this time, the plaintiff claimed that the lifeguard was “talking to girls and playing with a football.” Slip op. at 5. After the student drew attention to Beals’ body, the lifeguard pulled Beals from the water and attempted CPR. This proved fruitless, and Beals was declared dead when he reached a hospital. Beals’ mother sued the lifeguard for gross negligence. The trial court declined to grant defendant William Harmon, the lifeguard, immunity, and he appealed. A split court of appeals affirmed, and he again appealed to the Michigan Supreme Court.

Under Michigan’s Government Tort Liability Act (GTLA), governmental employees are generally immune from tort liability when engaged in a governmental function. However, the GTLA carves out an exception to this rule when (1) an employee is grossly negligent, and (2) this gross negligence is “the proximate cause” of a
plaintiff’s injury. Slip op. at 8. Because the GTLA uses the term “the” before proximate clause, the Michigan Supreme Court has previously held that this “contemplates one cause.” Slip op. at 9. Therefore, in order for a government employee to be sued, his or her grossly negligent act must be “the one most immediate, efficient, and direct cause of the injury or damage.” *Id.* The court here distinguished this analysis from an analysis that requires an act be only “a proximate cause.” *Id.*, n.18.

The court held that the lifeguard’s inaction was not the “most immediate, efficient, and direct cause” of Beals’ death. Slip op. at 10. Instead, Beals’ voluntary act of entering and diving into the water, along with whatever caused him to remain submerged, constituted “the proximate cause” under the GTLA. Slip op. at 10–11. As such, the lifeguard’s inaction could not be “the proximate cause” of Beals’ death. In reaching its decision, the court emphasized that the case arose in the context of governmental employee liability and that the exception provided to this immunity was “very narrow.”

**PENDING LEGISLATION**

*Tribal Equal Access to Voting Act of 2015*

In an uncommon move, the DOJ proposed federal legislation involving voting rights of Native Americans. The Tribal Equal Access to Voting Act of 2015 (the bill) seeks to increase the political participation of Native Americans by minimizing the distance they have to travel to reach a polling site, which is often inaccessible from American Indian lands and well-developed mass-transit systems. Additionally, the draft legislation includes language for Congress to make findings that this law is essential because Native Americans have a longstanding history of disenfranchisement and low voter turnout during elections. The bill specifically mandates that states or localities, whose territory includes all or any part of tribal lands of any Tribe, must arrange for a polling site that is selected by the tribal government. Such action is intended to ensure tribal inclusion. In instances where there are larger populations, additional polling places may be requested. Additionally, the law requires that the selected location must also contain all the essential equipment, voting materials, and voting procedures ordinarily encompassed at a traditional polling site.