

## **FALL 2012 NEWSLETTER**

### **CIVIL RIGHTS LAW UPDATE**

**By Nichole Plagens and Josh Skinner**

#### **UNITED STATES SUPREME COURT**

***Lefemine v. Wideman*, No. 12-168, 2012 U.S. LEXIS 8566 (November 5, 2012)**

A civil rights plaintiff who receives a grant of declaratory or injunctive relief “prevails” in the action and, as a result, is allowed to recover reasonable attorney’s fees.

Lefemine and others were told by Greenwood County police to discard signs featuring pictures of aborted fetuses used during a protest, or risk being ticketed for breach of the peace. This command effectively prevented Lefemine and other members of Columbia Christians for Life (CCL) from protesting for the next three years. Lefemine filed a complaint under 42 U.S.C. § 1983 against several Greenwood County police officers alleging violations of his First Amendment rights. He sought nominal damages, a declaratory judgment, and a permanent injunction. Additionally, he sought attorney’s fees, under 42 U.S.C. § 1988. Ruling on the parties cross motions for summary judgment the district court found that the defendants had infringed Lefemine’s rights. The court permanently enjoined the defendants from prohibiting Lefemine from using his signs. However it refused Lefemine’s request for nominal damages, and as a result refused his request for attorney’s fees. The Fourth Circuit affirmed the denial of attorney’s fees, reasoning that the injunctive relief alone, absent other damages, did not make Lefemine a prevailing party for purposes of recovery of attorney’s fees under Section 1988.

In a per curiam decision, the Supreme Court reaffirmed that an injunctive or declaratory judgment can make the plaintiff a prevailing party for purposes of an award of attorney’s fees, so long as the judgment alters the defendant’s behavior in such a way that it directly benefits the plaintiff. Here, the injunction allows Lefemine to carry his preferred signs during his demonstrations while protecting him from criminal penalties from the Greenwood County police department, since such penalties were deemed to be a violation of his First Amendment rights. Therefore, when the district court ordered the police department to comply with the law, such an injunction supported an award of attorney’s fees.

#### **UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

***Thorson v. Epps*, No. 11-60541, 2012 U.S. App. LEXIS 23356 (5th Cir. November 14, 2012)**

Mere conjecture that something could go wrong does not count as an objectively intolerable risk for purposes of determining whether a state’s lethal injection procedures constitute cruel and unusual punishment in violation of the Eight Amendment.

Thorson, an inmate on death row at the Mississippi State Penitentiary, brought a Section

1983 action to enjoin the use of Mississippi's current execution procedure against him. He claimed that the lack of a written document regarding all steps and aspects of the execution procedure creates the potential for an improperly anesthetized prisoner to feel the pain of the execution while conscious, in violation of the Eighth Amendment. The district court granted summary judgment, stating that a lack of evidence linking the procedure in place with the requisite risk of harm prevented it from being unconstitutional.

The Fifth Circuit affirmed, reiterating that the Eighth Amendment does not prohibit the possibility of pain, but rather the "wanton exposure of the condemned to objectively intolerable risk." To prevail there must be an objectively intolerable risk of serious harm. This requires prisoners to show more than just the potential for something to go wrong. No such objectively intolerable risk exists in Mississippi's execution procedure. The state ensures that highly trained paramedics administer the drugs, that they visually monitor the prisoner's consciousness, and that a sufficient amount of anesthesia is administered. The court found no need to make Mississippi copy exactly the execution procedures of another state.

***NRA of Am., Inc. v. Bureau of Alcohol*, No. 11-10959, 2012 U.S. App. LEXIS 22197 (5th Cir. October 25, 2012)**

The Second Amendment right to bear arms is not unlimited, and the government may impose conditions and qualifications on the commercial sale of arms as long as such regulations do not infringe upon the central right of law abiding, responsible, citizens to use arms in defense of hearth and home.

Appellants, the NRA and individuals aged between 18 and 20, challenged the constitutionality of certain laws that prohibit federally licensed firearms dealers from selling handguns to persons under the age of 21, asserting that they infringe upon the right of 18-to-20 year old adults to bear arms under the Second Amendment, and denies them equal protection of the law under the Due Process Clause of the Fifth Amendment. The government filed a motion for summary judgment, claiming lack of standing, and that the constitutional claims failed on the merits. The district court found that the Appellants had standing, but granted the motion, holding that they failed to make out either a Second Amendment or Fifth Amendment claim.

The Fifth Circuit affirmed, finding that the individuals had standing since they suffered an injury-in-fact when they were unable to purchase handguns from federal firearms licensees (FFL's), but that they did not have a meritorious constitutional claim. As to standing, the court reasoned that although 18-to-20 year olds are not prohibited all together from possessing handguns, they still have standing since they are prohibited from purchasing them from FFL's. In turning to the Second Amendment claim, the court adopted a two-step analysis: 1) whether the conduct falls within the scope of the Second Amendment right, and 2) what level of scrutiny should be applied. In deciding whether the conduct falls within the scope of the Second Amendment, the court looks to whether the law harmonizes with the historical traditions of the right to bear arms. If the law falls outside of the scope of the Second Amendment, the law passes constitutional muster, and the court's analysis ends without needing to look at the level of scrutiny to apply. If it does not, then the level of scrutiny is

determined by the nature of the conduct being regulated. If the conduct being regulated is at the core of the Second Amendment's right of a responsible adult to possess and use a handgun to defend his home and family, it requires strict scrutiny. All other regulations require intermediate scrutiny.

In applying that test the court found that the right of an 18-to-20 year old to purchase a handgun from FFL's only needs to pass intermediate scrutiny. In looking to the historical purpose of regulating the purchase of handguns by minors, the government was able to establish the means-ends fit between the regulation and the objective trying to be accomplished, thus passing intermediate scrutiny. As to the equal protection claim, the regulations do not impermissibly interfere with a Second Amendment right, and age is not a suspect class so it was appropriately dismissed.

***Dep't of Tex. Veterans of Foreign Wars v. Tex. Lottery Comm'n*, No. 11-50932, 2012 U.S. App. LEXIS 20935 (5th Cir. October 9, 2012)**

The government may subsidize some activities to the exclusion of others without violating the First Amendment. The form of the governmental subsidy can be a licensing scheme instead of cash payments or tax exemptions which take money from the government's treasury.

The Texas Bingo Enabling Act allows qualifying charities to conduct bingo games in order to raise money for their charitable causes. The Act prohibits charities from using bingo proceeds for certain types of political advocacy, including lobbying and supporting or opposing ballot measures. The Plaintiffs, a group of nonprofit charities, including the Department of Texas Veterans of Foreign Wars (VFW) and the Institute for Disability Access, d/b/a ADAPT of Texas, are licensed to conduct bingo games by the Texas Bingo Enabling Act. VFW and ADAPT both engage in political advocacy in order to carry out their charitable missions. Plaintiffs filed suit making a facial challenge to the Texas Bingo Enabling Act, claiming that prohibiting charities from using bingo proceeds for political advocacy, is a violation of the First Amendment. The district court granted summary judgment in favor of the charities, and issued a permanent injunction preventing enforcement of the challenged statutory provisions.

The Fifth Circuit reversed the district court's ruling, finding that the government may subsidize certain activities and not others without violating the First Amendment. The court reasoned that the requirement under the Bingo Act that the extra monies provided to the charities not be used for political advocacy does not penalize or prevent political speech outside the scope of the program. Nothing in the act prohibits the charities from engaging in political advocacy through use of other proceeds not procured under the act, and thus the provision does not operate to penalize speech and is permissible.

***Asgeirsson v. Abbot*, 696 F.3d 454 (5th Cir. September 25, 2012)**

The criminal penalties for violation of the Texas Open Meetings Act (TOMA) do not violate the First Amendment because TOMA is a content-neutral time, place, or manner restriction and therefore intermediate scrutiny is the appropriate standard of review.

TOMA requires meetings of governmental bodies to be open to the public. It applies to most

state and local governing bodies, but does not apply to the Legislature, the Governor, mayors, or other executive policymakers. In order to enforce the TOMA requirements, Section 551.114 of the Texas Government Code imposes criminal penalties on members of governmental bodies who knowingly participate in a closed meeting, organize a closed meeting, or close a meeting to the public. TOMA defines a meeting as “a deliberation between a quorum of a governing body...during which public business or public policy over which the governmental body has supervision or control is discussed. Plaintiffs, local government officials, sued seeking a declaration that Section 551.114 is a content-based restriction on political speech, unconstitutionally vague, and overbroad. They sought declaratory and injunctive relief. After a bench trial, the district court, found that Section 551.144 is not overbroad or vague, and it does not restrict speech based on its content, but rather requires disclosure.

The Fifth Circuit affirmed the district court’s decision, finding that rather than restricting speech, the TOMA is designed to encourage public discussion and promotes government transparency by allowing the people access to government decision making. The statute is aimed at opening up the process to the public, and not at restricting the ideas or messages to be expressed. The statute is therefore a content-neutral disclosure statute. As a result the statute is subject to intermediate scrutiny. Furthermore, the fact that TOMA is enforced with criminal penalties does not prevent it from being a disclosure statute for purposes of the First Amendment, and does not constitute unconstitutional harassment. Additionally, the statute is not overbroad when compared with the statute’s plainly legitimate sweep of promoting government transparency, trust in government, and participation by all elected officials. Finally, plaintiffs point to no section of TOMA that is vague on its face, and as a result this claim was dismissed as well.

***Opulent Life Church v. City of Holly Springs Miss., 697 F.3d 279 (5th Cir. September 27, 2012)***

A government may only exclude religious use of certain lands without violating RLUIPA and the First Amendment if it has a clear purpose for excluding religious use of that land, and other non-religious groups are also excluded from using that land because of the same purpose.

Opulent Life Church filed a motion for preliminary injunction claiming that a zoning ordinance Holly Springs Mississippi had on its books singled out churches for unfavorable treatment, including outright banning them from particular locations. Specifically, Opulent Life leased premises for purposes of providing a larger meeting space for its congregation, which they were unable to move into due to the ordinance. On the eve of oral argument, the City repealed the ordinance and replaced it with an even more stringent statute against churches in certain areas. The district court denied the motion on the sole ground that the Church had not shown a threat of irreparable harm.

The Fifth Circuit found that the district court abused its discretion in denying the preliminary injunction and vacated and remanded. In reaching its holding the court first found that Opulent Life had shown a substantial likelihood of success on the merits. The court held that Opulent Life made a prima facie showing of a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA), when its claim was based on an ordinance that expressly differentiates religious land use

from non-religious land use. The court then adopted a two-part test for how a government may rebut that presumption. The court held that the government may rebut the presumption by showing (1) the regulatory purpose or zoning criterion behind the regulation at issue, as stated explicitly in the text of the ordinance or regulation; and (2) whether the religious assembly or institution is treated as well as every other nonreligious assembly or institutions that is “similarly situated” with respect to the stated purpose or criterion.

Since the City amended the ordinance before oral arguments, the court remanded with instructions for the district court to apply the stated test in determining if Opulent Life would succeed on the merits under the new ordinance.

***Planned Parenthood Ass’n of Hidalgo Cnty. Tex. Inc. v. Suehs*, 692 F.3d 343 (5th Cir. August 21, 2012)**

A state may regulate the content of a state subsidized program by funding non-abortion family planning speech to the exclusion of abortion speech, without violating the First Amendment.

Under the Women’s Health Program (WHP), Texas pays health care providers for providing services to women, including some types of contraception. The Texas Health and Human Services Commission (THHSC) is charged with administering the WHP funds. In 2011 the Texas legislature re-authorized the WHP and reiterated that the THHSC will deny WHP funding to participants in the program who perform or promote, or affiliate with entities that perform or promote elective abortions. Planned Parenthood, believing compliance to be impossible, filed suit against the THHSC seeking declaratory and injunctive relief. They alleged that the regulations violate their constitutional rights to free speech and association, and deny them equal protection of the law because the regulations treat clinics and hospitals differently. The district court granted Planned Parenthood’s preliminary injunction finding that they had a substantial likelihood of succeeding on the merits of both claims.

The Fifth Circuit vacated the preliminary injunction and remanded, finding the regulations do not violate the First Amendment right to free speech. The state has the power to regulate the direct content of a program, even if that regulation as a byproduct promotes certain types of speech, without promoting an opposing view. This power extends to limiting the identifying marks program grantees are allowed to use, ensuring that the states message is not distorted. In finding that the regulations did not violate free speech, the Court went on to reason that the district court was wrong in applying strict scrutiny to Planned Parenthood’s equal protection claim, and remanded with directions to consider the constitutionality of the equal protection claims under a lesser tier of constitutional scrutiny.

***Pool v. City of Shreveport*, 691 F.3d 624 (5th Cir. August 16, 2012)**

Police officers are entitled to qualified immunity, absent a finding that their use of force was objectively excessive or clearly unreasonable. The officers’ underlying intent or motivations are not relevant to the determination.

During a traffic stop, Poole's interaction with Officers Stalnaker and Creighton led to his arrest. The officers state that Poole immediately resisted arrest, refused to give up his right arm, despite repeated instructions to do so, and verbally and physically resisted the officers' commands. During the altercation, the officers used their Taser on Poole. Once Poole was restrained, the officers noticed his left arm was injured in the struggle and the officers immediately called for medical assistance. Poole brought suit against the officers, the City of Shreveport, and the former chief of police, Mike VanSant, seeking damages for constitutional violations under 42 U.S.C. § 1983, specifically (1) use of excessive force in violation of the Fourth and Fourteenth Amendments, and (2) the City and VanSant failed to train and supervise the officers, and failed to establish and enforce policies related to the use of force, traffic stops, or the conduct of off-duty officers.

The Fifth Circuit affirmed the decision of the district court granting summary judgment to Stalnaker and Creighton on grounds of qualified immunity. The Court found that Poole failed to show that the officer's use of force was clearly excessive, and that the excessiveness was clearly unreasonable. It used an objective analysis, looking at whether the officer's actions were objectively reasonable in light of the facts and circumstances of the arrest, disregarding any underlying intent or motivation of the officers. Additionally, the Court rejected Poole's assertion that the force used was excessive when one looked at a combination of Creighton and Stalnakers actions and instead evaluated each officer's actions independently of each other. Based on the facts as the officers perceived them at the time of the arrest, there was no use of excessive force.

The Court also affirmed the grant of summary judgment to the City and VanSant, finding that they were not deliberately indifferent to the rights of citizens. The Court reasoned that Poole could not show deliberate indifference to the rights of the citizens of the city, when he failed to point to a specific policy or another single incident where lack of training lead to the use of excessive force.

***Backe v. LeBlanc*, 691 F.3d 645 (5th Cir. August 16, 2012)**

When withholding a ruling on qualified immunity, district courts are only permitted to authorize discovery that is narrowly tailored to facts necessary to rule on the defendant's qualified immunity claims.

Guests of a wedding celebrating at a bar became rowdy and the police were called. A fight broke out among the officers and the wedding guests, and the officers allegedly used excessive force on the wedding guests and bystanders. Appellees filed a Section 1983 suit against City of Galveston, Chief Wiley, City Manager LeBlanc, and a dozen individual officers alleging a long history of police brutality and excessive force, constituting a policy or custom of the city and its law enforcement. Defendants moved to dismiss based on qualified immunity. The district court denied Defendant's motion to dismiss pending general discovery, claiming it was too early to make a determination on the qualified immunity defense.

The Fifth Circuit vacated and remanded the district court's order stating that when qualified immunity is raised, it is immunity to suit, and not just a defense to liability. The district court must therefore find that the plaintiff has pled enough specific facts, which if true, would overcome the

defense of qualified immunity. Once the district court makes such a finding, if the court is still unable to rule on the immunity defense without further clarification of the facts, the court may issue a discovery order that is narrowly tailored towards only those facts that are necessary to a ruling on the immunity claim, and not issue a general discovery order.

### **TEXAS COURT OF APPEALS**

***Kastner v. Lawrence*, No. 01-10-00291-CV, 2012 Tex. App. LEXIS 9619 (Tex. App.—Houston [1st Dist.], November 21, 2012, no pet. h.)**

A judge and law clerk who act within the scope of their employment enjoy judicial immunity for their challenged actions. As a result the county also enjoys immunity, when its liability is based on a theory of vicarious liability.

Kastner was arrested on a warrant for passing a bad check at a grocery store. Kastner claims that the grocery store did not follow the proper procedure before making an affidavit for his arrest. As a result, of this failure, Kastner further alleges that the justice of the peace and his clerk acted improperly by issuing a warrant without first verifying that the grocery store had followed the necessary procedures for obtaining a warrant. Kastner sued the justice of the peace, three clerks, Harris County, and the State of Texas, alleging his civil rights were violated when a warrant was issued without sufficient evidence and probable cause. The petition specifically alleged that the justice of the peace and the law clerks were acting in the scope of their employment.

The Court of Appeals affirmed the trial courts grant of defendant's pleas to jurisdiction based on various theories of immunity. As to the judge and the clerks, the court reasoned that since they were acting within the scope of their employment judicial immunity was appropriate. The court further reasoned that since the judge and his clerks were immune, the county is likewise immune, since the county cannot be accountable for actions that the underlying employees have immunity from. The courts grant of immunity was based on the plaintiff's own petition which alleged that the judge and clerks were acting within the scope of their employment.

*RCI Entertainment, Inc. v. City of San Antonio*, 373 S.W.3d 589 (Tex. App.—San Antonio, 2012, no pet.)

An ordinance which: 1) prohibits an individual from intentionally or knowingly appearing in a state of nudity or semi-nudity in a public place, which includes inside a privately owned business; and 2) makes it unlawful for an individual, person, corporation, or association that manages, or operates a human display establishment to intentionally or knowingly allow an individual to appear on the premises in a state of nudity or semi-nudity was not an unconstitutional prior restraint on freedom of expression.

RCI Entertainment and other Appellants, owners and operators of cabaret establishments, allege that an ordinance making it illegal for an entity to operate a human display establishment that intentionally or knowingly allows individuals to appear in a state of nudity or semi-nudity in a public

place was unconstitutional, and challenged a denial of their request for declaratory and injunctive relief from the enforcement of the ordinance. They argue that the ordinance is a violation of article 1, section 8 of the Texas Constitution, which provides “every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.” Appellants argued that the Texas Constitution affords them greater protection than the First Amendment.

The court of appeals affirmed in part and reversed in part, remanding to the trial court with instructions to modify the scope of the injunction. In reaching its conclusion the court addressed the constitutional claim and determined if the ordinance was content-based or content-neutral. The court held that the ordinance was content-neutral, meaning it was not aimed at the expressive content of appearing nude, but at an attempt to curb the undesirable secondary effects of sexually oriented businesses. Since the ordinance is content-neutral, the court applied the same intermediate scrutiny analysis as applied under the First Amendment of the U.S. Constitution, finding that the ordinance withstands the test. In remanding the court directed the trial court to narrow the scope of the injunctive relief granted in favor of the city, since the inclusion of “representatives and contractors” rendered the scope of the injunction overly broad.