Supreme Court and Federal Case Law Update

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Overview of Presentation

- Impact of Gorsuch and Trump on the Supreme Court
- Supreme Court
  - Last term
  - This term
  - Overturning *Quill*
- Federal case law update

Who is Judge Gorsuch?

- Tenth Circuit Court of Appeals judge (10 years on the bench)
- 49 years old
- Harvard Law graduate
- Son of the first female head of the EPA
- Episcopalian/Catholic
- Justice Kennedy clerk

Justice Gorsuch is a Coup

- President Trump's biggest accomplishment to date
- Impeccable credentials, young, has already shown himself to be a reliable conservative
- Not a reflection of any of Trumps idiosyncrasies
  - Any Republican president would have picked him
  - Trump wanted someone strong and independent

We Should Have Known More about Him Before April

- Authored over eight hundred opinions; and participated in approximately 2,750 decisions
- No rulings on the some of the most prominent issues: gun control and abortion
- Most well known for his ruling regarding the birth control mandate, frozen trucker, and burping student

Amazing what we Know in Just One Day

- Only participated in 13 cases, only one of which was controversial
- Weighed into guns, same-sex marriage, and the travel ban
- Aligned himself with the most conservative Justices—Thomas and Alito rather than Roberts and Kennedy
- Described as a conservative activist

Travel Ban, Guns, Same-sex Marriage

- Travel ban
  - Would have allowed the travel ban to go into effect completely before the Court could rule on the merits
- Same-sex marriage
  - Nothing in *Obergefell* indicates that a birth registration regime based on biology is unconstitutional
- Guns
  - Court should have reviewed CA conceal carry law

Other Things to Think about

- Might be more conservative than Scalia
  - Fourth Amendment, Confrontation Clause
- How does he feel about precedent?
- Does he want to build consensus with colleagues?
  - Roberts and Kagan have never dissented alone
  - Written more non-mandatory opinions in two months than Kagan did in 2 years
  - Roberts speech on not liking too many opinion
- Views on *Chevron* deference will be very important in the future

Lot of Talk of Justice Kennedy Retiring

- Court we have right now is, in the big cases, a 5-4 conservative Court with Justice Kennedy in the middle
- Recently Justice Kennedy has reliably voted with the liberals on social issues
- If Trump replaces Kennedy, Chief Justice Roberts will be the swing Justice **and** the Chief Justice

Who Will Have 51 Votes in the Senate in 2018?

- If Democrats take control of the Senate in 2018 and Justice Kennedy retires who might President Trump nominate to fill his seat?
- Average retirement age for Supreme Court Justices is 79; Justice Kennedy is 80
- Oldest Justices are liberals and Justice Kennedy
  - Justice Ginsburg (84)
  - Justice Breyer (78)

Overall Observations about Last Term

- Court was very conscious about having only eight Justices
  - No real high interest cases—transgender bathroom case sent back to 4th Circuit
  - Lots of early, unanimous or 7-1 opinions (Thomas, dissenting) about 10 pages long
  - Court accepted lots of cases where generally they have significant agreement
    - Qualified immunity/police
    - First Amendment free speech

Pretty Good Term for Local Governments

- 4 cop/qualified immunity cases
  - Most important case was a unanimous win
  - No clear loses in any of the other case
  - Sotomayor was not out there (like she was two terms ago)
- Government lost all three speech cases--predicted
  - None of the case directly involved cities
  - No discussion of *Reed* in any of the opinions
- First takings cases victory since 2010

This Term

- Controversial
- Police
- First Amendment
- Miscellaneous

Controversial

- None of these cases directly affect local governments
  - Partisan gerrymandering
  - Cake case
  - Union dues

Gill v. Whitford

- Whether and when it is possible to bring a claim that partisan gerrymandering is unconstitutional
- *Veith v. Jubelirer* (2004) Justice Kennedy—might be justiciable under the First Amendment; "a workable standard" is needed
- Two judges concluded challengers to Wisconsin's redistricting plan came up with a workable standard—efficiency gap, which measures wasted votes

Gill v. Whitford

- In the 2015 election, Republican candidates received less than 49% of the statewide vote and won seats in more than 60% of the state's assembly districts
- The challengers argue that efficiency gaps over 7% violate the Constitution
- The efficiency gap in Wisconsin was 13.3 percent in 2012 and 9.6 percent in 2014

Gill v. Whitford

- Before the Supreme Court the challengers proposed a three-part test with a lot of math
  - Justice Roberts described the test as social science "gobbledygook"
- Justice Kennedy asked no questions the challenger's attorney about the substance of the test which means:
  - He likes the test and therefore has no questions
  - Nothing at all
- IMLA *amicus* brief

Janus v. AFSCME

- About half the states are "right to work" (including South Carolina) for public sector employees
  - If employees don't want to join the union they don't have to and don't have to pay a dime
- About half states are "agency fee"/"fair share" for public sector employees
  - State legislatures allow unions and management to agree that if employees don't join the union, they still have to pay their "fair share" of collective bargaining costs
- *Janus* could make all states right to work for public sector employees

Janus v. AFSCME

- Constitutionality of "fair share" established in 1977 in *Abood v. Detroit Board of Education*--no free riders are allowed!
- Supreme Court was supposed to overrule *Abood* in *Friedrichs v. California Teachers Association* in 2016
- Very likely only Justice Gorsuch's vote matters
- Case called *Citizens United* of collective bargaining; why?
- Let's say typical union dues are 10% political (no one has to pay) and 90% fair share—would you pay the 90% if you didn't have to?

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

- Colorado's public accommodations law prohibits discrimination against people based on sexual orientation
- Issue: Whether applying Colorado's public accommodations law to compel a cake artist to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment
- Bunch of these cases: wedding photographers, wedding stationary vendor, wedding florist, wedding venue

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

- Speech
  - "Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally"
- Religion
  - The Colorado Court of Appeals applied rational basis to Colorado's law and "we easily conclude that it is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation"

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

- Over 100 cities nationwide have similar ordinances (not many in SC)
- Religious liberty to be free from taking a position in conflict with your religious beliefs in all about the culture wars
- Court denied cert two terms ago in the pharmacy case—no Justice Scalia
- Cake case relisted 14 times—what's different now (hint: new Justice)
- Court can take a nibble rather than a bite into religious liberty
- Justice Kennedy's personal hell: state's rights, gay rights, religious liberty, free speech

Police Cases

- False arrest/qualified immunity
- Three Fourth Amendment search cases
- Jail case

District of Columbia v. Wesby

- Issue: whether police officers had probable cause to make an arrest late night partygoers for trespass?

District of Columbia v. Wesby

- House had some stuff in in but it did not appear occupied
- The party-goers gave police conflicting reasons for why they were at the house (birthday party v. bachelor party)
- Some said "Peaches" invited them to the house; others said they were invited by another guest
- Police officers called Peaches who told them she gave the partygoers permission to use the house
- But she admitted that she had no permission to use the house herself; she was in the process of renting it
- The landlord confirmed by phone that Peaches hadn't signed a lease

District of Columbia v. Wesby

- The partygoers sued the police officers for false arrest
- To be guilty of trespass the partygoers had to have entered the house knowing they were doing so "against the will of the lawful occupant or of the person lawfully in charge"
- They partygoers claimed they did not know they lacked permission to be in the house
- But did the officers have to believe them?

District of Columbia v. Wesby

- At oral argument
  - Justices seemed sympathetic of the partygoers
  - Unsympathetic of the denial of qualified immunity
  - Looked at the case more narrowly than I had hoped
- SLLC framing of the case
  - Can officers have probable cause to make an arrest if they don't believe the suspect's version of the story based on circumstantial evidence?
  - Police officers are almost always making credibility determinations when they are deciding whether to arrest someone

United States v. Carpenter

- Court's latest attempt to grapple with technology and the 4th Amendment
- Everyone knew the Court would resolve this issue sooner rather than later
- Lot of attention will be paid to how Justice Gorsuch votes

United States v. Carpenter

- Issue: must police must obtain warrants per the Fourth Amendment to require wireless carriers to provide cell-site data
- Cellphones work by establishing a radio connection with the nearest cell tower
- Towers project signals in different directions or "sectors"
- In urban areas, cell sites typically cover from between a half-mile to two miles
- Wireless companies maintain cell-site information for phone calls

United States v. Carpenter

- Stored Communications Act requires governments to obtain a court order based on "reasonable grounds" for believing that the records were "relevant and material to an ongoing criminal investigation"
- Sixth Circuit held that obtaining the cell-site data does not constitute a search under the Fourth Amendment because while "content" is protected by the Fourth Amendment "routing information" is not
- See *Smith v. Maryland* (1979) where the Supreme Court held that police installation of a pen register—a device that tracked the phone numbers a person dialed from his or her home phone—was not a search
- Third-party doctrine

Byrd v. United States

- Police officers lacked both a warrant and probable cause to search the car Byrd was driving as part of a traffic stop
- Byrd was not listed as an authorized driver on the rental agreement
- Issue: does a driver have a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement
- Third Circuit said no (Fourth Circuit has come to the same conclusion)

Collins v. Virginia

- Issue: does the automobile exception applies to a car that is parked on private property?
- Automobile exception: officers may search a car that is "readily mobile" without a warrant if officers have probable cause to believe they will find contraband or a crime has been committed
- Virginia Supreme Court says it does

Collins v. Virginia

- Regarding the car not being immediately mobile the court stated "[t]he mere fact that the stolen motorcycle was 'clearly operational and therefore readily movable' governs our decision"
- Regarding the car being parked on private property the Virginia Supreme Court noted that the United States Supreme Court "has never limited the automobile exception such that it would not apply to vehicles parked on private property"

Murphy v. Smith

- The Prison Litigation Reform Act states that when an inmate recovers money damages in a confinement conditions case "a portion of the judgment (not to exceed 25 percent)" shall be applied to his or her attorney's fees award
- Does "not to exceed 25 percent" means up to 25 percent or exactly 25 percent?

First Amendment

- Retaliatory arrest
- Political apparel at polling places
- Pregnancy clinic disclosures

Lozman v. City of Riviera Beach, Florida

- Issue: whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law

Lozman v. City of Riviera Beach, Florida

- Lozman: I was arrested for opposing the City's redevelopment plan
- City: Lozman was arrested for violating the City's rule that comments during the public comment period must relate to City business
- Jury: was probable cause to arrest Lozman for disturbing a lawful assembly
- Eleventh Circuit: because the arrest was supported by probable cause Lozman's First Amendment retaliatory arrest claim failed
- Supreme Court: *Hartman v. Moore* (2006) (to bring a *retaliatory prosecution* claim under the First Amendment a plaintiff must prove that no probable cause supported his or her prosecution)

Lozman v. City of Riviera Beach, Florida

- Problem for cities
  - Every interaction with a police officer could involve a possible retaliatory arrest claim
- Fun facts about this case
  - Issue was before the Court in 2012 (*Reichle v. Howards*)
  - Lozman and the City of Riviera Beach have been to the Supreme Court before (is a floating home a "vessel" per a federal admiralty statute)

Minnesota Voters Alliance v. Mansky

- May states (and local governments) ban political apparel at polling places?
- South Carolina is one of about 10 states that do
- Eighth Circuit said yes (no Fourth Circuit ruling on this issue)

Minnesota Voters Alliance v. Mansky

- *Burson v. Freeman* (1992) (a state may ban the "solicitation of votes" and "campaign materials" within 100 feet of the polling place)
- Has the Eighth Circuit stretched *Burson* too far?
  - Minnesota Voters Alliance: "*Burson* plainly does not endorse a categorical ban on all types of 'political' speech. The decision below departs from this Court's precedent on First Amendment overbreadth and effectively chills the free speech rights of millions of voters across the country by threatening criminal prosecution or civil penalties for voters who wear logoed t-shirts, caps, jackets, buttons, and other apparel in state-declared speech-free zones."

National Institute of Family and Life Advocates v. Becerra

- Does requiring pregnancy clinics to make the following disclosures violate the First Amendment:
  - Publically-funded family planning services, including contraception and abortion are available
  - Unlicensed pregnancy-related clinics to disseminate a notice stating they are unlicensed
- Ninth Circuit said no

National Institute of Family and Life Advocates v. Becerra

- Licensed notice is content-based but *Reed* (strict scrutiny) doesn't apply
- The licensed notice is profession speech and the Ninth Circuit applies intermediate scrutiny to such speech

National Institute of Family and Life Advocates v. Becerra

- Million dollar question this case might answer
  - Does *Reed*/strict scrutiny apply to content-based speech that is in a category that the Court has previously said a different level of scrutiny applies to READ: COMMERCIAL SPEECH?
  - From California's cert petition: [NIFLA amici] argue that, regardless of any professional context, compelled speech should receive strict scrutiny as content-based regulation under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). But *Reed* did not extinguish the categorically lower levels of scrutiny that apply to certain kinds of speech, such as commercial speech and speech in the context of a professional relationship.

Miscellaneous Cases

- Employment/Fifth Amendment
- Voter rolls maintenance

Hays, Kansas v. Vogt

- The Fifth Amendment says no person shall be "compelled in any *criminal case* to be a witness against himself"
- In *Garrity v. New Jersey* (1967) the Supreme Court held that public employers violate the Fifth Amendment when they give employees a choice between "self-incrimination or job forfeiture"
- Issue: whether the Fifth Amendment is violated when a public employee's compelled, self-incriminating statements are used against him or her at a *probable cause* hearing rather than at a *trial*

Hays, Kansas v. Vogt

- You can't make these facts up!
  - Vogt worked as a police officer for the City of Hays
  - In an interview with the City of Haysville, Vogt disclosed he had kept a knife he obtained in the course of his work as a Hays police officer. Haysville offered Vogt the job but told him he had to tell Hays about the knife and return it. Vogt did so.
  - The Hays police chief told Vogt to write a report about the knife; Vogt wrote a vague one-sentence statement. The Hays police chief then told Vogt to write a more detailed statement. Vogt claims this more detailed statement was a compelled, self-incriminating statement. It was used to locate more evidence.
  - Vogt was charged with two felonies related to possessing the knife. Per state law, he received a probable cause hearing before trial. Charges were dismissed at the probable cause hearing.

Hays, Kansas v. Vogt

- The Tenth Circuit concluded the right against self-incrimination is more than a trial right by looking at the text of the Fifth Amendment, which doesn't use the term "trial" or "criminal prosecution"

Hays, Kansas v. Vogt

- The SLLC *amicus* brief argues that government employers should not be liable for the use of compelled, self-incriminating statements by prosecutors at a probable cause hearings (or at trials) because government employers have no control over whether or how a prosecutor uses such statements
- If government employers can be liable for the actions of prosecutors they may be less likely to ferret out employee misconduct
- Alternatively, the SLLC *amicus* brief argues Vogt's sole remedy in this case should be the exclusion of his statements in his criminal case, not money damages against the City

Husted v. A Philip Randolph Institute

- Issue: whether federal law allows states to remove people from the voter rolls if the state sends them a confirmation notice after they haven't voted for two years, they don't respond to the notice, and then they don't vote in the next four years
- Ohio and 12 other states follow this process including South Carolina
- Philadelphia and numerous counties in Mississippi have been sued for not adequately maintaining voter rolls

Husted v. A Philip Randolph Institute

- The National Voter Registration Act (NVRA) says that roll maintenance procedures "shall not result in" people being removed from the polls for failure to vote
- The Help America Vote Act modified the NVRA to say that states may remove voters if they don't respond to a confirmation notice and don't vote in the next two federal election cycles

Husted v. A Philip Randolph Institute

- The Sixth Circuit struck down Ohio's scheme reasoning that it "constitutes perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from the rolls by reason of his or her failure to vote"
  - The "trigger" for someone being removed from the voter rolls is their failure to vote
- Ohio argues that it doesn't remove voters '"by reason of' their failure to vote; it removes voters 'by reason of'" their failure to respond to a notice and the NVRA doesn't regulate what triggers the confirmation notice

Husted v. A Philip Randolph Institute

- Must be some way to remove people from the voter rolls other than relying on post office change of address form and scanning the obituaries

Will *Quill* be Overturned?

- ****Cert not yet granted yet****
- In 2015 Justice Kennedy, prompted by an SLLC brief, stated he may be interested in overturning *Quill*
- South Dakota passed a law defying *Quill* with the hopes the Supreme Court will hold their law constitutional and overturn *Quill*
- *South Dakota v. Wayfair* is on its way to the Supreme Court

This Term?

- Briefing is expected the be complete mid-December
  - January conference: 5, 12, 19
  - At least ½ the cases granted at the conference on the 19th will be heard next term
  - No relist!

Federal Circuit Trends

- Thanks to Doug Douglas C. Haney, Corporation Counsel, Carmel, Indiana and the International Municipal Lawyers Association

First Amendment—Filming the Police

- Fourth Circuit hasn't yet ruled?
- *Fields v. Philadelphia* (3d Circuit)
  - The First Amendment protects the act of photographing, filming, or otherwise recording police officers who are performing their official duties in public
- *Turner v. Driver* (5th Circuit)
  - The First Amendment protects the right for a citizen to record police activities, subject to reasonable time, place, and manner restrictions

First Amendment—Prayer at Meetings

- Okay if always given by board members?
- *Lund v. Rowan County* (4th Cir.)
  - No. "Prayer practice served to identify the government with Christianity and risked conveying to citizens of minority faiths a message of exclusion. And because the commissioners were the exclusive prayer-givers, Rowan County's invocation practice falls well outside the more inclusive, minister-oriented practice of legislative prayer described in *Town of Greece*."
- *Bormuth v. Jackson County* (6th Cir.)
  - A board of commissioner's practice of opening its public meetings with a short invocation given by a commissioner based upon the dictates of his own conscience does not violate the Establishment Clause even if all of the commissioners are Christian

First Amendment—*Reed*

- *Reed*: strict scrutiny applies to content based speech
- Circuit courts are going to differ on interpreting *Reed*
- Million dollar question: does *Reed* apply to commercial speech?
- *Contest Promotions v. San Francisco* (9th Circuit)
  - *Reed* does not apply to commercial speech—allowing non-commercial billboards is okay

First Amendment—*Reed*: Beyond Signs

- Panhandling; can't banning stopping vehicles for employment solicitation
  - *Centro de la Comunidad v. Oyster Bay* (2d Circuit)
- Does not apply to sexually oriented businesses
  - *Henry v. Sandy Springs* (11th Circuit) (*Reed* does not abrogate the "secondary effects doctrine" as it relates to adult entertainment ordinances)
- Used to strike down other laws (not relevant to local governments): ballot selfies, anti-robocall laws disallowing particular messages

First Amendment—Banning Citizens from Social Media

- *Davison v. Loudoun County Board of Supervisors*
- Headed to the Fourth Circuit—getting national attention
- Loudon County Board Chair banned someone from her Facebook page for 12 hours
- The district court concluded, however, that under the totality of the circumstances, Randall was acting "under the color of state law" in maintaining the Facebook page "Chair Phyllis J. Randall" and banning the Plaintiff from that page violated the First Amendment in her individual capacity. Regarding the First Amendment claim, the court concluded that Randall had created a public forum with her Facebook page. The court did not determine what type of forum (traditional, limited, etc.) because it found that she had engaged in viewpoint discrimination by banning the Plaintiff from her page.
-

First Amendment—Employees Social Networking

- Employees have a First Amendment right to speak on matters of public concern but can't be disruptive—where is the line?
- *Bucker v. Howard County* (4th Circuit)
  - A firefighter terminated for his Facebook posts that, while partially touching upon matters of public concern, disrupted department efficiency, internal harmony, and trust, and were insubordinate and diminished his department's standing with the public, was not protected by the First Amendment
- *Liverman v. City of Petersburg* (4th Circuit)
  - A police department social networking policy that prohibited speech critical of the government employer by forbidding any comments unfavorable of the department's operations or policies is facially overbroad, and violates an officer's right to comment on matters of public concern

First Amendment—Public Concern

- Complaining about your co-workers isn't a matter of public concern
  - *Crouse v. Town of Moncks Corner* (4th Circuit) (Police officers, by encouraging an arrestee to file suit against a fellow officer that they did not like, did not engage in protected speech)
  - *Roake v. Forest Preserve Dist.* (7th Circuit) (An officer's internal complaint about the alleged racial profiling activities of fellow officers is not protected speech under the First Amendment)
  - *Cuancara v. Reams* (10th Circuit) (A deputy who was terminated after going outside her chain of command and accusing a fellow deputy of performing private work on public time did not engage in speech on a matter of public concern, especially when her contentions were weakly supported and **were not motivated by broader public purposes** but were instead the airing of a grievance)
- Neither is trying to support one of your co-workers
  - *Naghtin v. Montgagne Fire Dist. Bd.* (6th Circuit) (A firefighter who circulated a petition for the reinstatement of another firefighter to the position of unit captain)

Fourth Amendment Searches—Give Police Cell Phone

- And they can search it
  - *US v. Escamilla* (5th Circuit)
    - An arrestee who handed an officer his cell phone impliedly consented to its search; implied consent ended when the officer handed the phone back to the arrestee, and a second search, without renewed consent, violated the Fourth Amendment
  - *US v. Morgan* (8th Circuit)
    - No Fourth Amendment expectation of privacy existed when a plaintiff voluntarily displayed his cell phone screen in the presence of detectives

Fourth Amendment—Length of Stop

- *Rodriguez v. United States* (2015) (absent reasonable suspicion, police extension of a traffic stop to conduct a dog sniff violates Fourth Amendment)
- Funny
  - *Marshall v. Farmington Hills* (6th Circuit) (traffic offender insists that the officer detaining him bring the officer's supervisor to the scene)
  - *US v. Vargas* (11th Circuit) (no person present who could lawfully operate the stopped vehicle)
- Serious
  - *US v. Lopez* (10th Circuit) (No reasonable suspicion existed to detain a motorist until a drug dog could be summoned after the driver had been given a warning ticket and wished safe travels and the officer then returned to the vehicle and asked a few more questions after which the motorist refused consent to the search of her vehicle. General nervousness and unusual travel plans - - absent lies or inconsistencies - - do not provide reasonable suspicion sufficient to prolong a traffic stop)

Excessive Force—Techniques

- Circumstances dictate when each technique is okay
  - Too many taser cases to mention--*Armstrong v. Pinehurst* (4th Cir.) (tasing stationary, non-violent but resisting individual while executing an involuntary commitment order constitutes excessive force)
  - Punching (sometimes okay)
  - Half-spear take down
  - Flash bangs
  - Arm bar
  - Clotheslining

Excessive Force—Medical Conditions

- Courts seem sympathetic of use of force even with known medical conditions if the plaintiff was combative
  - *Estate of Corey Hill v. Miracle* (6th Circuit) (tased a diabetic person suffering from a hypoglycemic episode)
  - *Roth v. Viviano* (6th Circuit) (handcuffing seizing patient to give medical aid okay)

Excessive Force—Don't Advance Toward an Officer

- Especially if you have a weapon
  - *Roth v. Viviano* (6th Circuit) (armed; approaching from 40 feet away; never raised weapon)
  - *Malone v. Hinman* (8th Circuit) (ran towards officer holding a gun)
  - *Carabajal v. Cheyenne P.D.* (10th Circuit)(slowly drove vehicle towards officer; officer not required to "stand down and hope for the best")
  - *Hart v. Logan* (11th Circuit) (advanced and refused to show hands)

Excessive Force: Overly Tight Handcuffs

- *Getz v. Swoap* (6th Cir.)
  - Skin abrasion and 5-20 minutes not excessive force
- *Jackson v. Lebelan* (6th Cir.)
  - No excessive force without physical injury
- *Henderickson v. Cervone* (11th Cir.)
  - Painful handcuffs not excessive force

Excessive Force: Dogs that Won't Stop Biting

- *Cooper v. Brown* (5th Cir.)
- *Becker v. Elfreich* (7th Cir.)

Title VII—Sexual Orientation Discrimination

- Game changer: *Hively v. Ivy Tech Community College* (7th Circuit) (employees may bring sexual orientation discrimination claims under Title VII)
- Ivy Tech didn't appeal to SCOTUS
- En banc Eleventh Circuit recent refused to reconsider its ruling to the contrary in *Evans v. Georgia Regional Hospital*
- Lambda Legal has filed a cert petition in *Evans*

Title VII—Reassignment

- When is it an adverse employment action?
  - *Ontley v. Luke & Association* (5th Circuit) (lateral transfer not adverse employment action merely because it changes working hours or imposes a heavier workload)
  - *Frazier v. Richland Public Health* (6th Circuit) (reassignment of job duties even if the duties fall within the same job description can be retaliation; what if you are assigned all the "bad" duties within the description?)

Title VII—Best Argument: Not Race, Sex, Etc.

- Mere harassment, awful supervisors aren't enough
  - *Burgess v. Hattiesburg* (5th Circuit) ("mere workplace harassment")
  - *Black v. Reynolds* (11th Circuit) (bullying and harassment)
  - *Smith v. Mobile Shipbuilding* (11th Circuit) (general unfair workplace treatment)
  - *Zarza v. Tallahassee Housing Authority* (11th Circuit) ("unpleasant working conditions and an unfair and unpleasant boss")

ADA

- Supreme Court unfinished business
  - *Roell v. Hamilton County* (6th Circuit) (police don't have to accommodate threatening, mentally unstable person with verbal de-escalation before tasing)
  - *Los Angeles v. AECOM* (9th Circuit) (third parties can sue city if contractors failed to comply with the ADA)
- Work from home
  - *Banim v. Florida* (11th Circuit) (okay to require disabled employee working at home to keep a log of activities if all disabled employees with same accommodation must keep a log)

Legal Issue Related to Protests

- If you provide legal training to police officers and/or can recommend training for police officers
  - Encourage your police departments to offer a refresher for officers
  - It is hard to predict where, when, and over what protest will take place
  - Perception issues are a big of a deal as legal issues

Not Just Police Might Need Training

- Communications staff
- City council, mayor
- Code enforcement
- Administrative staff handling permits
- Building/operations staff
- First responders

Questions?

Thanks for attending!