CIVIL RIGHTS INSIDER

Federal Bar Association Civil Rights Law Section's Newsletter

Summer 2019

From the Desk of the Chairperson

Hello again from the Chair,

Summer is upon us and I hope you are enjoying the season. We are staying busy at the Civil Rights Section, and I have some important developments to report.

First, the Board voted to amend the Section Bylaws to extend the term of the Chair from one year to two years. We thought this was important to provide some stability in the Chair position, especially in light of a new FBA National policy that prohibits anyone from serving two consecutive terms as a Chair of a Section, absent prior approval from the National Board. All other officer positions will continue to have one-year terms so there can be flexibility in the leadership team. We also voted to make the chair of the membership committee an officer of the Section. We have submitted these proposed amendments to the FBA National Board for approval.

Second, the Board voted to create a committee to examine how the various federal district courts are addressing civil rights complaints filed by pro se plaintiffs. More specifically, the committee plans to examine the different types of programs district courts have implemented to assist pro se plaintiffs during the litigation process in federal court. The goal of the project is to draw together in one place information on the various types of pro se assistance programs that are out there, and also to collect information regarding the types and volume of pro se litigation in federal court. Hopefully, we can produce a manual that chief judges in the various district courts can use to evaluate and improve the efficiency of the courts and their ability to deliver justice to both pro se litigants and those appearing with lawyers. In this respect, the committee's work will dovetail with the FBA's Access to Justice Task Force, and we hope to partner with other Sections, such as the Litigation Section, which is also working on

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Supreme Court Update – Summer 2019

by Samuel T. Brandao, Clinical Instructor, Civil Rights and Federal Practice Clinic, Tulane University Law School

Department of Commerce v. New York, 351 F. Supp. 3d 502, 2019 WL 190285 (S.D.N.Y. 2019), *cert. granted*, 139 S. Ct. 953 (2019).
No. 18-966; opinion filed June 27, 2019. Vote: 5-4

The Department of Commerce's much-discussed proposal to add a citizenship question to the 2020 census did not violate the Enumeration Clause or the Census Act, but the sole stated reason for adding the question—to allow improved DOJ enforcement of the Voting Rights Act—"seems to have been contrived." Chief Justice Roberts, writing for the majority, explains that meaningful judicial review requires courts to reject pretextual reasons even where, as here, they find no substantive problems with an agency decision.

Justice Thomas insists in a dissent joined by the conservative justices that this requirement is new and will "transform" administrative law, mostly by allowing discovery on the sincerity of an agency's stated rationale. The liberal justices agree that the VRA reason was a mere pretext but join Justice Breyer in urging that the decision was arbitrary, capricious, and an abuse of discretion under the APA, primarily because the evidence suggests the question would actually result in less effective VRA enforcement because it would reduce the accuracy of the count. Result: affirmed in part, reversed in part, and remanded.

Benisek v. Lamone, 266 F. Supp. 3d 799 (D. Md. 2017), *appeal docketed, Lamone v. Benisek, 138 S. Ct. 543 (2017).*
No. 18-726; consolidated with
Common Cause v. Rucho, 279 F. Supp. 3d 587 (M.D.N.C. 2018), *appeal docketed, Rucho v. Common Cause,* 139 S. Ct. 782 (2019).
No. 18-422; opinion filed June 27, 2019. Vote: 5-4

Chief Justice Roberts, joined by the conservative justices, holds that challenges to partisan gerrymanders present nonjusticiable political questions. Conscious that the Court's precedents require courts to engage with districting issues, including racial gerrymanders and one-person-one-vote cases, the majority nevertheless rejects political gerrymandering claims as impossible to evaluate. The key point is that racial categories are "inherently suspect," but political categories are not, leaving the reviewing court to decide a question not of kind but of degree: how much partisanship is too much. And, although extreme gerrymanders seem unfair, defining fairness presents difficult questions, such as whether the map should maximize the number of competitive districts or allot each party a proportional share of safe seats. The majority holds that these questions are political, not legal.

The liberal justices joined Justice Kagan's impassioned dissent, which accuses the majority of abdicating its duty in the face of a dire, even existential threat to our democracy. Justice Kagan read her dissent from the bench, including its unusual closing line describing her "deep sadness." Result: vacated and remanded with instructions to dismiss.

Madison v. Alabama, op. of January 16, 2018, Mobile County Circuit Court Case CC-1985-001385.80, *cert. granted,* 138 S. Ct. 1172 (2018) (granting review of an otherwise unreviewable opinion of the state trial court denying a petition to suspend execution based on incompetency).
No. 17-7505; opinion filed February 27, 2019. Vote: 5-3

An Alabama prisoner whose strokes and vascular dementia have left him unable to remember his crime and with limited understanding of his circumstances wins at least a temporary reprieve from execution. Chief Justice Roberts joins the four liberal justices; Justice Kavanaugh did not participate.

Panetti v. Quarterman made clear that an execution is cruel unless the prisoner understands the reasons for it. Although that case involved psychotic delusions, the *Madison* majority explains that other mental illnesses also bar execution if they prevent that understanding. And, although Vernon Madison cannot remember committing his crime, he might nevertheless be able to understand why he is being singled out for death—a question the trial court must now answer. Result: vacated and remanded.

Bucklew v. Precythe, 883 F.3d 1087 (8th Cir. 2018) (2-1 decision), *cert. granted,* 138 S. Ct. 1706 (2018).
No. 17-8151; opinion filed April 1, 2019. Vote: 5-4

Prisoners mounting as-applied challenges to planned execution methods, for example because they will likely cause cruel levels of pain, must propose an alternative method.

Russell Bucklew will now die via lethal injection despite an extremely rare medical condition that causes blood-filled tumors to grow in his throat. Justice Gorsuch, writing for the conservative majority, explains that the inmate's proposed alternative must "significantly reduce a substantial risk of severe pain"—although it need not be available under that state's current law—and that the state must have no good reason not to switch. Bucklew proposed nitrogen gas, but the majority holds that his proposal fails for two reasons: it lacked details, including how the gas would be administered; and Missouri had a reason not to switch, namely that it would be the first state to use nitrogen. The opinion does acknowledge, in a footnote, that three states enacted laws to allow nitrogen as an execution method, but perseveres in holding that Bucklew's proposal fails the *Baze / Glossip* test.

The opinion drew two concurrences: Justice Thomas believes only intentional infliction of suffering is cruel; Justice Kavanaugh implies that a firing squad might be a readily implemented alternative for any state, though he is specific about raising, but not answering, the question. Justice Breyer writes the main dissent, while Justice Sotomayor dissents separately to emphasize that a late-filed challenge must nevertheless receive full review—not be treated as "presumptively suspect." Result: affirmed.

Gamble v. United States, 694 F. App'x 750 (11th Cir. 2018)

(unpublished per curiam), *cert. granted,* 138 S. Ct. 2707 (2018).
No. 17-646; opinion filed June 17, 2019. Vote: 7-2

A strong majority upholds the dual sovereignty doctrine that allows both a State and the federal government to prosecute a single criminal act. Writing for that majority, Justice Alito explains that the Double Jeopardy Clause prohibits multiple trials for "the same offence," but not for the same act—and, if two sovereigns each outlaw an act, then that act constitutes two offenses. Gamble's attempts to overcome *stare decisis* fail because the historical record does not clearly indicate, for example, that the Framers would have supposed that a foreign court's criminal trial would preclude a domestic one.

Justice Thomas concurs with a lengthy explanation of his view that the Court too often relies on *stare decisis* to uphold "demonstrably erroneous" precedents, giving them a status higher than federal statutes or the Constitution itself. Justices Gorsuch and Ginsburg, dissenting separately, would hold that the Double Jeopardy Clause prohibits more than one prosecution by any part of the United States. Result: affirmed.

Timbs v. Indiana, 84 N.E.3d 1179 (Ind. 2017), *cert. granted,* 138 S. Ct. 2650 (2018).
No. 17-1091; opinion filed February 20, 2019. Vote: 9-0

The Eighth Amendment's prohibition of excessive fines protects a fundamental right and is incorporated against the states under the Fourteenth Amendment. Justice Ginsburg wrote for the unanimous Court, drawing concurrences from Justices Gorsuch and Thomas insisting that the proper vehicle for that incorporation was the privileges and immunities clause rather than the due process clause. Result: vacated and remanded.

Nieves v. Bartlett, 712 F. App'x 613 (9th Cir. 2017) (mem.), *cert. granted,* 138 S. Ct. 2709 (2018).
No. 17-1174; opinion filed May 28, 2019. Vote: 6-3

A § 1983 claim for retaliatory arrest fails where that arrest was supported by probable cause, unless a plaintiff can show that she was arrested when similarly situated folks who had not been engaging in protected speech were not. Chief Justice Roberts wrote for the ideologically heterogeneous majority.

Justice Thomas concurred in the result but did not agree with the exception crafted by the majority, preferring instead a consistent rule that probable cause always precludes liability: any "discomfort with the number of warrantless arrests that are privileged today is an issue for state legislatures, not a license for this Court to fashion" a new exception, in Thomas's view.

The other eight Justices agree that the rule must incorporate exceptions, but they do not agree on their extent. Lower courts will have to decide whether the Roberts exception absolutely requires comparators, as Justice Sotomayor fears, or can be applied "commonsensically" to make claims possible to prove with a broader spectrum of evidence, as Justice Gorsuch opines. Result: reversed and remanded.

Mount Lemmon Fire District v. Guido, 859 F.3d 1168 (9th Cir. 2017), *cert. granted,* 138 S. Ct. 1165 (2018).
No. 17-587; opinion filed November 6, 2018. Vote: 8-0

A unanimous Court explains that the Age Discrimination in Employment Act applies to small state agencies, overruling the Sixth, Seventh, Eighth, and Tenth Circuits, which had enforced in the state agency context the twenty-employee minimum that applies to private employers. The Ninth Circuit, so often reversed in recent terms, gets a rare affirmance here. Justice Kavanaugh did not participate. Result: affirmed.

Sam Brandao is a Clinical Instructor with experience enforcing housing equity, civil rights, and disability rights. He joined the Tulane Civil Rights and Federal Practice Clinic in 2016 after completing a two-year Skadden Fellowship, during which he served as a staff attorney at Southeast Louisiana Legal Services in New Orleans. At SLLS, he litigated housing discrimination cases and advocated for policy changes on behalf of persons with disabilities. Brandao clerked for United States District Judge Eldon E. Fallon of the Eastern District of Louisiana and for Circuit Judge Jacques L. Wiener, Jr. of the United States Court of Appeals for the Fifth Circuit. In the Civil Rights and Federal Practice Clinic, he assists Director Lucia Blacksher Rainer in supervising student-attorneys in a range of client representation, including federal cases involving the civil rights of incarcerated citizens, employment discrimination, housing discrimination, and other constitutional claims.

Appear in the Civil Rights Insider!

Call for Articles for the Civil Rights Insider

The editors of The Civil Rights Insider invite submissions for publication. Publication allows you to announce your latest win (or loss,) publicize a successful appeal that offers a valuable precedent, share a local phenomenon in the law that may have national implications, invite others to a conference that will be addressing novel issues of civil rights law, provide your personal take on a recent Supreme Court decision and its implications for your practice, or highlight a member whose work you believe should be acknowledged. We welcome your contributions as well as suggestions of subjects that should be addressed so that the newsletter serves us all.

Articles need only be between 500 – 1000 words. If interested, contact Steve Dane of Relman, Dane & Colfax PLLC, at sdane@relmanlaw.com.

#MeToo on Campus: How the Trump Administration's Proposed Title IX Regulations Fail to Provide a Safe Educational Environment

by Ellen Eardley, Mehri & Skalet, Washington, D.C.

Even before the #MeToo movement, student activists pushed universities to address the epidemic of sexual harassment, particularly sexual assault, on campus. The Obama Administration responded with guidance in the form of a 2011 Dear Colleague Letter and a 2014 question and answer fact sheet ("Questions & Answers on Title IX and Sexual Violence"). These reminded institutions of their responsibility to address sexual assault as a form of sexual harassment, indicated that grievance procedures and investigative processes used to address sexual harassment should be available for complaints of sexual violence, required use of the preponderance of the evidence standard in grievance proceedings, and discouraged schools from allowing complainants and respondents to cross-examine one another in school grievance proceedings.

A backlash soon followed. Many alleged that the Obama Administration's guidance favored complainants and denied respondents due process. In response, in the fall of 2017, shortly before #MeToo, President Trump's Secretary of Education, Betsy DeVos, rescinded the 2011 Dear Colleague Letter and the 2014 Questions & Answers on Title IX and Sexual Violence, and issued interim guidance. In November 2018, she issued a notice of proposed rulemaking to amend Title IX's regulations. The comment period closed on February 15, 2019.

The Secretary's proposed regulations are concerning for three reasons. First, the proposed definition of sexual harassment significantly departs from Supreme Court precedent, which will lead to confusion. Second, the proposed regulations narrowly define the scope of sexual harassment that schools may address through formal grievance procedures, tying the hands of administrators who wish to limit the on-campus effects of off-campus conduct. And, third, the proposed regulations limit institutional liability to circumstances where the school has actual notice and is deliberately indifferent, a much more deferential standard than permitted since a 2001 Department of Education guidance required schools to act reasonably and take immediate and effective corrective action.

What Is Sexual Harassment? Under DeVos's Proposal, Not Much (Or, at Least, Not as Much as Before).

Title IX of the Education Amendments of 1972 prohibits sex discrimination in educational programs or activities receiving federal funds, and is enforced by the U.S. Department of Education. In 1979, the Supreme Court held that individuals have an implied private right of action under Title IX.[1]

Originally, Title IX did not expressly prohibit or define sexual harassment, and did not clearly delineate institutional liability. The legal concept of sexual harassment developed in case law over the next several decades. To this day, Title IX's implementing regulations do not mention sexual harassment. This subject has been reserved for the courts and informal guidance from the Department of Education – until DeVos's proposed regulations.

In the late 1980s and the 1990s, the Supreme Court addressed the concept of sexual harassment, first under Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination (among other forms of discrimination) in employment. In *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986), the Court recognized that hostile environment sexual harassment may be actionable, even if there was no tangible economic discrimination in the workplace. The Court ruled that sexual harassment must be "sufficiently severe **or** pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 68 (emphasis added).[2]

Then, in two Title IX decisions in 1998 and 1999, the Supreme Court held that schools are liable in private damage actions for teacher-to-student and student-to-student sexual harassment if the school has notice of the harassment and is deliberately indifferent.[3] The Court in *Davis* further concluded that an action for student-to-student sexual harassment, "will lie only for harassment that is so severe, pervasive **and** objectively offensive that effectively bars the victim's opportunity to an educational opportunity or benefit."[4] In her decision, Justice O'Connor offered no explanation as to why harassment under Title IX must be severe "and" pervasive, rather than severe "or" pervasive as set forth under Title VII in *Meritor.*

In 2001, the Department of Education reformulated its definition of sexual harassment for its own enforcement actions, revising previous guidance from 1997.[5] The 2001 guidance very simply defines sexual harassment in straightforward language that is accessible to students, teachers, and administrators: "unwelcome conduct of a sexual nature." The guidance also instructed schools to focus on two key issues: (1) whether the conduct denies or limits a student's ability to participate in or benefit from the educational program because of sex; and (2) the nature of the school's responsibility to address the conduct. Arguably, the Department's 2001 standard prohibited a wider range of sexual harassment, "unwelcome conduct of a sexual nature," than harassment that is both "severe **and** pervasive" as set forth by the Supreme Court.

In 2011, the Department of Education continued to broadly define sexual harassment as unwelcome conduct of a sexual nature in a now-withdrawn Dear College Letter that explained that a school's obligation to address sexual harassment includes an obligation to address sexual violence.

The proposed DeVos regulations would significantly narrow the Department's definition of sexual harassment by adopting the "severe **and** pervasive" language from *Davis* for the first time. Sexual harassment would be defined as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[6]

Not only does this definition depart from the longstanding 2001 guidance, it also defines sexual harassment under Title IX more narrowly than under Title VII. The proposed regulation would prohibit a broader range of sexual harassment against employees, such as elementary school teachers, than against students, including elementary school students. In other words, as the National Women's Law Center explained in its comments on the proposed regulations, "schools would be held to a far lesser standard in addressing the harassment of students—including the sexual harassment and abuse of children under its care—than in addressing harassment of adult employees."

Off Campus? Out of Luck.

DeVos's proposed regulations would require schools to dismiss internal complaints of sexual harassment if the harassment "did not occur within the recipient's program or activity."[7] The DeVos proposal would require K-12 schools, colleges, and universities, to ignore allegations of harassment that occur off campus and outside of school events even if such incidents have continuing effects in the educational setting.[8]

As a former university administrator responsible for enforcing civil rights and addressing harassment, I find such a limitation on a school's ability to process internal complaints of harassment deeply troubling. For universities, such guidance may mean that they are required to dismiss complaints of sexual harassment and sexual misconduct that occur off, but near campus, such as in sorority and fraternity houses, in local businesses, and on regularly traversed thoroughfares that connect two parts of university-owned property, unless the conduct occurred during a university sponsored event. Requiring dismissal of off-campus conduct ignores the realities of sexual harassment, which often consists of multiple events or a pattern of conduct that unfolds in multiple settings, sometimes on and sometimes off campus.

The proposed regulations offer no guidance on how schools should address off campus sexual harassment that impacts the classroom and other educational activities. For example, the proposed regulations could be interpreted to require a university to dismiss a complaint from an undergraduate student who, during his first semester on campus, endured verbal sexual harassment and non-consensual sexual touching by a graduate student at an off-campus party, even though the graduate student has become his teaching assistant second semester. Similarly, the DeVos dismissal mandate could arguably require schools to dismiss complaints of online or cyber sexual harassment and sex-based stalking that interfere with educational access.

How Can a School Avoid Responsibility for Sexual Harassment? Just Don't Be Deliberately Indifferent or Clearly Unreasonable.

In the 2001 guidance, the Department avoided the use of the Supreme Court's "deliberate indifference" standard in setting forth schools' responsibility to address harassment. Instead, it directed schools to "take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again." What is reasonable, the Department clarified, depends on the circumstances. This standard aligns with the Title VII standard of addressing harassment by co-workers and makes sense in the educational context where the goal is to provide equal access to the educational environment.

The proposed DeVos regulations, however, abandon the requirement to take immediate and appropriate steps and invite schools to do the bare minimum, requiring a school only to respond in a manner "that is not deliberately indifferent" or in manner that is "clearly unreasonable in light of the known circumstances." Rather than acting reasonably, a school would need only to avoid acting clearly unreasonable. When it comes to protecting students, whether kindergarteners or college seniors, the Department of Education should encourage schools to take prompt corrective action—not to merely avoid indifference. Students deserve better. n

Ellen Eardley advocates for civil rights, represents people who have experienced sexual harassment, and advises employers and educational institutions on inclusive policies and practices. Ellen is a partner at the Washington, DC law firm of Mehri & Skalet, PLLC and an adviser with the Working IDEAL consulting firm. Previously, Ellen served as the Assistant Vice Chancellor for Civil Rights & Title IX at the University of Missouri, taught Sex-Based Discrimination at the American University Washington College of Law, and was a fellow at the National Women's Law Center.

Endnotes:

[1]Cannon v. University of Chicago, 441 U.S. 677 (1979).

[2]The Court expanded on its sexual harassment standard under Title VII in Harris v. Forklift Systems, 510 U.S. 17 (1993). It held that whether an environment is abusive depends upon the totality of the circumstances, including the frequency of the conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with work performance. Id. at 23. In 1998, the Court decided a pair of cases that articulated that an employer is liable for co-worker sexual harassment when it knew or should have known of the conduct and failed to stop it and is vicariously liable for sexual harassment by supervisors when the harassment culminates in a tangible employment action. If there is no tangible employment action, then the employer has the opportunity to prove an affirmative defense. Burlington Industries, Inc., 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[3]In Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998), the Supreme Court held that a school can be held liable for monetary damages in a private enforcement action for sexual harassment by a teacher against a student if a school official who has authority to address the harassment has knowledge of the harassment and is deliberately indifferent in responding. In Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), the Court held that a private damages action is available for student-to-student sexual harassment.

[4]Id. at 633 (emphasis added).

[5]Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, Or Third Parties

(Jan. 2001) available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

[6]Proposed §106.44(e)(1)(ii). The proposed regulations also water down the definition of sexual harassment perpetrated by an employee and sexual violence: "an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct" and "an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting program." Previous Department guidance did not limit sexual violence to criminal conduct. The 2014 Questions and Answers defined sexual violence as: "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (e.g., due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Sexual violence can be carried out by school employees, other students, or third parties. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX."

[7]Proposed § 106.45(b)(3) (stating that such allegations "must" be dismissed).

[8]In contrast, the 2011 Dear Colleague Letter, which DeVos withdrew, highlighted that schools may have an obligation to respond to student-on-student sexual harassment that initially occurs off school grounds and outside school activities because of the continuing effects of harassment in the educational setting.

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these issues. If you have any questions or would like to serve on the committee, please get in touch with either me or the committee chair, Kyle Kaiser, at kkaiser@agutah.gov.ww

Third and finally, we have set the official annual meeting for the Section to be held during the FBA National Annual Meeting and Convention, which is scheduled for September 5-7, 2019, in Tampa, Florida. The exact date and time for our Section meeting will be set soon. Of course we will have a dial-in number for everyone who wants to call in, but I hope you will consider attending the annual convention in person. It's always a great time and a good chance to get to know your fellow Civil Rights Section members.

Thanks, I hope you enjoy this edition of the Civil Rights Insider, and happy summer!

2019 FBA ANNUAL MEETING & CONVENTION

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