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**FIFTH CIRCUIT UPDATE**

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## I. Introduction.

Given its size and location, the Fifth Circuit has always had a flow of extremely important cases. That did not change this year. The Court handled its usual docket of commercial cases and criminal case in addition to many cases involving Constitutional rights and federal statutes. But on top of that, the Court decided several cases that got national attention, including an extraordinary decision involving the Indian Child Welfare Act (ICWA), various challenges to COVID restrictions in light of the pandemic, and even some challenges to the results of the 2020 Presidential election. Given the scope of the task, this paper will try to cover some of the most interesting and important developments in the Court this year in a number of different topics. Hopefully this overview will provide the reader with a sense of the Court's workload and decisions.

In particular, I will provide an update on procedural cases, cases involving federal statutes, commercial cases, cases involving qualified immunity, cases involving attorneys' fees, cases involving personal injury matters, and cases that involve the application of state law in federal court. One additional note: a significant portion of the Fifth Circuit's work this year was taken up with election related litigation. In particular, there were several challenges to accommodations made by various states in response to COVID-19 at the ballot box, followed by challenges by the former President and his supporters to the results of the Presidential election.

However, many of these cases were resolved on the Court's shadow docket; that is, by denied stays and other interlocutory orders, and did not result in reasoned opinions. For that reason, I have not included an in-depth discussion of those cases here. *See, e.g., Texas Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020) (application of Texas statute requiring voters under the age of 65 to prove a disability to vote by mail did not violate the Twenty-Sixth Amendment); *Texas League of United Latin American Citizens v. Hughs*, 978 F.3d 136 (5th Cir. 2020) (Fifth Circuit allows Texas Governor to limit personal delivery of mail-in ballots to only one location per county); *Richardson v. Texas Secretary of State*,

978 F.3d 220 (5th Cir. 2020) (voter verification procedures passed by Texas legislature should not have been enjoined).

## **II. COVID-19.**

### **A. Oral arguments.**

For most of this past year, the Fifth Circuit held oral arguments by Zoom only. Over the last several months, the Court has been holding some limited number of oral arguments in person in New Orleans, subject to counsel's agreement. The Court has created an elaborate series of security measures to allow argument to proceed, including allowing *only* arguing counsel into the building at the time of their argument, plexiglass barriers, masks, and other methods to prevent transmission of the COVID-19 virus. One can hope now that the vaccine is here and is effective, that the Court can once again return to in-person arguments for most cases in this coming year.

I have heard that other circuits are considering blending Zoom arguments with in-person arguments (that is, in any particular argument, counsel would have the right to present argument by Zoom even if the panel and opposing counsel are in person). To my knowledge, the Fifth Circuit is not publicly considering this expedient.

### **B. COVID related litigation.**

The flood of COVID-related litigation has slowed as the pandemic has slowly abated. Perhaps the most important COVID-related case, the *Valentine v. Collier* litigation, has come to a close. Last year, Judge Keith Ellison of the Southern District of Texas entered a preliminary injunction requiring COVID-19 tests and many other measures for every inmate in one part of "Pack Unit," a prison in Grimes County, Texas for geriatric prisoners. After several trips back and forth to the Fifth Circuit, the Court finally vacated the district court's permanent injunction. Although the Court found that "this litigation generally and the district court's careful management and expedited handling of the case played a role in motivating the prison officials into action and saved countless lives," the

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