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FIFTH CIRCUIT UPDATE

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I. Introduction.

As ever, the Fifth Circuit continued to handle a high volume of important and nationally salient cases this year. Among others, the Court issued decisions on SB8, Texas's new abortion regulation, immigration issues, vaccine mandates for private businesses, vaccine mandates for soldiers, the right to sue the leader of a protest movement, and Texas's new social media regulation. And, of course, the Fifth Circuit continued to issue decisions on a wide range of commercial and civil rights disputes implicating the interests of citizens in all three Fifth Circuit states. 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 interesting and happy note that is important for Fifth Circuit practitioners to know. Before April 2022, the Chief Judge of the Fifth Circuit was the Honorable Priscilla Owen. After marrying the Chief Justice of the Texas Supreme Court, Nathan Hecht, the Chief Judge readopted her maiden name, and is now known as Chief Judge Richman. The Fifth Circuit has changed all official correspondence and its website to take into account this change, and lawyers should be careful to address the Judge correctly.

One other piece of important news. For the last two years, this paper has included a section about COVID-19 and its effects on oral argument. I am pleased to note that I have removed that section from the paper this year, because the Court is now in full in-person operation. Lawyers may wear masks in the courthouse and during oral argument if they so choose. The court has been unwilling in some circumstances to allow lawyers who are more concerned about COVID-19 to participate in oral argument by video—the results of such motions depend in large part on the panel to which oral argument is assigned and the reason why the video argument is needed.

II. The Fifth Circuit in the Supreme Court.

As usual, the Fifth Circuit has had several cases that have reached the Supreme Court of the United States this year. Out of five Fifth Circuit cases decided by the Supreme Court this term (as of this writing, in early June 2022), four have been reversed. The four civil cases are noted below (*Ramirez* is about an execution, but it is based on the Religious Freedom Restoration Act, or RFRA).

As ever, this sort of statistic is very contingent on the kinds of cases presented to the Court and should not be taken as some indication of the merits of the cases or the decisions of the Fifth Circuit. This does not consider the many cases of the Fifth Circuit that have arrived in the Fifth Circuit via the so-called “shadow docket” (i.e., cases that are decided without oral argument or full briefing, and often without full opinion).

A. *Badgerow v. Walters*, 142 S. Ct. 1310 (2022). The Supreme Court holds that the Fifth Circuit’s rule for “pass through” Federal subject matter jurisdiction when deciding motions to confirm or vacate arbitrations under the FAA is wrong. You must look *only* to the face of the motion to confirm or vacate.

B. *Ramirez v. Collier*, 142 S. Ct. 1264 (2022). Applying RFRA, the Supreme Court reversed the Fifth Circuit’s decision that a condemned prisoner was not entitled to have his preferred chaplain audibly pray over him and touch his body while being executed.

C. *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022). The Supreme Court reversed the Fifth Circuit’s decision that a city ordinance that distinguished between “on-premises” and “off-premises” billboards violated advertisers’ First Amendment rights. Yes, the ordinance requires the regulatory to read the sign (to see whether it advertises something on or off premises). But that is a content neutral distinction “similar to ordinary time, place, or manner restrictions.” *Id.* at 1473.

D. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022). The Supreme Court agreed with the Fifth Circuit that emotional

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