

SECTION ON CIVIL RIGHTS

NEWSLETTER*

December 2009

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SECTION OFFICERS AND EXECUTIVE COMMITTEE

Chair:

Gilda R. Daniels, University of Baltimore School of Law
Ph: (410) 837-4607
Email: gdaniels@ubalt.edu

Chair-Elect:

Rosalie Levinson, Valparaiso University School of Law
Email: Rosalie.Levinson@valpo.edu

Michèle Alexandre, The University of Mississippi
Ph: (662) 915-6858
Email: malexand@olemiss.edu

Jack M. Beerman, Boston University School of Law
Ph: (617) 353-2577
Email: beerman@bu.edu

Sam Kamin, University of Denver College of Law
Ph: (303) 871-6125
Email: skamin@law.du.edu

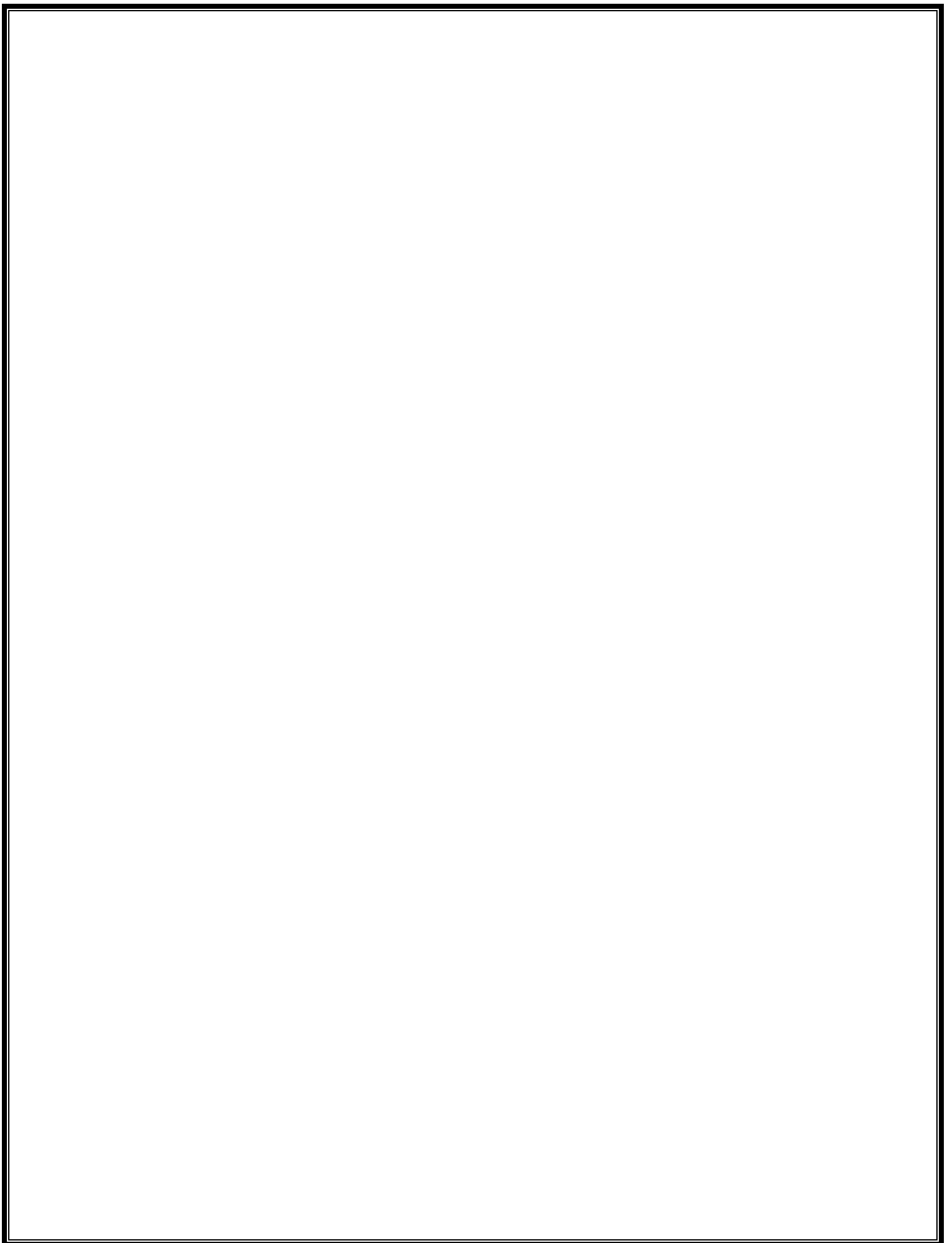
Barbara Kritchevsky, The University of Memphis Cecil C. Humphreys School of Law
Ph: (901) 678-3239
Email: bkrтчvs@memphis.edu

** The Section on Civil Rights Newsletter is a forum for the exchange of points of view.*

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Listserv Email: civilrights@lists.washlaw.edu

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MESSAGE FROM THE CHAIR

Gilda R. Daniels
University of Baltimore School of Law

Greetings!!!

It has certainly been an exciting decade in civil rights and no area arguably more prevalent than voting rights. From the 2000 Presidential election debacle, the renewing of the Voting Rights Act, major Supreme Court decisions, election protection campaigns, and the election of the first African American as President of the United States, we have certainly come a long way. With President Obama's election and his selection of the nation's first Latina United States Supreme Court Justice, talk of post-racial bliss abounds. Yet, there is much more territory to conquer.

As we enter this new decade, an old but familiar civil rights challenge exists with the census, redistricting and the counting of displaced voters, such as those who suffered in the wake of Hurricane Katrina as well as incarcerated persons. The Civil Rights Section panel presentation at the AALS Conference, entitled ***The Census, Redistricting and Displaced Voters*** will discuss these and other issues on Saturday, January 9, 2010 from 8:30 a.m. to 10:15 a.m. The 2010 Census and redistricting cycle have great implications on civil rights issues. The next round of redistricting potentially could determine who gets elected and with great shifts in demographics from the housing boom and bust and the current recession, a lot is at stake.

Our panelists are experts in the area of voting rights, law and democracy. This panel features scholars who write and practice in the voting rights area.

Kristen Clarke is the Co-Director of the Political Participation Group at the NAACP Legal Defense and Educational Fund, Inc. (LDF), where she oversees and coordinates the activities of the organization's legal program in the areas of voting rights and election law. Prior to joining LDF, Ms. Clarke worked for several years in the Civil Rights Division of the U.S. Department of Justice. She served as a trial attorney in the Voting Section of the Division where she handled a number of matters arising under the Voting Rights Act of 1965, among other statutes.

Ms. Clarke writes and comments frequently on issues concerning race, law and democracy. Her book, *Seeking Higher Ground: The Hurricane Katrina Crisis Race and Public Policy Reader*, was released by Palgrave Macmillan in December 2007. Her new book, *Barack Obama and African American Empowerment: The Rise of Black America's New Leadership* (co-edited with Dr. Manning Marable) was released in November 2009. Her writing has appeared in a number of books including the American Bar Association's book on modern American election law and voting rights, *America Votes!* Her most recent article, *The Obama Factor: The Impact of the 2008 Presidential*

Election on Future Voting Rights Act Litigation, appears in the 2009 issue of the Harvard Law & Policy Review. She received her undergraduate degree from Harvard and her J.D. from Columbia School of Law.

Kareem Crayton is an Associate Professor of Law at the University of Southern California (USC). He is a redistricting and voting rights specialist in the field of law and politics. His scholarly research explores subjects that include election law, the political representation of racial minorities, and the emerging constitutional democratic system in South Africa. His work has appeared in highly regarded law reviews and other publications. His current work focuses on the legal and political debates surrounding the most recent renewal of the 1965 Voting Rights Act.

At USC Law, Professor Crayton teaches Civil Procedure, Election Law and Comparative Constitutional Law. Professor Crayton is also an affiliated faculty member of Harvard University's Department of Government and USC's Department of Political Science, where he teaches Civil Rights & Civil Liberties and The Politics of the American City.

Prior to joining the faculty at USC Law, Professor Crayton was the inaugural Vanderbilt Fellow at Vanderbilt Law School. He also served as a foreign law clerk for The Honorable Sandile Ngcobo, Chief Justice of the Constitutional Court in the Republic of South Africa, and The Honorable Harry Edwards, Judge of the United States Court of Appeals for the D.C. Circuit. Professor Crayton is a magna cum laude graduate of Harvard College. He also earned a J.D. and Ph.D. in Political Science from Stanford University.

Damon Hewitt joined the NAACP Legal Defense and Educational Fund, Inc. (LDF) as a Skadden Fellow in 2001, founded LDF's "Dismantling the School-to-Prison Pipeline" initiative, which challenges racial disparities that lie at the intersection of the education system and the juvenile and criminal justice systems and since 2006, has coordinated LDF's post-Hurricane Katrina litigation and advocacy efforts. Mr. Hewitt received a bachelor's degree in political science from Louisiana State University and he received his law degree from the University of Pennsylvania Law School, where he was a recipient of the Public Interest Scholarship, a research assistant to Professor Lani Guinier, and president of his graduating class. Following law school, Mr. Hewitt worked as a law clerk for Judge Eric L. Clay of the United States Court of Appeals for the Sixth Circuit. He has authored and co-authored numerous publications, and is frequently quoted in the media on school discipline and racial justice issues, including those impacting New Orleans and the Katrina Diaspora. He has made appearances in a number of print publications and on broadcast programs, including Education Week, the ABC News program Primetime, NPR's Democracy Now, and CNN's Lou Dobbs Tonight. He was also featured in director Spike Lee's epic documentary film, *When the Levees Broke: A Requiem in Four Acts*.

Michael Pitts is a John S. Grimes Fellow and Associate Professor at Indiana University School of Law-Indianapolis. Prior to joining the faculty, he practiced as a trial attorney in the Voting Section of the United States Department of Justice. He is a graduate of Georgetown University Law Center, where he was a member of the Order of the Coif and served as an associate editor of *The Georgetown Law Journal*. Following law school, he clerked for the Honorable C. Arlen Beam, United States Court of Appeals for the Eighth Circuit.

Professor Pitts' scholarly work focuses on the law of democracy, particularly voting rights and election administration, and his work has been published in a variety of law reviews and journals. He was named a John S. Grimes fellow in 2008-09 and 2009-10, and a Dean's Fellow in recognition of scholarly excellence in 2007-08 and 2008-09. Professor Pitts frequently provides commentary about election law issues to the media and has been quoted by *The Associated Press* and *The New York Times*, and has appeared on *CNN*.

John V. White became Dean at the UNLV Boyd School of Law from Louisiana State University (LSU) Paul M. Hebert Law Center where he was the J. Dawson Gasquet Memorial Professor of Law. At LSU, he taught for 15 years and wrote and lectured extensively about civil rights law. A recent article, *The Persistence of Race Politics and the Restraint of Recovery in Katrina's Wake*, was published in the 2006 anthology, *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA*. Dean White was also a Distinguished Visiting Professor at the University of Insubria in Como, Italy, where he worked on the role of civil rights law and multicultural theories in responding to globalism. He helped organize and direct a summer school in comparative law in Insubria and twice directed the LSU summer program in Lyon, France. Before teaching law, he was an Orville Schell Fellow at Human Rights Watch in New York City where he worked on prison and human rights practices in Egypt. Dean White received his J.D. from Yale Law School in 1991, where he was a notes and topics editor for the Yale Law Journal and participated in the Jerome N. Frank Legal Service Organization.

Gilda R. Daniels is an Assistant Professor at the University of Baltimore (UB), where she teaches civil procedure, election law and critical legal theory. She is a voting rights and election law expert, who has testified before the United States Senate Judiciary Committee. Before joining the faculty at UB, she served as a Deputy Chief in the Department of Justice, Civil Rights Division, and Voting Section. She has more than a decade of voting rights experience bringing cases that involved various provisions of the Voting Rights Act, National Voter Registration Act and other voting rights statutes. Prior to beginning her voting rights career, Prof. Daniels was a staff attorney with the Southern Center for Human Rights representing death row inmates and bringing prison condition cases.

Her scholarly writing focuses on voting rights and election administration issues and has been published in the *Louisville and Indiana Law Review*. She is a graduate of New York University School of Law, where she was a Root Tilden Scholar and elected National Chair of the National Black Law Students Association. She clerked in the Eleventh Circuit Court of Appeals with the Honorable Joseph W. Hatchett.

Please join us for an interesting and timely discussion.

UPCOMING EVENTS

- ▶ The 2010 Annual Meeting of the Association of American Law Schools will take place in New Orleans, Louisiana from January 6 through January 10, 2010.
- ▶ The Section on Civil Rights Program is scheduled for Saturday, January 9, 2010 from 8:30 a.m. to 10:15 a.m. This year's topic is *The Census, Redistricting and Displaced Voters*.
- ▶ The section's business meeting will immediately follow the program.

SUPREME COURT NEWS (NOTABLE DECISIONS)

Northwest Austin Municipal Utility District No. One v. Holder, 129 S.Ct. 2504 (2009).

Questions Presented: This case presented two questions regarding the necessity of the Voting Rights Act of 1964: 1) Whether §4(a) of the Voting Rights Act (VRA), which permits "political subdivisions" of a State covered by §5's requirement that certain jurisdictions pre-clear changes affecting voting with the federal government to bail out of §5 coverage if they can establish a ten-year history of compliance with the VRA, must be available to any political subunit of a covered State when the Court's precedent requires "political subdivision" to be given its ordinary meaning throughout most of the VRA and no statutory text abrogates that interpretation with respect to §4(a); and 2) Whether, under the Court's consistent jurisprudence requiring that remedial legislation be congruent and proportional to substantive constitutional guarantees, the 2006 enactment of the §5 pre-clearance requirement can be applied as a valid exercise of Congress's remedial powers under the Reconstruction Amendments when that enactment was founded on a congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting rights guarantees in jurisdictions covered only on the basis of data 35 or more years old, or even when considered under a purportedly less stringent rational-basis standard.

Background: The appellant, a small utility district located in Austin, Texas is required by §5 of the Voting Rights Act of 1965 (Act) to seek federal preclearance before anything regarding changes affecting voting occurs. This requirement is mandated regardless of whether there is evidence voters have ever been discriminated against on the basis of race in previous elections.

“Under Texas law, the district does not register voters but is responsible for its elections. Before 2004, the district's elections were held at private residences. Those polling places were precleared and never the subject of discrimination-related complaints, but the board eventually desired to hold elections at a more convenient public location, like the neighborhood school. While inquiring about holding elections at the school, the district learned that it could contractually delegate the conduct of its elections to Travis County and put district elections on the countywide ballot.”

Appellant's Brief at 9, *Northwest Austin Mun. Util. Dist. No. One*, 129 S.Ct. 2504 (No. 08-322). The district filed suit under the bailout provision pursuant to §4(a) of the VRA, which allows a political subdivision to be released from the preclearance requirements if certain conditions are met.

Holding: The court, with only one justice in partial dissent, said *Northwest Austin Municipal Utility District No. 1* can opt out of the advance approval requirement of federal preclearance for

changes in election procedures. It held: 1) utility district was political subdivision eligible to file suit to bail out of pre-clearance requirements; 2) Supreme Court refrained from deciding whether pre-clearance requirements were unconstitutional. 129 S.Ct. 2504 (2009).

Ricci v. DeStefano, 129 S.Ct. 2658 (2009).

Questions Presented: The questions presented before the Court were:

1) When an otherwise valid civil service selection process yields unintended racially disproportionate results, may municipalities reject the results and the successful candidates for reasons of race absent the demonstration required by 42 U.S.C. § 2000e-2(k)?

2) Does 42 U.S.C. §2000e-2(l), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race ...," permit employers to refuse to act on the results of such tests for reasons of race?

3) If, citing the public interest in eradicating political patronage, racism and corruption in civil service, a state's highest court mandates strict compliance with local laws requiring race-blind competitive merit selection procedures, does 42 U.S.C. §2000e-7 permit federal courts to relieve municipalities from compliance with such laws?

Petitioner's Brief on the Merits at *i*, *Ricci v. DeStefano*, 129 S.Ct. 2658 (Feb. 19, 2009) (No. 08-328), 2009 WL 453242.

Background: Petitioners, New Haven firefighters and lieutenants, qualified for a promotion to command positions pursuant to job-related examinations and merit selection rules. Identifying the race of successful candidates and Title VII's "disparate impact" provision¹, city officials decided to refuse to promote the Firefighters, and the promotion test results were thrown out.

Holding: The Court's *Ricci* decision essentially means that where a city is faced with the difficult position of choosing between a potential disparate impact liability suit versus a disparate

¹ "Disparate impact practices are practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities. *Ricci v. DeStefano*, 129 S.Ct. 2658, 2672 (U.S., 2009).

treatment liability suit, that city must err on the side of triggering a disparate impact on a particular racial group, to avoid liability. In a 5-4 decision the Court held that:

1) city's refusal to certify results was a violation of Title VII's disparate-treatment prohibition absent some valid defense...since the city made its employment decision because of race; *Ricci*, 129 S.Ct. 2658, 2673 (2009); 2) "before employer can engage in intentional discrimination for asserted purpose of avoiding unintentional disparate impact, employer must have strong basis in evidence to believe it will be subject to disparate-impact liability" if it fails to take race-conscious action; *id.* at 2677; 3) city officials arguments that the examinations were not job-related and consistent with business necessity were contradicted by the record; *id.* at 2678; and 4) "city officials lacked strong basis in evidence to believe there existed equally valid, less-discriminatory alternative to the use of examinations that served city's needs, but, the city refused to adopt." *Id.* at 2679.

Ricci, 129 S.Ct. 2658, 2673-2679 (2009).

Dissent. Dissenting, Justice Ginsberg believed the City of New Haven rightfully feared the city would find itself vulnerable to a Title VII disparate impact suit if the firefighters' promotion test results were certified. Justice Ginsberg condemns the majority for disregarding pertinent facts in this story; and in doing so, taking the issue presented out of context. Justice Ginsberg points out that it is against the backdrop of: 1) minority groups being severely underrepresented in the New Haven Fire Department both in the past and in the present; and 2) of entrenched inequality, must the promotion process be assessed. Accordingly, the New Haven Civil Service Board (CBS), voting not to certify the promotion exam results, acted in a lawful manner to comply with Title VII's disparate impact provision. Justice Ginsberg further acknowledges that the New Haven Firefighters had "no vested right to a promotion." *Id.* at 2690. The Court could have reasoned then, that the City of New Haven needed only a rational basis for not certifying the test results.

Horne v. Flores, 129 S. Ct. 2579 (2009).

Questions Presented:

1) Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.

2) Whether compliance with No Child Left Behind's (NCLB's) extensive requirements for English language instruction is sufficient to satisfy the Equal Education Opportunity Act's (EEOA's) mandating States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

Brief for Petitioners at *i*, *Horne v. Flores*, 129 S. Ct. 2579 (Feb. 19, 2009) (No. 08-294), 2009 WL 453245.

Background:

In 1992 English Language-Lerner (ELL) students and their parents in sued the State of Arizona, in a class action suit, for failing to comply with the Equal Education Opportunity Act (EEOA). They contended Arizona officials were not taking “appropriate steps” to educate non-English speaking school children. In 2000, a federal district court held that Arizona violated the Equal Educational Opportunity Act (“EEOA”), because it was not adequately funding programs for teaching English to students, and declaratory relief was granted for the non-settled portion of the claim. Arizona then implemented huge funding increases and complied with the comprehensive federal requirements for English-language instruction under the No Child Left Behind Act (NLCB). In 2005, Arizona still was not adequately funding ELL programs because it was not earmarking ELL-specific funds to cover the entire cost of ELL instruction. Since, the district court has refused to modify its eight-year-old injunction, imposing penalties on the State until the Arizona Legislature further increases funding substantially to programs for teaching English to students. The Ninth Circuit held that Petitioners were not entitled to relief because: 1) the named defendants support the injunction; and 2) the injunction's basic premises have not been swept away.

Brief for Petitioners at 17-25, *Horne v. Flores*, 129 S. Ct. 2579 (Feb. 19, 2009) (No. 08-294), 2009 WL 453245.

Holding: In a 5-4 Decision the Supreme Court reversed and remanded case for further hearings. Unsatisfied with how the district court evaluated the changes that Arizona made to its English language programs, the Court held: 1) Superintendent had standing; 2) Court of Appeals should have inquired whether changed conditions satisfied EEOA; 3) district court abused its discretion on remand by focusing only on increased funding for ELL programs; 4) on remand, district court must consider factual and legal challenges that may warrant relief; 5) State's compliance with No Child Left Behind Act (NCLB) benchmarks did not automatically satisfy EEOA requirements; and 6) statewide injunction was not warranted.

Crawford v. Nashville and Davidson County, 129 S.Ct. 846 (2009).

Question Presented: Does the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protect a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment?

Background:

A sexual harassment investigation in 2002 gave rise to this action. Three women who provided information about their experiencing sexual harassment by the

employee relations director for the Metro School District, Dr. Gene Hughes, also expressed fears of retaliation for their participation in the investigation. While the investigator's reports did not resolve the merits of the sexual harassment allegations, and no disciplinary actions were taken against Hughes, Crawford was suspended the same day the report was released. She was then fired approximately two months later Crawford, filed a Title VII action alleging retaliation.

Brief for Petitioner at 1-6, *Crawford v. Nashville and Davidson County*, 129 S.Ct. 846 (Apr. 9, 2008) (No. 06-1595), 2008 WL 1721898.

Holding: The Supreme Court in a unanimous ruling held the protection of the opposition clause of the antiretaliation provision of Title VII extended to employee who spoke out about sexual harassment, not on her own initiative, but in answering questions during employer's investigation of coworker's complaints, abrogating *Bell v. Safety Grooving & Grinding*, 107 Fed.Appx. 607, 2004 WL 1922170.

Safford Unified Sch. Dist. No. 1 v. Redding, 129 S.Ct. 2633 (2009).

Questions Presented: 1) Whether the Fourth Amendment prohibits public school officials from conducting a search of a student suspected of possessing and distributing a prescription drug on campus in violation of school policy. 2) Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public school administrator may be liable in a damages lawsuit under 42 U.S.C. § 1983 for conducting a search of a student suspected of possessing and distributing a prescription drug on campus. Brief for Petitioners at *i*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S.Ct. 2633 (Feb. 25, 2009) (No. 08-479), 2009 WL 507028.

Background: Middle school student, Savana Redding, by her mother, brought an action under 42 U.S.C. § 1983, against her school district, assistant principal, administrative assistant, and school nurse, alleging that in their quest to find prohibited prescription drugs, strip searched 13-year-old Savana Redding violating her Fourth Amendment right to be secure in her person against unreasonable searches. School officials did not contact Redding's parents prior to making her remove her shoes, socks, shirt, and pants. All articles of clothing, including Savana's underwear, were individually searched. School officials found no drugs or any other prohibited items.

Holding: In an 8-1 ruling, the justices said that school officials violated the Fourth Amendment ban on unreasonable searches when they ordered 13-year-old Savana Redding to remove her clothes and shake out her bra and panty in search of pills. The Court held that:

- 1) assistant principal had reasonable suspicion that students were distributing contraband drugs;
- 2) principal's reasonable suspicion did not justify a strip search;

3) However, the law regarding strip searches of students was not clearly established, and accordingly, the officials were entitled to qualified immunity. *Safford Unified Sch. Dist. No. 1*, 129 S.Ct. 2633 (2009).

Forest Grove Sch. Dist. v. T.A., 129 S.Ct. 2484 (2009).

Question Presented: Whether the Individuals with Disabilities Education Act permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place their child in private school, and the child had not previously received special education and related services under the authority of a public agency.

Background:

Congress enacted Individuals with Disabilities Education Act (IDEA) for in 1970 for the purpose of ensuring all children with disabilities are provided a free appropriate public education (FAPE). FAPE emphasizes special education and related services which are designed to meet children's unique needs, and assures that the rights of these children and their parents are protected. Forest Grove School District sought judicial review of a hearing officer's decision that required the district to reimburse private-school tuition of a student, T.A., who had been diagnosed with learning disabilities after his parents pulled him from a public school then placed him in private school without the consent of or referral by a public agency. T.A.'s parents withdrew him from public school and placed him in a private school due to his suffering from drug abuse and depression. T.A.'s parents did not arrange for their son to be evaluated for a disability, nor did they inform anyone of a belief that their son was not receiving adequate public education. T.A.'s parents filed suit to be reimbursed for their private school tuition triggering a mandatory assessment of their son, which revealed he was disabled.

Brief of Petitioner at 2-8, *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484 (Feb. 25, 2009) (No. 08-305), 2009 WL 507022.

Holding:

In a 6-3 decision the Court held 1) the Individuals with Disabilities Education Act (IDEA) authorizes reimbursement for private special-education services when a public school fails to provide child with a free appropriate public education (FAPE) and the private-school placement is appropriate, regardless of whether the child previously received special-education or related services through the public school. 2) the 1997 Amendments to IDEA did not categorically bar reimbursement of private-education tuition if a child had not previously received special education and related services through the public school, abrogating *Greenland School Dist. v. Amy N.*, 358 F.3d 150; and 3) IDEA authorized reimbursement of the costs of child's private special-education services.

Forest Grove Sch. Dist., 129 S.Ct. 2484, 2496 (2009).

AT&T Corp. v. Hulteen, 129 S.Ct. 1962 (2009).

Questions Presented:

- 1) Whether an employer engages in a current violation of Title VII when, in making post-PDA eligibility determinations for pension and other benefits, the employer fails to restore service credit that female employees lost when they took pregnancy leaves under lawful pre-Pregnancy Discrimination Act leave policies.
- 2) Whether the Ninth Circuit's finding of a current violation of Title VII in such a circumstance gives impermissible retroactive effect to the PDA.

Background: Female employees and their union brought a Title VII action against their employer alleging sex and pregnancy discrimination in connection with the calculation of their pension benefits.

Holding: The Supreme Court held that; 1) an employer does not necessarily violate Title VII when that employer pays pension benefits calculated in part under an accrual rule, applied only prior to the Pregnancy Discrimination Act (PDA) and gave less retirement credit for pregnancy leave than for medical leave generally; 2) an employer's calculation of female employees' pension benefits under such an accrual rule did not violate the PDA; abrogating *Pallas v. Pacific Bell*, 940 F.2d 1324 (C.A.9 1991); and

- 3) PDA did not apply retroactively.

Bartlett v. Strickland, 129 S.Ct. 1231 (2009).

Question Presented: Whether a racial minority group that constitutes less than 50% of a proposed district's population can raise a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Background:

The North Carolina Constitution provides that "no county shall be divided" in the formation of state House and Senate districts. [N.C. Const. art. II, §§ 3\(3\), 5\(3\)](#). The North Carolina Supreme court acknowledged that strict compliance with the Whole County Provisions was "impossible" in light of the VRA and the "one-person, one-vote" requirement. *Stephenson v. Bartlett*, 562 S.E.2d at 396 (2003). County brought an action against the Governor of North Carolina and other state officials alleging the legislative redistricting plans violated the "Whole County" Provision of the state constitution. The North Carolina Supreme Court held that a minority group must constitute a numerical

majority of the voting-age population in an area before §2 requires the creation of a legislative district to prevent dilution of that group's votes. Accordingly, African-Americans in District 18 did not have such a numerical majority, the legislature was ordered to redraw the district.

Brief for Petitioners at 2-8, *Bartlett v. Strickland*, 129 S.Ct. 1231 (June 10, 2008) (No. 07-689), 2008 WL 2415164.

Holding: In a 5-4 decision the Court ruled that a key provision of the Voting Rights Act that keeps minority votes from being diluted during redistricting does not apply in districts where a minority group makes up less than 50 percent of the voting age population. The Court held that crossover districts (Crossover districts are districts in which minority voters make up less than a majority of the voting-age population, but the minority population is potentially large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate) do not meet the [Gingles](#) requirement that a minority group must be sufficiently large and geographically compact enough to constitute majority in a single-member district, for purpose of claim under Voting Rights Act's vote dilution provision. *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986). Voting Rights Act of 1965, § 2(a), as amended, [42 U.S.C.A. § 1973\(a\)](#).

Fitzgerald v. Barnstable Sch. Comm., 129 S.Ct. 788 (2009).

Question Presented: Whether Title IX's implied right of action precludes § 1983 constitutional claims to remedy sex discrimination by federally funded educational institutions. *Fitzgerald*, 129 S.Ct. 788, 792 (2009).

Background:

Petitioners, a five year-old elementary school student Jacqueline Fitzgerald and her parents, filed suit against respondents, their local school district's governing board and superintendent, under, Title IX of the Education Amendments of 1972, [20 U. S. C. §1681\(a\)](#), and [42 U. S. C. §1983](#) for violation of the Equal Protection Clause of the [Fourteenth Amendment](#). Petitioners alleged that respondents' response to allegations of sexual harassment of petitioners' daughter by an older student, a third-grade schoolmate named Oleson, was inadequate. Oleson, forced Jacqueline to lift her skirt, pull down her underwear and expose herself to him every time she wore a skirt or dress. Jacqueline informed her parents six months after the harassment began, and they immediately contacted the school principal. The school initiated an ad hoc investigation. Other students confirmed the harassment however the principal found these witnesses "too young to be credible." No disciplinary measures were taken against Oleson. Among its rulings, the District Court dismissed the §1983 claim and the First Circuit affirmed, holding, Title IX's implied private remedy was sufficiently

comprehensive to preclude the use of §1983 in order to advance a constitutional claims.

Brief for Petitioners at 5-8, *Fitzgerald v. Barnstable Sch. Comm.*, 129 S.Ct. 788 (Aug. 22, 2008) (No. 07-1125), 2008 WL 3911136.

Holding: In a unanimous decision, the Supreme Court ruled that Title IX, which prohibits sex discrimination in educational institutions receiving federal assistance, does not prevent people from also making constitutional claims of sex discrimination.

Gross v. FBL Fin. Services, Inc., 129 S.Ct. 2343 (2009).

Question Presented: Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?

Background:

Employee, Jack Gross, brought an action against his employer under the Age Discrimination in Employment Act (ADEA), alleging he was demoted and his age was the motivating factor. In 1971 Gross was hired by a subsidiary of FBL Financial Group. In 2002 he held the position of Claims Administration Director. In 2003, Gross was demoted from Claims Administration Director to Claims Project Coordinator when the FBL subsidiary for which Gross worked merged with FBL's Kansas and Nebraska subsidiaries. The change in position resulted in approximately twenty thousand dollars in salary, and twenty-six thousand dollars worth of stock options. Gross was 54 years-old at the time. United States District Court for the Southern District of Iowa, ruled in favor of Gross. His employer appealed. The United States Court of Appeals for the Eighth Circuit, [526 F.3d 356](#), reversed.

Brief for Petitioner at 2-4, *Gross v. FBL Fin. Services, Inc.*, 129 S.Ct. 2343 (Jan. 26, 2009) (No. 08-441), 2009 WL 208116.

Holding:

In a 5-4 decision the Supreme Court held a plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action. The burden of persuasion to show employer would or would not have taken the action regardless of age remains on the plaintiff’s shoulders. Showing some evidence that age was one motivating factor in the decision to terminate the employee is not enough. Further, the court held mixed-motives jury instruction is never proper in ADEA case.

Gross, 129 S.Ct. 2243, 2351-2352 (2009).

NOTABLE PENDING CASES

08-7412 *Graham v. Florida*

Question Presented: Whether the Eighth Amendment's prohibition on cruel and unusual punishment prohibit a state legislature from setting a punishment of life in prison without parole for the commission of a non-homicide crime committed by juveniles? Brief for Petitioner at *i*, *Graham v. Florida*, --- S.Ct. ---- (July 16, 2009) (08-7412), 2009 WL 2159655.

Background: The State filed a probation violation report against defendant, who was on probation for pleading guilty to the crimes of armed burglary and attempted armed robbery which occurred when he was 16 years old. *Id.* at 2 (Jul. 16, 2009). The Circuit Court of Duval County determined that a probation violation had occurred and sentenced defendant to life imprisonment without the possibility of parole. Defendant appealed. The District Court of Appeals held the sentence of life imprisonment without possibility of parole was not cruel and unusual punishment, under the 8th Amendment of the U.S. Constitution, nor did it violate the United Nations International Covenant on Civil and Political Rights (ICCPR).

08-7621 *Sullivan v. Florida*

Question Presented: Does the Eighth Amendment's prohibition on cruel and unusual punishment prohibit a state legislature from setting a punishment of life in prison without parole for heinous crime committed by juveniles?

Background:

At the time of the offense in 1989, Joe Sullivan was a thirteen-year-old child living in a home where he was regularly subjected to physical and sexual abuse. Joe also is mentally disabled. On the day of the crime, two older boys convinced Joe to participate in a burglary. The three boys entered the home of Lena Bruner in the morning while no one was there. One of the older boys took some money and jewelry. The three boys then left. That afternoon, Ms. Bruner was sexually assaulted in her home. She never saw her attacker. One of the older boys accused Joe of the sexual battery. Each of the older boys received short sentences in juvenile detention. Thirteen-year-old Joe Sullivan was charged and tried as an adult. Joe Sullivan was convicted and sentenced to life imprisonment without parole. The district court of appeal affirmed the conviction without opinion, and the Supreme Court of Florida likewise dismissed review without opinion. See *Floyd v. State*, 808 So. 2d 175, 182 (Fla. 1992) (where trial court denies post-conviction motion without evidentiary hearing, court is bound to accept the defendant's factual allegations as true to the extent they are not refuted by the record).

Brief for Petitioner at 2-5, *Sullivan v Florida*, --- S.Ct. ---- (July 16, 2009) (No. 08-7621), 2009 WL 2159656.