CIVIL RIGHTS

ADA

Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227 (10th Cir. 2016) (Moritz)

A donor with various psychiatric disorders, including borderline schizophrenia, filed an action alleging that the plasma-donation center impermissibly discriminated against him on basis of his disability, in violation of Title III of the ADA. The parties consented to final disposition by magistrate judge. The district court dismissed the action and the donor appealed.

The Tenth Circuit reversed. It held that the plasma-donation center was a "service establishment" under the section of the ADA governing public accommodations for service establishments.

Judge Moritz explained, "Here, the district court concluded that plasma-donation centers (PDCs) aren't service establishments because, unlike § 12181(7)(F)'s enumerated examples, PDCs don't provide a service to the public in exchange for a fee. We find this superficial distinction irrelevant. Under the plain language of § 12181(7)(F), a PDC is a

"service establishment" for two exceedingly simple reasons: It's an establishment. And it provides a service. This straightforward conclusion is entirely consistent with the goal and purpose of Title III. Thus, we need not look beyond the plain language of § 12181(7)(F) to determine that a PDC constitutes a public accommodation." 828 F.3d at 1129.

Judge Holmes filed a dissenting opinion. He explained, "I would conclude that to qualify as a "service establishment" under § 12181(7)(F), an entity must offer the public a service in the form of expertise or specialized equipment for use in achieving some desired end of the public in exchange for compensation. . . . [P]lasma-donation centers do not satisfy this description." 828 F.3d at 1229.

J.V. v. Albuquerque Public Schools, 813 F.3d 1289 (10th Cir. 2016) (Matheson)

Parents, on behalf of their minor child, brought action against a public school district, alleging discrimination in violation of Title II of the ADA. The district court granted summary judgment to the defendant school district.

The Tenth Circuit affirmed. The court held that (1) the school security officer did not place the child in handcuffs due to his disability, thereby precluding discrimination claims under Title II of the ADA; (2) the child was not denied access to education, so as to violate Title II of the ADA; (3) the school district did not exhibit deliberate indifference to the student's disability through a purported failure to train its employees, thereby precluding discrimination claim under Title II of ADA; and (4) a reasonable accommodation claim under the ADA was precluded because the parents had not shown that they requested an accommodation or that the need for one was obvious.

Taylor v. Colorado Dept. of Health Care Policy and Financing, 811 F.3d 1230 (10th Cir. 2016) (Bacharach)

A disabled Medicaid claimant, her two health care attendants, and a nonprofit organization filed an action against the Department of Health Care Policy and Financing, alleging that agency's refusal to combine medical assistance programs to pay for attendants to drive her to and from medical appointments constituted discrimination based on her disability, in violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act.

The agency moved to dismiss, and the district court granted motion. The court also denied the Plaintiffs' motion for reconsideration.

The Tenth Circuit affirmed. The court held that (1) the agency was not required to pay for driving time; (2) the claimant was treated in same manner as every other Medicaid recipient in the county; (3) under the ADA, the agency was not required to create a new benefit to pay attendants to drive to medical appointments; and (4) the fee schedule for

paying attendants, which the plaintiff submitted on a motion for reconsideration, did not warrant a different decision; the evidence established that the agency was not authorized to pay attendants for transporting the plaintiff.

Bank Assets

Columbian Financial Corp. v. Stork, 811 F.3d 390 (10th Cir. 2016) (Bacharach)

A sole shareholder in bank brought a § 1983 action against Office of the State Bank Commissioner of Kansas and four Commission officials, alleging denial of due process when Commissioner seized bank's assets and appointed Federal Deposit Insurance Corporation (FDIC) as receiver after declaring bank insolvent, and seeking equitable remedies and damages. The district court dismissed the complaint, and the shareholder appealed.

The Tenth Circuit affirmed in part, vacated in part, and remanded. It held that (1) remand was warranted for the district court to reconsider, without need to abstain, the shareholder's equitable claims; (2) the seizure of assets without a pre-deprivation hearing did not violate a clearly established constitutional right; and (3) the delay between the seizure of assets and post-deprivation hearing did not violate any clearly established constitutional right either.

Bigamy prosecutions

Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016) (Matheson)

A polygamist family filed a § 1983 action against county attorney challenging the constitutionality of Utah's bigamy statute. The district court entered summary judgment in the plaintiffs' favor, *see* 947 F.Supp.2d 1170, and awarded attorney fees, costs, and expenses, *see* 43 F.Supp.3d 1229.

The county attorney appealed. The Tenth Circuit held that the attorney's announcement of a policy of limiting bigamy prosecutions rendered the case moot.

Campaign finance laws

Coalition For Secular Government v. Williams, 815 F.3d 1267 (10th Cir. 2016) (Phillips)

A nonprofit corporation that was planning to raise and spend $3,500 to advocate against a statewide ballot initiative filed an action against the Colorado Secretary of State, seeking declaratory and injunctive relief exempting it from Colorado's registration and expenditure disclosure requirements. The district court ruled that the requirements violated the corporation's First Amendment right of free association. *See* 71 F.Supp.3d 1176.

The Secretary appealed, and the Tenth Circuit affirmed. Judge Phillips explained, "The Colorado Constitution defines 'issue committee' as follows:

> [A]ny person, other than a natural person, or any group of two or more persons, including natural persons: (I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or (II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

COLO. CONST. art. XXVIII, § 2(10)(a). Once a person or group of persons qualifies as an issue committee under this definition, a substantial set of registration and disclosure requirements apply . . . [T]he regulatory framework governing issue committees in Colorado derives from multiple sources: the state's constitution, COLO. CONST. art. XXVIII, §§ 2–3, 7, 9–10; its statutes, Colo.Rev.Stat. §§ 1–45–101 to –118 (2015); and its regulations, COLO.CODE REGS. § 1505–6 (2015)." 815 F.3d at 1269-70.

The court ruled that:

1. Exacting scrutiny, rather than a less stringent standard, applied, and

2. The Colorado Secretary of State could not constitutionally require the plaintiff to register and disclose as an issue committee under Colorado's regulatory framework. "The informational interest in the Coalition's disclosures is far outweighed by the substantial and serious burdens of the required disclosures." 815 F.3d at 1276. The Colorado regulatory framework violated the First Amendment.

Independence Institute v. Williams, 812 F.3d 787 (10th Cir. 2016) (Tymkovich)

A nonprofit corporation sued Colorado Secretary of State, seeking a declaratory judgment and injunctive relief regarding reporting and disclosure requirements, under Colorado Constitution and Colorado's Fair Campaign Practices Act, for an electioneering

communication consisting of a television advertisement containing issue advocacy. The plaintiff corporation alleged that the advertisement would be broadcast before an upcoming gubernatorial election and that it would violate the First Amendment rights of association and privacy as applied to donors who contributed $250 or more to support the advertisement. The district court granted summary judgment to the Secretary, thereby upholding the statute.

The Tenth Circuit affirmed. It held that (1) sufficiently tailored political campaign contribution disclosure requirements could reach at least some types of issue speech, including speech that did not reference particular election campaign but did mention candidate shortly before election, and (2) the Colorado political campaign contribution disclosure requirements served important government interests and were sufficiently tailored to justify compelled disclosure of donors to an advertisement mentioning candidate prior to the election.

Color of State Law

Wasatch Equality v. Alta Ski Lifts Co., 820 F.3d 381 (10th Cir. 2016) (Moritz)

Snowboarders filed an action against a privately-owned operator of a ski resort, United States Forest Service (USFS), and Forest Service Supervisor, alleging that the resort's ban on use of snowboards denied snowboarders equal protection in violation of Fifth and Fourteenth Amendments.

The district court granted the defendants' motions to dismiss. The Tenth Circuit affirmed. The court held that the ban did not constitute state action under any of the various standards for assessing private/government conduct (the symbiotic-relationship test; the nexus test, the joint-action test; and the public-function test).

Schaffer v. Salt Lake City Corp., 814 F.3d 1151 (10th Cir. 2016) (Ebel)

The plaintiff filed a § 1983 action against a city and two parking enforcement officers, alleging that she was maliciously prosecuted for aggravated assault after the officers falsely reported to police that she hit them with her truck after they issued her a parking ticket. The district court granted the defendants' motion for summary judgment.

The plaintiff appealed, and the Tenth Circuit affirmed. The court held that (1) the officers did not take action under color of state law in giving allegedly false testimony, as required for § 1983 liability. Judge Ebel explained, "The fact that the parking enforcement officers were on duty when they gave their witness statements does not alone render those statements under color of state law. Neither does the fact that the incident arose from the parking officers' previous exercise of state authority to issue parking tickets satisfy the color of state law requirement. The record is devoid of any indication that their exercise of that

authority extended to their witness statements and testimony." 814 F.3d at 1156-57.

(2) The parking officers did not engage in joint action with the police when they reported their encounter with the plaintiff and then testified against her.

Commerce Clause

Direct Marketing Ass'n v. Brohl, 814 F.3d 1129 (10th Cir. 2016) (Matheson)

An association of retailers filed an action against the Executive Director of the Colorado Department of Revenue, challenging the constitutionality of the notice and reporting requirements that state imposed on retailers that did not collect taxes on sales to Colorado purchasers. The district court granted summary judgment to the association and permanently enjoined enforcement of requirements on ground that they violated the Commerce Clause.

The defendant appealed, and the Tenth Circuit, in a prior opinion, remanded with instructions to dismiss on the ground that district court lacked jurisdiction because of the Tax Injunction Act (TIA). 735 F.3d 904. The United States Supreme Court granted certiorari and then reversed and remanded. *See* 135 S.Ct. 1124.

On remand, the Tenth Circuit held that the state's notice and reporting requirements did not violate the dormant Commerce Clause. "We conclude by noting the Supreme Court's observation in *Quill* [*Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992)] that Congress holds the 'ultimate power' and is 'better qualified to resolve' the issue of 'whether, when, and to what extent the States may burden interstate [retailers] with a duty to collect [sales and] use taxes.'" 814 F.3d at 1147.

Judge Gorsuch filed a concurrence. In his view as well, *Quill* was controlling and the plaintiffs had failed to establish a discrimination-based claim. In his view, any claim of discrimination was easily rejected: "The plaintiffs haven't come close to showing that the notice and reporting burdens Colorado places on out-of-state mail order and internet retailers compare unfavorably to the administrative burdens the state imposes on in-state brick-and-mortar retailers who must collect sales and use taxes. If anything, by asking us to strike down Colorado's law, out-of-state mail order and internet retailers don't seek comparable treatment to their in-state brick-and-mortar rivals, they seek more favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage opportunity or 'tax shelter.'" 814 F.3d at 1150 (quoting *Quill*, 504 U.S. at 329 (White, J., concurring in part and dissenting in part)).

Due Process Rights

Onyx Properties LLC v. Board of County Commissioners of Elbert County, 838 F.3d

1039 (10th Cir. 2016) (Hartz)

Landowners filed § 1983 actions alleging that a county board of commissioners violated their due process rights by requiring them to rezone their properties before they could subdivide them. In one action, the district court entered summary judgment in the board's favor, and the landowners appealed. In other action, the district court dismissed the complaint and denied the landowners' motion for leave to file an amended complaint.

The landowners appealed, and the Tenth Circuit consolidated the cases. It then affirmed the district court's decisions. It held that:

1. The Due Process Clause did not require the board to give notice or to hold public hearings before adopting regulations and maps. Judge Hartz explained that the regulations and maps "were of the type that all courts recognize would not be subject to a due-process hearing requirement. "We hold that the Board's adoption of the [maps and regulations] was a legislative act and that the federal Constitution did not afford the plaintiffs the right to a hearing. This does not mean that they have no remedy for the alleged violation of state procedures. It is just that they must seek that remedy under state law." 838 F.3d at 1048.

2. The board's purported conduct was not sufficiently egregious to violate affected landowners' substantive due process rights.

Establishment Clause

Felix v. City of Bloomfield, 841 F.3d 848 (10th Cir. 2016) (Ebel)

The plaintiffs challenged the City of Bloomfield, New Mexico's allowing the installation of a Ten Commandments monument on the City Hall Lawn. Following a bench trial, the district court entered judgment for the plaintiffs.

The Tenth Circuit affirmed. It held that:

1. The plaintiffs have suffered a legally sufficient injury to bring their claim in federal court.

2. The monument was government speech subject to the limitations of the Establishment Clause.

3. "In light of the context and apparent motivation of the Ten Commandments' placement on the lawn, we conclude the City's conduct had the effect of endorsing religion in violation of the Establishment Clause." 841 F.3d at 851. "The apparent purpose and context of the Monument's installation would give an objective observer the impression of

official religious endorsement." *Id.* at 858. The court examined the text of the Monument, its placement on the lawn, the circumstances of its financing and installation, and the timing of the resulting litigation.

4. "[B]ecause of the plain religious motivations apparent from the approval (approved alone), financing (sponsored entirely by churches), and unveiling (ceremony rife with Christian allusions) of the Monument, the City would have to do more than merely add a few secular monuments in order to signal to objective observers a principal or primary message of neutrality. Thus the impermissible taint of endorsement remains, and as we have said, nothing sufficiently purposeful, public, and persuasive was done to cure it." *Id.* at 864.

COPE v. Kansas State Bd. of Educ., 821 F.3d 1215 (10th Cir. 2016) (Lucero)

A group of parents and children (called the "Citizens for Objective Public Education," or COPE), Kansas parents, and school children (COPE), filed an action challenging a 2013 decision of the Kansas Board of Education to adopt curriculum standards establishing performance expectations for science instruction in kindergarten through twelfth grade. COPE asserted that although the standards purport to further science education, their concealed aim was to teach students to answer questions about the cause and nature of life with only non-religious explanations.

COPE asserted injury under the Establishment Clause because: (a) the Board's adoption of the Standards communicated a religious symbol or message and breached plaintiff parents' trust; and (b) the Kansas schools' implementation of the Standards was imminent and would result in anti-religious instruction. COPE also asserted that two plaintiffs had standing as taxpayers who objected to their tax dollars being used to implement the Standards.

The district court dismissed the suit without prejudice for lack of standing. The Tenth Circuit affirmed. It held that:

(1) The Board's adopting of the standards did not create the kind of injury in fact necessary to establish standing. "[T]he Standards do not condemn any or all religions and do not target religious believers for disfavored treatment. And COPE offers only threadbare assertions that the Standards intend to promote a non-religious worldview. Thus, COPE's allegations regarding adoption amount to psychological consequences produced by the observation of conduct with which it disagrees. This injury does not suffice." 821 F.3d at 1221.

(2) The local school districts' potential implementation of the Standards was not sufficient to constitute an injury in fact either.

Excessive Force

Albada v. Pickens, --- F.3d ----, 2016 WL 7367765, (10th Cir. Dec. 20, 2016) (Briscoe)

The plaintiff Erma Aldaba filed a 42 U.S.C. § 1983 action on behalf of her deceased son, Johnny Manuel Leija, who died after an altercation with two police officers who used a taser to restrain him at an Oklahoma hospital where he was being treated for pneumonia. Among other allegations, the plaintiff contended that the officers had used excessive force, in violation of her son's Fourth Amendment rights. Only the excessive force claim was at issue in this appeal.

The plaintiff's son had been admitted at 11:00 a.m. and diagnosed with dehydration and severe pneumonia. His illness led to low oxygen levels, which can in turn affect an individual's mental state. His behavior at that time was pleasant and cooperative, but by 6:00 p.m., he refused to cooperate with hospital staff, accused the nurse of telling him lies and secrets, and became increasingly aggressive, shouting, "I am Superman. I am God." Hospital staff called in law enforcement "for assistance with a disturbed patient." The officers arrived at the scene shortly after the son exited his room; they saw him visibly agitated, and hospital staff informed the officers that he was ill and could die if he left the hospital. The officers testified that they repeatedly ordered the son to get on his knees and calm down, and that they warned him several times they would use a taser. When the son continued to fail to comply, the officers fired the taser twice, and placed him in a prone position on the ground, where one of the officers managed to get one handcuff on his arm. At that point, the son went limp and was pronounced dead at 7:29 p.m.

The district court granted summary judgment in favor of the defendants as to all claims except the excessive force claim. On that claim, the court held that there were numerous disputed factual issues regarding the reasonableness of the officers' conduct, including the degree of resistance exhibited by the son after being confronted by the officers, the threat he posed to the officers and the public, and the officers' knowledge of the son's medical condition.

The officers filed an interlocutory appeal, and, in a prior appeal written by Judge McKay, the Tenth Circuit affirmed the denial of qualified immunity on the excessive force claim. *See Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015). Judge Phillips dissented from that ruling.

Following the issuance of this opinion, the officers filed a petition for a writ of certiorari in the United States Supreme Court. The Supreme Court granted the writ, vacated the panel opinion, and remanded for further consideration in light of *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (per curiam). In that case, the Supreme Court held that officers who fatally shot a motorist who was fleeing from arrest were entitled to qualified immunity.

In this opinion, the Tenth Circuit concluded that it had erred in the prior opinion by rejecting the officers' qualified immunity defense. As Judge Briscoe explained, "We erred . . . by relying on excessive-force cases markedly different from this one. Although we cited *Graham v. Conner*, 490 U.S. 386 (1989) to lead off our clearly-established-law discussion,

we did not just repeat its general rule and conclude that the officers' conduct had violated it. Instead, we turned to our circuit's sliding-scale approach measuring degrees of egregiousness in affirming the denial of qualified immunity. *Aldaba*, 777 F.3d at 1159. We also relied on several cases resolving excessive-force claims. But none of those cases remotely involved a situation as here: three law-enforcement officers responding to a distress call from medical providers seeking help in controlling a disruptive, disoriented medical patient so they could provide him life-saving medical treatment." 2016 WL 7367765, at * 5.

The court remanded the case to the district court with instructions that it grant summary judgment to them on qualified immunity grounds.

Gutierrez v. Cobos, --- F.3d —, -2016 WL 6694533 (10th Cir. 2016) (Matheson)

The plaintiff filed a § 1983 action against a county sheriff, his deputies, and county officials, alleging that the deputies used excessive force on her and unlawfully entered her mother's apartment and then unlawfully seized her mother by using a stun gun. The district court granted the deputies' motion for summary judgment.

The Tenth Circuit affirmed. It held that (1) the plaintiff failed to carry her burden of showing that the deputy violated clearly established law by using a stun gun; (2) the warrantless entry into apartment occurred in hot pursuit, and the arrest of the plaintiff's mother did not violate either the plaintiff's or her mother's clearly established Fourth Amendment rights; (3) the plaintiff's mother was not unreasonably seized in violation of law that was clearly established at the time; and (4) the district court did not abuse its discretion in denying the plaintiff's request for additional discovery.

Davis v. Clifford, 825 F.3d 1131 (10th Cir. 2016) (Lucero)

The plaintiff brought a § 1983 action against police officers and a city, alleging that officers used excessive force in arresting her for driving with a suspended license. According to the plaintiff's evidence, upon stopping her car, which had a license plate with a handicapped symbol, an officer called for additional assistance; several police cars arrived and officers began pounding the plaintiff's car with their batons, demanding she exit the vehicle. Fearing for her safety, Davis asked the officers for assurances that they would not hurt her, and they responded by smashing her car window, pulling her through the broken window by her hair and arms, and throwing her on the glass-littered pavement.

The plaintiff also asserted that the city had failed to properly train and supervise the officers.

The district court granted summary judgment to the defendants. The Tenth Circuit affirmed in part and reversed in part. It held that, as to two of the officers their alleged use of force against a misdemeanant who did not pose an immediate threat to herself or others

would be excessive under clearly established law. The court affirmed as to all other defendants because the plaintiff waived any other challenges.

Perea v. Baca, 817 F.3d 1198 (10th Cir. 2016) (Lucero)

The estate of a detainee filed an action against two police officers, a police department, and a city, alleging that the officers had used excessive force in pushing the detainee off a bicycle and using stun gun ten times during encounter. The district court denied the officers' motion for summary judgment based on qualified immunity.

The officers appealed, and the Tenth Circuit affirmed. The court held that (1) fact questions as to whether officers' use of stun gun was reasonable precluded summary judgment based on qualified immunity, and (2) it was clearly established that continued use of force after an individual has been subdued was a violation of the Fourth Amendment.

Cordova v. City of Albuquerque, 816 F.3d 645 (10th Cir. 2016) (Tymkovich)

The plaintiff filed a § 1983 action against the city, its police chief, and its police officers alleging malicious prosecution, excessive force, and interference with his right to associate with his family. The district court entered judgment in the officers' favor, and the arrestee appealed.

The Tenth Circuit affirmed. The court held that (1) the dismissal of the assault charges under New Mexico's Speedy Trial Act did not qualify as a favorable termination required to support the malicious prosecution claim; (2) the officers were entitled to qualified immunity with regard to the familial association claim; (3) New Mexico law did not create a liberty interest in a preliminary hearing within twelve days of an arrest; (4) a defendant officer was entitled to qualified immunity from liability on the claim that the officer violated the plaintiff's due process rights by transferring him to a county jail's medical facility after the hospital discharged him; (5) the district court did not abuse its discretion in admitting evidence of events prior to shooting; (6) evidence regarding the plaintiff's failure to comply with police officers' commands was admissible; and (7) the officer's order to "drop the gun" gave the plaintiff sufficient warning that the officer was going to shoot.

Judge Gorsuch filed a concurring opinion. He agreed with the affirmance of summary judgment on the malicious prosecution claim. He wrote separately to explain that he would not recognize it as a constitutional tort.

Pauly v. White, 814 F.3d 1060 (10th Cir. 2016) (Seymour)

The representative of a shooting victim's estate filed a § 1983 action alleging that state police officers used excessive force when they shot the victim through a window of his home

while investigating an earlier road rage incident involving his brother. The district court denied the officers' motion for summary judgment, and they filed interlocutory appeal.

The Tenth Circuit affirmed. It held that summary judgment in favor of the non-shooting officers on qualified immunity grounds was not warranted, and (2) summary judgment in favor of shooting officer on qualified immunity grounds was not warranted.

Judge Moritz filed a dissenting opinion. In her view, "Officer White did what any objectively reasonable officer in his position would do—respond in kind to the immediate threat of deadly force. Because the plaintiffs fail to establish either that Officer White's use of deadly force was objectively unreasonable or that it violated clearly established law, I would reverse the district court's rulings and grant all three defendants' motions for summary judgment on qualified immunity grounds with respect to the plaintiffs' § 1983 claim." 814 F.3d at 1091.

First Amendment Rights

Verlo v. Martinez, 820 F.3d 1113 (10th Cir. 2016) (McHugh)

Individuals who wished to pass out jury nullification literature in a plaza outside of a courthouse, and an association whose members intended to pass out similar literature in the same plaza, filed an action against a state judicial district and others, seeking to challenge judicial order barring expressive activities in the plaza. The district court granted the plaintiffs' motion for preliminary injunction in part, and, 2015 WL 5159147, and denied district's motion for stay pending appeal.

The state judicial district appealed, and the Tenth Circuit affirmed. The court held that (1) review was limited to evidence before the district court at time of preliminary injunction hearing; (2) the district waived any challenge to the district court's findings that the elements of irreparable harm, balance of equities, and public interest favored a limited preliminary injunction; (3) the district waived any argument that restricted areas of courthouse plaza were nonpublic fora; (4) the district court applied the correct legal standard for content-neutral restrictions when analyzing the district's order; and (5) the state judicial district's order banning expressive activity likely violated the First Amendment.

Fourth Amendment Rights

Big Cats of Serenity Springs, Inc. v. Rhodes,--- F.3d ----, 2016 WL 7187301 (10th Cir. Dec. 12, 2016)

A Colorado-based non-profit organization that provides housing, food, and veterinary care for exotic animals filed an action against three inspectors from the United States Department of Agriculture's Animal and Plant Health Inspection Service after the inspectors, accompanied by El Paso County sheriff's deputies, broke into the organization's facility without its permission to perform an unannounced inspection of two tiger cubs. At at the time the inspectors entered the facility, the tiger cubs were at a veterinarian's office receiving treatment, as the plaintiff organization had stated to the APHIS inspectors the previous day.

The plaintiff organization asserted claims under *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971) and 42 U.S.C. § 1983, asserting the entry was an illegal search under the Fourth Amendment. The district court denied the APHIS inspectors' motion to dismiss the complaint and they filed an interlocutory appeal challenging the court's failure to grant qualified immunity.

The Tenth Circuit affirmed in part and reversed in part. The court held that (1) the complaint stated a claim for relief under *Bivens*. "No APHIS inspector would reasonably have believed unauthorized forcible entry of the Big Cats facility was permissible, and therefore Big Cats and its directors may have a claim for violation of their Fourth Amendment right to be free from an unreasonable search," 2016 WL 7187301 at * 1, and (2) the district court erred in failing to dismiss the § 1983 claim. The inspectors had not acted under color of state law.

Vasquez v. Lewis, 834 F.3d 1132 (10th Cir. 2016) (Lucero)

A motorist brought a § 1983 action against patrol officers who stopped him for a minor traffic violation, alleging that officers violated his Fourth Amendment rights by detaining him and searching his automobile without reasonable suspicion. The district court granted summary judgment to the officers, but the Tenth Circuit reversed.

The court noted that the officers had relied on the following factors to justify the search: (a) the plaintiff was driving alone late at night; (b) he was traveling on I-70, "a known drug corridor"; (c) he was from Colorado and was driving from Aurora, Colorado, "a drug source area"; (d) the back seat did not contain items the Officers expected to see in the car of someone moving across the country; (e) the items in his back seat were covered and obscured from view; (f) he had a blanket and pillow in his car; (g) he was driving an older car, despite having insurance for a newer one; (h) there were fresh fingerprints on his trunk; and (i) he seemed nervous.

The court explained that "[s]uch conduct, taken together, is hardly suspicious, nor is it particularly unusual. . . . Though we analyze these facts under the totality of the circumstances, we first note which factors have less weight in our analysis. We start with the most troubling justification: Vasquez's status as a resident of Colorado. The Officers rely

heavily on Vasquez's residency because Colorado is known to be home to medical marijuana dispensaries. But we find this justification, in isolation or in tandem with other considerations, unconvincing." 834 F.3d at 1136-37.

The court held that (1) the officers did not have reasonable suspicion to detain and search motorist's vehicle, and (2) the officers were not entitled to qualified immunity.

Judge Tymkovich dissented. In his view, "This case presents a close call on reasonable suspicion. But the essence of qualified immunity is to give government officials protection in resolving close calls in reasonable ways. Because the majority employs a divide-and-conquer analysis specifically rejected by the Supreme Court and because Vasquez cannot identify clearly established law necessary to overcome qualified immunity, I respectfully dissent." 834 F.3d at 1140.

Culver v. Armstrong, 832 F.3d 1213 (10th Cir. 2016) (Baldock)

The plaintiff, whose public intoxication charge had been dismissed, brought a § 1983 action against a police officer for unlawful arrest. The district court granted the officer's motion for summary judgment based on qualified immunity.

The plaintiff appealed, and the Tenth Circuit affirmed. The court held that the police officer was entitled to qualified immunity from liability on the unlawful arrest claim.

Judge Baldock explained, "The facts of this case, when considered together with the Wyoming Supreme Court's construction of WYO. STAT. ANN. § 6-5-204(a) . . . arguably were sufficient to warrant a prudent officer in believing Plaintiff had committed or was committing the criminal offense of 'interfer[ing] with ... a peace officer while engaged in the lawful performance of his official duties' in violation of Wyoming law. And this means that at the time of his encounter with [the defendant police officer], the law was not clearly established in Plaintiff's favor, such that a reasonable officer would have known that seizing Plaintiff was against the law." 832 F.3d at 1220.

A.M. v. Holmes, 830 F.3d 1123 (10th Cir. 2016) (Holmes)

A mother, on behalf of a minor student, filed a § 1983 action against a school principal, assistant principal, and a school resource officer, alleging First, Fourth, and Fourteenth Amendment violations arising from a May 2011 arrest of the student for allegedly disrupting his physical-education class, and a November 2011 search for contraband. The disruption occurred as follows:

"On May 19, 2011, CMS physical-education teacher Margaret Mines–Hornbeck placed a call on her school-issued radio to request assistance with a student. Officer Acosta, the school resource officer, responded to the call. As he approached the designated

classroom, he saw a student—later identified as F.M., who was then thirteen years old and in the seventh grade—sitting on the hallway floor adjacent to the classroom while Ms. Mines–Hornbeck stood in the hallway near the classroom door. Other students were peering through the doorway.

Ms. Mines–Hornbeck explained that F.M. had generated several fake burps, which made the other students laugh and hampered class proceedings. After F.M. ignored her requests to stop making those noises, Ms. Mines–Hornbeck ordered him to sit in the hallway. F.M. nominally complied, but once he was situated in the hallway, he leaned into the classroom entranceway and continued to burp and laugh. This obliged Ms. Mines–Hornbeck to have to deal with F.M. repeatedly and rendered her unable to continue teaching the class. Ms. Mines–Hornbeck told Officer Acosta that she needed F.M. removed from there because she could not control F.M." 830 F.3d at 1129-30 (citations and alterations omitted).

The district court granted the principal and assistant principal's motions for summary judgment and denied the mother's motion for summary judgment on her claims against officer. The mother appealed.

The Court of Appeals affirmed. It held that (1) the officer had arguable probable cause to arrest student; (2) the officer was entitled to qualified immunity on the mother's excessive force claim; (3) reasonable suspicion supported the principal's search; and (4) the mother could not prevail on her First Amendment retaliation claim.

Judge Gorsuch dissented. He explained his view as follows, " If a seventh grader starts trading fake burps for laughs in gym class, what's a teacher to do? Order extra laps? Detention? A trip to the principal's office? Maybe. But then again, maybe that's too old school. Maybe today you call a police officer. And maybe today the officer decides that, instead of just escorting the now compliant thirteen year old to the principal's office, an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention. My colleagues suggest the law permits exactly this option and they offer ninety-four pages explaining why they think that's so. Respectfully, I remain unpersuaded." 830 F.3d at 1169.

Mayfield v. Bethards, 826 F.3d 1252 (10th Cir. 2016) (McHugh)

Property owners commenced an action under § 1983 claiming that a police officer violated their Fourth and Fourteenth Amendment rights by killing their pet dog. The district court denied the officer's motion to dismiss on qualified immunity grounds. The defendant officer filed an interlocutory appeal.

The Tenth Circuit affirmed the denial of qualified immunity. The court held that (1) the plaintiffs' dog constituted an "effect" under the Fourth Amendment; (2) the killing of the dog by the police officer was a Fourth Amendment seizure; (3) the court could not consider a police report explaining reason for officer killing the plaintiff's dog–because the report was not mentioned in the plaintiffs' complaint; and (4) the law that pet dogs were subject to Fourth Amendment protection was clearly established when police officer killed the dog belonging to the plaintiffs.

Individuals with Disabilities Education Act (20 U.S.C. § 1400)

M.S. ex rel. J.S. v. Utah Schools for Deaf and Blind, 822 F.3d 1128 (10th Cir. 2016) (Murphy)

The mother of a residential student at school for deaf and blind students brought a civil action under the IDEA against the school, seeking relief additional to that awarded by hearing officer in a due process hearing. The parties filed cross motions for judgment on the administrative record. The district court held that the school denied the student a free appropriate public education, but did not resolve issue of placement, instead deferring to student's individual education program team to determine placement at an appropriate school.

The mother appealed, and the Tenth Circuit vacated and remanded. The court held that the district court's delegation of the student's school placement to her current IEP team violated the IDEA's review scheme, and a remand was required for district court to resolve the school placement issue.

Malicious prosecution

M.G. v. Young, 826 F.3d 1259 (10th Cir. 2016) (McKay)

The plaintiffs brought a 42 U.S.C. § 1983 action against a city and city officials alleging malicious prosecution. The district court granted summary judgment to the defendant city official on the malicious prosecution claims. The plaintiffs appealed.

The Tenth Circuit affirmed. It held that the plaintiffs failed to satisfy a requirement for a § 1983 malicious prosecution claim-- that criminal proceedings had been terminated in their favor. Judge McKay explained, "Since Plaintiffs bear the burden of proof on this point, their inability to demonstrate that their convictions were vacated for reasons indicative of innocence is fatal to their malicious prosecution claims. We thus conclude that the district court did not err in granting Defendants' motion for summary judgment on these claims." 826 F.3d at 1268.

Sanchez v. Hartley, 810 F.3d 750 (10th Cir. 2016) (Bacharach)

A cognitively and developmentally disabled plaintiff filed a § 1983 action against a county sheriff's office, a board of county commissioners detectives, an investigator, and a district attorney's office, alleging that he was maliciously prosecuted, in violation of his Fourth Amendment rights. The district court denied the defendants' motion to dismiss based on qualified immunity and the statute of limitations. 65 F.Supp.3d 1111. The district court

also denied the defendants' motion for reconsideration. *See* 2014 WL 4852251.

The Tenth Circuit affirmed in part and dismissed in part. The court held that (1) the plaintiff stated malicious prosecution claim; (2) the initial warrantless arrest did not invalidate the malicious prosecution claim; (3) the potential liability for malicious prosecution was not confined to the district attorney; (4) the "shock the conscience" standard for substantive due process claims was inapplicable; (5) the detectives and the investigator were not entitled to qualified immunity from the malicious prosecution claim; and (6) the court would not exercise pendent appellate jurisdiction over the statute of limitations issue.

Judge Bacharach explained the grounds for the malicious prosecution claim as follows:

"[In *Wilkins v. DeReyes*, 528 F.3d 790 (10th Cir.2008)], we recognized a cause of action under § 1983 for malicious prosecution in violation of the Fourth Amendment for seizures that occur after a warrantless arrest. If arrested without a warrant . . . a plaintiff can challenge the probable cause determination made during the constitutionally-required probable cause hearing, which must occur after the initial warrantless arrest. A plaintiff who brings such a challenge would state a Fourth Amendment violation sufficient to support a § 1983 malicious prosecution cause of action.

Our holding in *Wilkins* forecloses the defendants' argument that Mr. Sanchez is confined to a false-imprisonment claim because he was arrested without a warrant. It is true that the defendants initially arrested Mr. Sanchez without a warrant and, therefore, without legal process. But after this warrantless arrest, there were multiple judicial determinations of probable cause to detain Mr. Sanchez on all of the pending charges. Based on this legal process, Mr. Sanchez spent an additional 125 days in jail." 528 F.3d at 757.

Property interests

Martin Marietta Materials, Inc. v. Kansas Dept. of Transp., 810 F.3d 1161 (10th Cir. 2016) (Phillips)

The company that supplied concrete for state Department of Transportation highway projects brought action against DOT officials after its quarries were removed from a list of preapproved limestone-aggregate suppliers to DOT, claiming it was deprived of its property and liberty interests without due process in violation of Fourteenth Amendment. The district court dismissed the action, 953 F.Supp.2d 1176, and the company appealed.

The Tenth Circuit affirmed. It held that (1) the supplier did not properly preserve and the appellate court was not required to address the supplier's argument that the DOT did not have authority to remove its quarry from preapproved list because Federal Highway

Administration (FHWA) had not approved DOT's stop-gap measures; (2) the supplier did not have protected property interest in remaining on list of preapproved suppliers after it failed the DOT's test; (3) the supplier was not in privity with the DOT and the DOT's contractors, and thus did not have a protected property interest in being on the DOT's preapproved list of suppliers; and (4) DOT did not make any false, and thus defamatory, statements against the supplier.

Judge Moritz dissented. She explained,

"Throughout its opinion, the majority repeatedly and consistently states that Martin Marietta asserts a property interest in actually supplying aggregate from its quarries to KDOT projects. Yet Martin Marietta challenges only the dismissal of its claim that it has a property interest in inclusion or retention on the Approved List—not in actually supplying aggregate.

Applying a properly cabined due process analysis and considering only whether Martin Marietta has a property interest in inclusion or retention on the Approved List, I would hold that Martin Marietta has plausibly stated a legitimate claim to entitlement. Therefore, Martin Marietta's removal from that list without notice or hearing violated its right to due process under the Fourteenth Amendment. Thus, I dissent from the majority's decision affirming the district court's dismissal of Martin Marietta's procedural due process claim with respect to its asserted property interest.

However, because Martin Marietta hasn't challenged on appeal the district court's conclusion that it wasn't defamed, I concur in the majority's decision to affirm the dismissal of its liberty interest claim." 810 F.3d at 1186-87.

Punitive damages awards

Lompe v. Sunridge Partners, LLC, 818 F.3d 1041 (10th Cir. 2016) (McHugh)

A tenant filed an action against an apartment complex owner and its manager, seeking to recover damages for injuries sustained when she was exposed to carbon monoxide in her apartment due to a malfunctioning furnace. After jury awarded punitive damages to the tenant, the owner and manager renewed their motion for judgment as a matter of law. The district court denied the motion, 54 F.Supp.3d 1252, and the owner and the manager appealed.

The Tenth Circuit reversed and remanded. It held that (1) the owner's actions in operating the apartment did not constitute willful and wanton misconduct, precluding the tenant's recovery of punitive damages from the owner on a Wyoming state law claim; (2) in contrast, the issue of whether the manager had engaged in willful and wanton misconduct warranting punitive damages under Wyoming law was properly submitted to the jury; (3) the evidence of the manager's gross and net income and partner distributions for previous eight years was sufficient evidence of the manager's wealth or financial condition to support award of punitive damages;
and (4) the district court was not required to provide a jury instruction that explained that the state of mind required for punitive damages must approach an intent to harm.

However, the court also held that (5) the award of $22.5 million in punitive damages against the manager was grossly excessive and arbitrary in violation of constitutional due process; and that (6) the punitive damages award against the manager would be reduced from $22.5 million to $1.95 million, reflecting a 1:1 ratio between punitive and compensatory damages, to comport with due process.

Judge Bacharach filed an opinion concurring in part and dissenting in part. He explained, "In my view, the evidence was sufficient for the jury to assess punitive damages against [the owner]. As to [the manager] I agree with the majority that the punitive-damages award was so large that it resulted in a denial of due process. But I believe the majority reduces the punitive-damages award too far below the constitutional limit. Rather than order a remittitur of $1.95 million, I would reduce the amount of punitive damages to be assessed against [the manager] to $7.8 million, four times the amount of compensatory damages. 818 F.3d at 1076.

Reproductive rights

Planned Parenthood Association of Utah v. Herbert, 839 F.3d 1301 (10th Cir. 2016) (Briscoe), *reh'g denied*, 2016 WL 6310780 (10th Cir. Oct. 31, 2016)

An organization that provided reproductive health services brought a § 1983 action alleging that the Governor of the State of Utah violated the organization's constitutional rights by directing the Executive Director of the Utah Department of Health to stop the Department from acting as an intermediary for pass-through federal funds that the organization used to implement programs in Utah. The organization moved for a temporary restraining order and a preliminary injunction. The district court initially issued a temporary restraining order, but later withdrew it and denied the organization's motion for a preliminary injunction.

The organization appealed, and the Tenth Circuit reversed and remanded. The court held that (1) the organization failed to establish a likelihood of success on the merits of its class-of-one equal protection claim; but (2) the organization established a substantial likelihood of success on the merits of its unconstitutional conditions claims; (3) the organization established likelihood of irreparable harm; (4) the possibility of organization's First Amendment rights being irreparably harmed outweighed any opposing interests asserted by defendants; and (5) the issuance of an injunction was in the public interest.

The Tenth Circuit denied rehearing en banc. Judges Briscoe and Bacharach wrote separately in support of the denial of en banc rehearing.

Judge Gorsuch dissented from the denial of rehearing en banc. Judges Tymkovich, Hartz, and Holmes joined in that dissent.

Second Amendment Rights

Colorado Outfitters Ass'n v. Hickenlooper, 823 F.3d 537 (10th Cir. 2016) (Moritz)

Gun owners, associations of gun owners and advocates, and businesses that manufactured or sold magazines and/or firearms filed an action against the Colorado Governor in his official capacity, alleging that the criminal statutes that banned the sale and possession of "large-capacity magazines" and expanded mandatory background checks violated the Second and Fourteenth Amendments, as well as the Americans with Disabilities Act (ADA). The governor moved to dismiss for failure to state a claim. The district court granted the motion in part and denied it in part. *See* 2013 WL 6384218. Following a bench trial, the district court entered judgment for the governor. *See* 24 F.Supp.3d 1050.

The Tenth Circuit held that the plaintiffs lacked standing, and it vacated the district court's decision and remanded for dismissal. The court held that (1) the plaintiff youth outdoor activities organization lacked Article III standing to challenge statute expanding mandatory background checks; (2) the plaintiff advocacy organization lacked associational standing; (3) the plaintiff gun owners had waived a claim that they had Article III standing to challenge statutes under the ADA; (4) the advocacy organization lacked Article III standing to challenge the criminal statute expanding background checks for firearms under the ADA; and (5) the plaintiff sheriffs also lacked Article III standing.

Substantive Due Process

Estate of Reat v. Rodriguez, 824 F.3d 960 (10th Cir. 2016) (Tymkovich)

The estate of an automobile passenger, who was fatally shot by attackers after a 911 operator told a driver to return to city in which the driver and the passenger were attacked, filed a § 1983 action against the 911 operator. The district court granted summary judgment in favor of the operator on all constitutional claims, except the Fourteenth Amendment substantive due process claim that was based on theory of state-created danger. The operator appealed.

The Tenth Circuit reversed the denial of the defendant's summary judgment motion on the substantive due process claim. It reasoned that the operator's conduct did not violate clearly defined contours of the state-created danger doctrine, and the thus operator was entitled to qualified immunity. "No reasonable 911 operator could have known that these actions would have resulted in liability under the Fourteenth Amendment." 824 F.3d at 967.

The court declined to exercise jurisdiction over the remaining state law claims.

Voting Rights

Fish v. Kobach, 840 F.3d 710 (10th Cir. 2016) (Holmes)

The plaintiffs challenged a Kansas law requiring documentary proof of citizenship ("DPOC") for voter registration, KAN. STAT. ANN. § 25–2309(l), as applied to the federally mandated voter-registration form that must be a part of any application to obtain or renew a driver's license (the "motor voter" process). The district court granted the plaintiffs' motion for a preliminary injunction, holding that the plaintiffs had made a strong showing that section 5 of the National Voter Registration Act (the "NVRA"), 52 U.S.C. § 20504, preempted the Kansas law.

The Kansas Secretary of State appealed, and the Tenth Circuit affirmed. Judge Holmes explained,

"[T]he district court did not abuse its discretion in granting the preliminary injunction because the NVRA preempts Kansas's DPOC law as enforced against those applying to vote while obtaining or renewing a driver's license. Specifically, section 5 of the NVRA provides, as most relevant here, that the state motor voter form 'may require only the minimum amount of information necessary to . . . enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.' 52 U.S.C. § 20504(c)(2)(B)(ii). Section 5 also requires motor voter forms to include a signed attestation under penalty of perjury that the applicant meets the state's eligibility criteria, including citizenship. § 20504(c)(2)(C). We hold that this attestation under penalty of perjury is the presumptive minimum amount of information necessary for state election officials to carry out their eligibility-assessment and registration duties. As it pertains to the citizenship requirement, the presumption ordinarily can be rebutted (i.e., overcome) only by a factual showing that substantial numbers of noncitizens have successfully registered to vote under the NVRA's attestation requirement. Having determined that Secretary Kobach has failed to make this showing, we conclude that the DPOC required by Kansas law is more than the minimum amount of information necessary and, therefore, is preempted by the NVRA." 840 F.3d at 716-17.

Zoning

Zia Shadows, L.L.C. v. City of Las Cruces, 829 F.3d 1232 (10th Cir. 2016) (McHugh)

The operator of a mobile home park filed an action against a muncipality, alleging that delays in approving an operator's zoning request, and the conditions ultimately attached to the approval, violated the operator's rights to due process and equal protection, and that city's actions were taken in retaliation for the operator's public criticisms of the city. The district court granted summary judgment to the city on the due process and equal protection claims, and a jury found in favor of the city on the retaliation claim.

The Tenth Circuit affirmed. It held that (1) the operator of the mobile home park did not have a protectable property interest in its special-use permit or in approval of its planned unit development (PUD) zoning application; (2) the evidence did not support the operator's class of one equal protection claim; (3) the district court was not required to enforce a stipulation to erroneous jury instruction on elements of First Amendment retaliation claim; (4) the operator was not prejudiced by district court's correction of an erroneous jury instruction; and (5) the district court was not required to disqualify a city-employed juror for implied bias.

Judge McKay dissented on the question of juror bias. In his view,"[a]n employment relationship with a party is an extraordinary situation requiring exclusion of a juror for implied bias. This court has said so. The Supreme Court has said so. I would thus remand for a new trial." 829 F.3d at 1254.