Constitutional Litigation Under Section 1983

THIRD EDITION

2025 SUPPLEMENT

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Chapter 1. Official Liability for Constitutional Wrongs

B. "State Action" Compared

Replace *Almand v. Dekalb County*, 103 F.3d 1510 (11th Cir. 1997), on page 11 with the following principal case and accompanying Notes:

LINDKE v. FREED
Supreme Court of the United States
601 U.S. 187 (2024)

BARRETT, J., delivered the opinion of the [unanimous] Court.

Sometime before 2008, while he was a college student, James Freed created a private Facebook profile that he shared only with "friends." When Freed, an avid Facebook user, began nearing the platform's 5,000-friend limit, he converted his profile to a public "page." This meant that *anyone* could see and comment on his posts. Facebook did not require Freed to satisfy any special criteria either to convert his Facebook profile to a public page or to describe himself as a public figure.

In 2014, Freed was appointed city manager of Port Huron, Michigan, and he updated his Facebook page to reflect the new job. For his profile picture, Freed chose a photo of himself in a suit with a city lapel pin. In the "About" section, Freed added his title, a link to the city's website, and the city's general email address. He described himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI."

As before his appointment, Freed operated his Facebook page himself. And, as before his appointment, Freed posted prolifically (and primarily) about his personal life. Freed also posted information related to his job. He described mundane activities, like visiting local high schools, as well as splashier ones, like starting reconstruction of the city's boat launch.

Freed's readers frequently commented on his posts, sometimes with reactions (for example, "Good job it takes skills" on a picture of his sleeping daughter) and sometimes with questions (for example, "Can you allow city residents to have chickens?"). Freed often replied to the comments, including by answering inquiries from city residents. He occasionally deleted comments that he thought were "derogatory" or "stupid."

After the COVID–19 pandemic began, Freed posted about that. Some posts were personal, like pictures of his family spending time at home and outdoors to "[s]tay safe" and "[s]ave lives." Others related to Freed's job, like a description of the city's hiring freeze and a screenshot of a press release about a relief package that he helped prepare.

Enter Kevin Lindke. Unhappy with the city's approach to the pandemic, Lindke visited Freed's page and said so. For example, in response to one of Freed's posts, Lindke commented that the city's pandemic response was "abysmal" and that "the city deserves better." When Freed posted a photo of himself and the mayor picking up takeout from a local restaurant, Lindke

complained that while "residents [we]re suffering," the city's leaders were eating at an expensive restaurant "instead of out talking to the community." Initially, Freed deleted Lindke's comments; ultimately, he blocked him. Once blocked, Lindke could see Freed's posts but could no longer comment on them.

Lindke sued Freed under 42 U.S.C. § 1983, alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed's Facebook page, which he characterized as a public forum. Freed, Lindke claimed, had engaged in impermissible viewpoint discrimination by deleting unfavorable comments and blocking the people who made them.

When a government official posts about job-related topics on social media, it can be difficult to tell whether the speech is official or private. We hold that such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media.

In the run-of-the-mill case, state action is easy to spot. Courts do not ordinarily pause to consider whether § 1983 applies to the actions of police officers, public schools, or prison officials. And, absent some very unusual facts, no one would credit a child's assertion of free speech rights against a parent, or a plaintiff 's complaint that a nosy neighbor unlawfully searched his garage.

Sometimes, however, the line between private conduct and state action is difficult to draw. *Griffin* v. *Maryland*, [378 U.S. 130 (1964),] is a good example. There, we held that a security guard at a privately owned amusement park engaged in state action when he enforced the park's policy of segregation against black protesters. Though employed by the park, the guard had been "deputized as a sheriff of Montgomery County" and possessed "the same power and authority" as any other deputy sheriff. The State had therefore allowed its power to be exercised by someone in the private sector. And the source of the power, not the identity of the employer, controlled.

By and large, our state-action precedents have grappled with variations of the question posed in *Griffin*: whether a nominally private person has engaged in state action for purposes of § 1983. Today's case, by contrast, requires us to analyze whether a *state official* engaged in state action or functioned as a private citizen. This Court has had little occasion to consider how the state-action requirement applies in this circumstance. P. 765.

The question is difficult, especially in a case involving a state or local official who routinely interacts with the public. Such officials may look like they are always on the clock, making it tempting to characterize every encounter as part of the job. But the state-action doctrine avoids such broad-brush assumptions—for good reason. While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights. By excluding from liability "acts of officers in the ambit of their personal pursuits," *Screws v. United States*, 325 U.S. 91, 111 (1945) (plurality opinion), the state-action requirement "protects a robust sphere of individual liberty" for those who serve as public officials or employees.

The dispute between Lindke and Freed illustrates this dynamic. Freed did not relinquish his First Amendment rights when he became city manager. On the contrary, "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." This right includes the ability to speak about "information related to or learned through public employment," so long as the speech is not "itself ordinarily within the scope of [the] employee's duties." Where the right exists, "editorial control over speech and speakers on [the public employee's] properties or platforms" is part and parcel of it. Thus, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own.

So Lindke cannot hang his hat on Freed's status as a state employee. The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights. Categorizing conduct, therefore, can require a close look. P. 766.

That said, our precedent articulates principles that govern cases analogous to this one. For the reasons we explain below, a public official's social-media activity constitutes state action under § 1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. The appearance and function of the social-media activity are relevant at the second step, but they **767 cannot make up for a lack of state authority at the first.

The first prong of this test is grounded in the bedrock requirement that "the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State*." *Lugar*, 457 U.S. at 937 (emphasis added). An act is not attributable to a State unless it is traceable to the State's power or authority. Private action—no matter how "official" it looks—lacks the necessary lineage.

This rule runs through our cases. *Griffin* stresses that the security guard was "possessed of state authority" and "purport[ed] to act under that authority." *West* v. *Atkins*[, 487 U.S. 42 (1988),] states that the "traditional definition" of state action "requires that the defendant ... have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." (Quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). *Lugar* emphasizes that state action exists only when "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." By contrast, when the challenged conduct "entail[s] functions and obligations in no way dependent on state authority," state action does not exist. *Polk County v. Dodson*, 454 U.S. 312 (1981) (no state action because criminal defense "is essentially a private function ... for which state office and authority are not needed").

Lindke's focus on appearance skips over this crucial step. He insists that Freed's social-media activity constitutes state action because Freed's Facebook page looks and functions like an outlet for city updates and citizen concerns. But Freed's conduct is not attributable to the State unless he was "possessed of state authority" to post city updates and register citizen concerns. If the State did not entrust Freed with these responsibilities, it cannot "fairly be blamed" for the

way he discharged them. Lindke imagines that Freed can conjure the power of the State through his own efforts. Yet the presence of state authority must be real, not a mirage.

Importantly, Lindke must show more than that Freed had *some* authority to communicate with residents on behalf of Port Huron. The alleged censorship must be connected to speech on a matter within Freed's bailiwick. For example, imagine that Freed posted a list of local restaurants with health-code violations and deleted snarky comments made by other users. If public health is not within the portfolio of the city manager, then neither the post nor the deletions would be traceable to Freed's state authority—because he had none. For state action to exist, the State must be "responsible for the specific conduct of which the plaintiff complains." There must be a tie between the official's authority and "the gravamen of the plaintiff 's complaint."

To be clear, the "[*m*]*isuse* of power, possessed by virtue of state law," constitutes state action. *Classic*, 313 U.S. at 326; see also, *e.g.*, *Screws*, 325 U.S. at 110 (plurality opinion) (state action where "the power which [state officers] were authorized to exercise was misused"). While the state-action doctrine requires that the State have granted an official the type of authority that he used to violate rights—*e.g.*, the power to arrest—it encompasses cases where his "particular action"—*e.g.*, an arrest made with excessive force—violated state or federal law. See also *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278 (1913) (the Fourteenth Amendment encompasses "abuse by a state officer ... of the powers possessed"). Every § 1983 suit alleges a misuse of power, because no state actor has the authority to deprive someone of a federal right. To misuse power, however, one must possess it in the first place.

Where does the power come from? Section 1983 lists the potential sources: "statute, ordinance, regulation, custom, or usage." Statutes, ordinances, and regulations refer to written law through which a State can authorize an official to speak on its behalf. "Custom" and "usage" encompass "persistent practices of state officials" that are "so permanent and well settled" that they carry "the force of law." So a city manager like Freed would be authorized to speak for the city if written law like an ordinance empowered him to make official announcements. He would also have that authority even in the absence of written law if, for instance, prior city managers have purported to speak on its behalf and have been recognized to have that authority for so long that the manager's power to do so has become "permanent and well settled." And if an official has authority to speak for the State, he may have the authority to do so on social media even if the law does not make that explicit.

Determining the scope of an official's power requires careful attention to the relevant statute, ordinance, regulation, custom, or usage. In some cases, a grant of authority over particular subject matter may reasonably encompass authority to speak about it officially. For example, state law might grant a high-ranking official like the director of the state department of transportation broad responsibility for the state highway system that, in context, includes authority to make official announcements on that subject. At the same time, courts must not rely on "excessively broad job descriptions" to conclude that a government employee is authorized to speak for the State. The inquiry is not whether making official announcements *could* fit within the job description; it is whether making official announcements is *actually* part of the job that the State entrusted the official to do.

In sum, a defendant like Freed must have actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. If the plaintiff cannot make this threshold showing of authority, he cannot establish state action.

For social-media activity to constitute state action, an official must not only have state authority—he must also purport to use it. State officials have a choice about the capacity in which they choose to speak. "[G]enerally, a public employee" purports to speak on behalf of the State while speaking "in his official capacity or" when he uses his speech to fulfill "his responsibilities pursuant to state law." If the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice.

Consider a hypothetical from the offline world. A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; the latter is private action taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context—an official meeting versus a private event—differs. He invoked his official authority only when he acted as school board president.

The context of Freed's speech is hazier than that of the hypothetical school board president. Had Freed's account carried a label (*e.g.*, "this is the personal page of James R. Freed") or a disclaimer (*e.g.*, "the views expressed are strictly my own"), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal. Markers like these give speech the benefit of clear context: Just as we can safely presume that speech at a backyard barbeque is personal, we can safely presume that speech on a "personal" page is personal (absent significant evidence indicating that a post is official).[1] Conversely, context can make clear that a social-media account purports to speak for the government—for instance, when an account belongs to a political subdivision (*e.g.*, a "City of Port Huron" Facebook page) or is passed down to whomever occupies a particular office (*e.g.*, an "@PHuronCityMgr" Instagram account). Freed's page, however, was not designated either "personal" or "official," raising the prospect that it was "mixed use"—a place where he made some posts in his personal capacity and others in his capacity as city manager.

[1] [fn.2] An official cannot insulate government business from scrutiny by conducting it on a personal page. The Solicitor General offers the particularly clear example of an official who designates space on his nominally personal page as the official channel for receiving comments on a proposed regulation. Because the power to conduct notice-and-comment rulemaking belongs exclusively to the State, its exercise is necessarily governmental. Similarly, a mayor would engage in state action if he hosted a city council meeting online by streaming it only on his personal Facebook page. By contrast, a post that is compatible with either a "personal capacity" or "official capacity" designation is "personal" if it appears on a personal page.

Categorizing posts that appear on an ambiguous page like Freed's is a fact-specific undertaking in which the post's content and function are the most important considerations. In some circumstances, the post's content and function might make the plaintiff 's argument a slam dunk. Take a mayor who makes the following announcement exclusively on his Facebook page: "Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules." The post's express invocation of state authority, its immediate legal effect, and the fact that the order is not available elsewhere make clear that the mayor is purporting to discharge an official duty. If, by contrast, the mayor merely repeats or shares otherwise available information—for example, by linking to the parking announcement on the city's webpage—it is far less likely that he is purporting to exercise the power of his office. Instead, it is much more likely that he is engaging in private speech "relate[d] to his public employment" or "concern[ing] information learned during that employment."

Hard-to-classify cases require awareness that an official does not necessarily purport to exercise his authority simply by posting about a matter within it. He might post job-related information for any number of personal reasons, from a desire to raise public awareness to promoting his prospects for reelection. Moreover, many public officials possess a broad portfolio of governmental authority that includes routine interaction with the public, and it may not be easy to discern a boundary between their public and private lives. Yet these officials too have the right to speak about public affairs in their personal capacities. Lest any official lose that right, it is crucial for the plaintiff to show that the official is purporting to exercise state authority in specific posts. And when there is doubt, additional factors might cast light—for example, an official who uses government staff to make a post will be hard pressed to deny that he was conducting government business.

One last point: The nature of the technology matters to the state-action analysis. Freed performed two actions to which Lindke objected: He deleted Lindke's comments and blocked him from commenting again. So far as deletion goes, the only relevant posts are those from which Lindke's comments were removed. Blocking, however, is a different story. Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. The bluntness of Facebook's blocking tool highlights the cost of a "mixed use" social-media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts.[3] A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.

* * *

The state-action doctrine requires Lindke to show that Freed (1) had actual authority to speak on behalf of the State on a particular matter, and (2) purported to exercise that authority in the relevant posts. To the extent that this test differs from the one applied by the Sixth Circuit, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

NOTES

1. *O'Connor-Ratliffe v. Garnier*, 601 U.S. 205 (2024). The Sixth Circuit opinion that was reversed in *Lindke* had applied what might be described as the most restrictive definition of state action found anywhere in the United States. The Sixth Circuit concluded that no state action existed regardless of whether Freed used the page to discuss official matters, since the page was not paid for with government funds, government staff did not help administer it, no law or ordinance required it, and his office did not own the page; in the words of the Sixth Circuit, "Freed's page did not belong to the office of city manager." Under this ownership theory, Freed was "acting in his personal capacity—and there was no state action."

In contrast, in the companion case of *O'Connor-Ratliffe v. Garnier*, 601 U.S. 205 (2024), the Ninth Circuit relied heavily on a "show of authority" analysis to conclude that state action existed in a social media case much like that presented in *Lindke*. The Ninth Circuit began by stating that the problem was essentially the same as "whether off-duty governmental employees are acting under color of state law." Pointing to law enforcement cases, the Ninth Circuit explained that "[w]hat matters … is whether the state official 'abused her responsibilities and purported or pretended to be a state officer' at the time of the alleged constitutional violation." Because the government officials (school board trustees) in *Garnier* "identified themselves on their Facebook pages as 'government official[s]'," geared "the content of the [their] pages … overwhelmingly toward 'provid[ing] information to the public about' the [school board's] 'official activities and solicit[ing] input from the public on policy issues' relevant to Board decisions," used their pages with "the purpose and effect of influencing the behavior of others," and "'related [their pages] in some meaningful way' to their 'governmental status' and 'to the performance of [their] duties,'" the Ninth Circuit found they had engaged in state action. That their pages were neither funded nor authorized by the school board did not direct a different outcome, the Ninth Circuit concluded, since the officials "effectively 'display[ed] a badge' to the public signifying that their accounts reflected their official roles … whether or not the [school] District had in fact authorized or supported them."

The Supreme Court found the Ninth Circuit's approach to be "different from the one we have elaborated in [*Freed v.*] *Lindke*" and thus vacated it in favor of further proceedings. The Court observed that the Ninth Circuit's approach erred because it considered controlling whether a governmental defendant "(1) purports to or pretends to act under color of law; (2) her pretense of acting in the performance of [her] duties had the purpose and effect of influencing the behavior of others; and (3) the harm inflicted on plaintiff related in some meaningful way either to the officer's governmental status or to the performance of [her] duties." The Supreme Court's approach in *Lindke* thus falls somewhere between the Sixth Circuit's restrictive ownership theory and the Ninth Circuit's "pretense" or "show of authority" approach.

2. Misuse of Authority. The *Lindke* Court did not cite *Monroe v. Pape*, 365 U.S. 167 (1961) (*see* Section 1.A., *supra*), in its opinion, but reiterated that a misuse of authority can still constitute state action (and presumably be "under color of" law), citing (among other cases) *Home Telephone & Telegraph v. City of Los Angeles*, 227 U.S. 278 (1913). "Every § 1983 suit alleges a misuse of power," the Supreme Court observed, "because no state actor has the

authority to deprive someone of a federal right. To misuse power, however, one must possess it in the first place."

3. Is Apparent Authority No Longer Enough? The Court stated in *Lindke* that authority must be "actual" as opposed to "apparent." The *Lindke* Court observed that "an official's power requires careful attention to the relevant statute, ordinance, regulation, custom, or usage." Further, "courts must not rely on 'excessively broad job descriptions' to conclude that a government employee is authorized to speak for the State. The inquiry is not whether making official announcements *could* fit within the job description; it is whether making official announcements is *actually* part of the job that the State entrusted the official to do." Defined as such, does this approach mirror "scope of employment"?

With claims made against police officers for various forms of wrongful arrest of excessive force, in contrast, lower courts have regularly looked to "shows of authority" and "pretenses" -- concepts more akin to apparent authority as opposed to "scope of employment" – to hold police officers had engaged in state action. *See*, *e.g.*, *Mitchell v. Gieda*, 215 Fed. Appx. 163 (3d Cir. 2007) (stating that where off-duty police officers "act with police authority, purport to act with such authority, or otherwise display any indicia of such authority" they are engaged in state action); *Almand v. Dekalb County*, 103 F.3d 1510 (11th Cir. 1997). Rarely if ever has actual authority been ruled necessary. Indeed, Justice Barrett in *Lindke* recognized that state action in "run of the mill" cases involving police officers is "easy to spot." Will it continue to be easy to spot under *Lindke*'s scope of employment test?

Likewise, lower courts have concluded that public school teachers engage in state action when they sexually abuse students without inquiring whether the teacher had actual authority to do so. Instead, something more like apparent authority has been found to be enough. *See*, *e.g.*, *Doe v. Taylor Independent Schools*, 15 F.3d 443 (5th Cir. 1994). Does *Lindke* change that?

Could *Lindke*'s actual authority, scope of employment requirement be limited to social media claims made under the First Amendment? In *Martinez v. Harroun*, 2025 WL 35595, *2 (D. Colo. 2025), the court observed that courts "have clearly grappled with how to apply the [*Lindke*] test outside the context of a public official's speech" and then went on to reject the notion that *Lindke* must be applied across-the-board "in any 'color of law' analysis." Instead, "due to different contexts," the court ruled, "the framing of the analysis is different" with excessive force. "Whether an official had actual authority to speak on behalf of the state on a certain topic is a different question than whether a police officer had the actual authority to use force on behalf of the state." Where a city grants "general authority to use physical force on its behalf [to a police officer] by making him a police officer and granting him his badge," the state-action question is simply "whether he retained any of that authority at the time of the challenged action." So long as "directives and the badge delegate some actual state authority," the court ruled, a police officer can be engaged in state action "even [when his] actions clearly exceeded the scope of that authority."

4. Applying *Lindke* Beyond Social Media. In *Lawson v. Creely*, 137 F.4th 404 (6th Cir. 2025), the Sixth Circuit applied *Lindke* jot-for-jot to a Fourth Amendment claim brought by a public-sector (school) employee (Lawson) against two supervisors (Creely and Franke) who had

searched her office. The district court ruled that the defendants' conduct was "fairly attributable to the State" because their status as school employees granted them the access they needed to search Lawson's office. The Sixth Circuit, applying *Lindke*, disagreed. No state law or regulation "task[ed] Creely and Franke with searching Lawson's [office]," it ruled. Although the two defendants were required by law to cooperate in school district investigations, they were not expressly authorized to conduct their own. Further, even if they had been authorized to investigate, rules and regulations required that they "use 'sound judgment' and employ methods that are 'reasonable and commonly accepted.'" "[R]ifling through a coworker's bag is [not] a reasonable and commonly accepted measure." Their conduct was thus not specifically authorized.

Although "a closer call," state law did not "generally" delegate to the defendants "authority to conduct investigations or seek out potential dangers beyond what was immediately ascertainable to them," either. "[A] holistic review of the school's policies suggests that employees should report concerns and suspicions to supervisors or law enforcement," the Court concluded. "Considering these policies as a whole, the state had not delegated even the *general* type of authority at issue here to employees like Creely and Franke." Is this holding consistent with *Monroe v. Pape*? *See* Section 1.A, *supra*. Remember that in *Pape* the police officers argued they did not act under color of state law because state law prohibited their specific actions. Or are police simply different in the contexts of excessive force and investigations? *See Mackey v. Rising*, 106 F.4th 552 (6th Cir. 2024) (distinguishing police use of force from the use of force by other government officials under *Lindke*).

5. Custom and Usage. Written law, like statutes and ordinances, obviously can provide the actual authority demanded by the Court in *Lindke*. But so can "custom and usage," which according to the *Lindke* Court "encompass persistent practices of state officials that are so permanent and well settled that they carry the force of law." Consequently, "a city manager like Freed would … also have that authority even in the absence of written law if, for instance, prior city managers have purported to speak on its behalf and have been recognized to have that authority for so long that the manager's power to do so has become permanent and well settled." Would proving a pattern or practice, like that sometimes used to establish municipal liability, *see* Chapter 4.C., *infra*, be sufficient? How many prior instances are required?

6. Purporting to Be Private. The Court observed in *Lindke* that "[f]or social-media activity to constitute state action, an official must not only have state authority—he must also purport to use it. State officials have a choice about the capacity in which they choose to speak." Is this requirement limited to First Amendment claims that originate with social media? Does it also apply to judges, police officers and school teachers who are accused of abuse? Could Judge Lanier in the case that follows, *see* page 14 in the main text, have protected himself from a finding of state action by "purporting" to act in a private capacity when he sexually assaulted his victims in his courthouse?

Add the following to the end of Note 4 on page 25:

See also Department of Transportation v. Ass'n of American Railroads, 575 U.S. 43 (2015) (concluding that Amtrak is government actor and stating that the "practical reality of

[government] control and supervision prevails over [government's] disclaimer of Amtrak's governmental status"); *Manhattan Community Access Corp. v. Halleck*, 587 U.S. 802 (2019) (holding that municipally created but privately run public access cable television station was not engaged in state action).

C. Unauthorized Conduct that Does Not Violate the Constitution

Add the following to the end of Note 4 on page 39:

See also Kingsley v. Hendrickson, 576 U.S. 389 (2015) (holding under Due Process Clause that a pretrial detainee need only show that force purposely or knowingly used against him constitutes objectively unreasonable "excessive force" akin to that proscribed by Fourth Amendment).

Add the following to the end of Note 6 on page 40:

In *Torres v. Madrid*, 592 U.S. 306 (2021), the Supreme Court in a 5-3 decision by the Chief Justice ruled that a police shooting of a fleeing suspect constituted a seizure within the meaning of the Fourth Amendment even though the suspect escaped: "the officers' shooting applied physical force to her body and objectively manifested an intent to restrain her from driving away. We therefore conclude that the officers seized Torres for the instant that the bullets struck her." The majority cautioned, however, that the Fourth Amendment required not only an "intent to restrain," but that "a seizure by force—absent submission—lasts only as long as the application of force. That is to say that the Fourth Amendment does not recognize any '*continuing* arrest during the period of fugitivity.'" (Emphasis original). "The fleeting nature of some seizures by force undoubtedly may inform what damages a civil plaintiff may recover, and what evidence a criminal defendant may exclude from trial. But brief seizures are seizures all the same."

Replace Note 7 on page 40:

7. Fifth Amendment Takings. In *Knick v. Township of Scott*, 588 U.S. 180 (2019), the Court overruled *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Consequently, taking claims under the Fifth Amendment are not like procedural due process claims, and a state's judicial remedies for taking need not be first exhausted in order to ripen a Fifth Amendment takings claim (and be pursued under § 1983 when a proper defendant exists). Still, when a State effects a taking, the unavailability of § 1983 (since States are not proper defendants, *see* Chapter 3.C., *supra*, and *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) (page 169 of the text), means that plaintiffs must still use a State's remedies, like inverse condemnation. *See Devillier v. Texas*, 601 U.S. 285 (2024) (holding that no direct constitutional action exists under the takings clause when State remedies exist). These problems are discussed in Chapter 8, *infra*, and the accompanying supplemental material.

Add the following Note 11 on page 43:

11. Miranda Violations. The Court in *Vega v. Tekoh*, 597 U.S. 134 (2022), ruled that because the Fifth Amendment right announced in *Miranda v. Arizona*, 384 U.S. 436 (1966), are merely a

prophylactic, and "a violation of *Miranda* is not itself a violation of the Fifth Amendment," section 1983 cannot be used to address violations of this right. The Court also ruled against treating *Miranda* violations as violations of federal law for purposes of section 1983. Applying a cost-benefit analysis that appears unique to *Miranda* violations, the Court stated that "'[a] judicially crafted' prophylactic rule should apply 'only where its benefits outweigh its costs,' and here, while the benefits of permitting the assertion of *Miranda* claims under §1983 would be slight, the costs would be substantial."

E. Federal Statutory Violations

Add the following paragraph to the end of Note 2 on page 57:

In *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), the Court in a 5 to 4 opinion authored by Justice Scalia ruled that the Supremacy Clause itself does not imply a federal cause of action:

> It is apparent that this Clause creates a rule of decision: Courts "shall" regard the "Constitution," and all laws "made in Pursuance thereof," as "the supreme Law of the Land." They must not give effect to state laws that conflict with federal laws. It is equally apparent that the Supremacy Clause is not the " 'source of any federal rights,' " and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.

The Court noted in this case brought against state officials in their official capacities under the federal Medicaid Act that the plaintiffs did not rely on 42 U.S.C. § 1983.

Justice Breyer added a fifth vote to the majority opinion and stated in his concurrence: "I would not characterize the question before us in terms of a Supremacy Clause 'cause of action.' Rather, I would ask whether 'federal courts may in [these] circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law.' I believe the answer to this question is no." Justice Sotomayor spoke for four in dissent: "[a] suit, like this one, that seeks relief against state officials acting pursuant to a state law allegedly preempted by a federal statute falls comfortably within th[e] doctrine [of *Ex parte Young*, 209 U.S. 123 (1908) (discussed in Chapter 3.B., *infra*)]."

Add to the end of Note 3 on page 58:

The Court in *Health and Hospital Corporation of Marion County v. Talevski*, 599 U.S. 166 (2023), ruled that congressional Spending Clause measures continue to be cognizable under § 1983, rejecting the claim that because third-party beneficiaries of contracts in the middle nineteenth century could not enforce the terms of contracts the Forty-second Congress (which passed § 1983 in 1871) would not have intended Spending Clause measures to be privately enforceable either. The Court then specifically concluded that the individual, private rights created by the Federal Nursing Home Reform Act (FNHRA) are enforceable under § 1983.

The Court in *Medina v. Planned Parenthood South Atlantic*, 604 U.S. __ (2025), however, distinguished *Talevski* and appears to have limited it to its facts. In concluding that a Medicaid provision requiring States to allow covered individuals to seek treatment from "any qualified provider" was not enforceable under § 1983, the Court observed that "it is rare enough for any statute to confer an enforceable right," and "spending-power statutes like Medicaid are especially unlikely to do so." Under *Talevski*, the Court observed, "a plaintiff must show that the law in question 'clear[ly] and unambiguous[ly]' uses 'rights-creating terms.'" "In addition, the statute must display 'an unmistakable focus' on individuals like the plaintiff." "[T]his as a stringent and 'demanding' test." "And even for the rare statute that satisfies it, … a §1983 action still may not be available if Congress has displaced §1983's general cause of action with a more specific remedy."

"[M]issing from [Medicaid]," the Court stated, "is anything like [the] clear and unambiguous 'rights-creating language' [found in the statute at issue in *Talevski*]." "To continue receiving federal funding, the Medicaid Act says, a State need only 'comply substantially' with the any-qualified-provider mandate." This "suggests that a statute addresses a State's obligations to the federal government, not the rights 'of any particular person.'" Medicaid's restrictions "do not appear in any discernible order," and the "requirements are directed to the Secretary of Health and Human Services, who must approve any plan' that meets them." "[T]he statute before us stands in stark contrast to the ones we faced in *Talevski*, where Congress set its rights-creating provisions apart from others and, in doing so, helped alert grantees that accepting federal funds comes with a duty to answer private suits."

Replace citation at the end of Note 4 on page 58:

Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012), *certiorari dismissed as improvidently granted,* 571 U.S. 1 (2013).

Add to Note 6 on page 60:

The Supreme Court in *Ziglar v. Abbasi*, 582 U.S. 120 (2017), ruled that a *Bivens* remedy does not extend to Due Process and Equal Protection claims challenging the conditions of confinement imposed on those arrested pursuant to a formal policy adopted by Executive Branch officials in the wake of the September 11, 2001 attacks on the World Trade Center and Pentagon. In *Hernandez v. Mesa*, 589 U.S. 83 (2020), it ruled that the family of a fifteen-year-old Mexican national killed by a federal agent in a cross-border shooting possessed no direct constitutional cause of action, stating that it will not extend *Bivens* to a "new context" and "a claim based on a cross-border shooting arises in a context that is markedly new." In *Egbert v. Boule*, 596 U.S. 482 (2022), the Court applied this same logic to rule that Border Patrol agents were not subject to *Bivens* actions under either the First or Fourteenth Amendments. In *Goldey v. Fields*, 604 U.S. __ (2025) (per curiam), the Court ruled that no direct constitutional cause of action exists under the Eighth Amendment against guards who use excessive force.

Chapter 2. Official Immunities

A. Absolute Immunity

[1] Legislative Immunity

Add the following at the end of the second paragraph of Note 1 on page 66:

See also Matteo Godi, *Section 1983: A Strict Liability Statutory Tort*, 113 CALIF. L. REV. (forthcoming) (arguing that immunity doctrines undermine Congress' intent that section 1983 operate as a strict liability statutory tort).

Add the following at the end of Note 2 on page 67:

Cf. Fulton County Special Purpose Grand Jury v. Graham, 2022 U.S. App. Lexis 29349 (11th Cir. Oct. 20, 2022) (noting that the lower courts disagree whether "informal investigation[s] by an individual legislator acting without committee authorization" are protected by the Speech or Debate Clause, but concluding that, even if they are, "efforts to 'cajole' or 'exhort' Georgia election officials" to change the results of the 2020 presidential election were not protected and that Senator Lindsey Graham could therefore be called to testify before a Georgia grand jury about any "non-investigatory conduct" in post-election calls he made to Georgia election officials), *stay denied*, 143 S. Ct. 397 (2022), *dismissed as moot*, 2022 U.S. App. Lexis 35610 (11th Cir. Dec. 20, 2022). *See also* Maggie Haberman & Alan Feuer, *Pence Won't Appeal Ruling Compelling Testimony to Jan. 6 Grand Jury, Aide Says*, N.Y. TIMES, Apr. 6, 2023, at A7 (reporting that a federal district judge held that, while former Vice President Mike Pence's role as president of the Senate on January 6, 2021, entitled him to some Speech or Debate Clause protection, he had to appear before the federal grand jury investigating President Trump's attempts to overturn the 2020 election and testify about "any potentially illegal acts" on Trump's part).

B. Qualified Immunity

Add the following at the end of the first paragraph of Note 1 following *Harlow v. Fitzgerald* on page 96:

Compare Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021) (reporting that 19th century common law afforded absolute immunity to high-ranking executive-branch officials and that the qualified immunity protecting other executive officials was unavailable if a plaintiff produced clear evidence of the defendant's "subjective improper purpose"), *with* William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115 (2022) (responding that the common law version of qualified immunity more closely resembled quasi-judicial immunity in that it applied to "quasi-judicial acts like election administration and tax assessment" but not "ordinary law enforcement decisions"). *See also* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201 (2023) (reporting that the original version of section 1983 enacted in 1871 included language (later omitted "[f]or reasons unknown" from the first compilation of federal

law) providing that federal civil rights claims were available "notwithstanding 'any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary," and concluding that "Section 1983's original text conveys congressional intent that [state common law] immunity defenses should not apply to the newly created civil rights actions").

Add the following at the end of Note 1 following *Harlow v. Fitzgerald* on page 97:

For a symposium addressing the pros and cons of qualified immunity, see Symposium, *The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793 (2018).

Court-watchers wondered whether the Supreme Court was poised to reconsider the qualified immunity doctrine when the Court relisted nine cert petitions challenging the defense for about a month starting in May of 2020. *See* John Elwood, *Relist Watch: Looking for the Living Among the Dead*, SCOTUSBLOG (May 27, 2020, 11:29 AM), https://www.scotusblog.com/2020/05/relist-watch-looking-for-the-living-among-the-dead/. Towards the end of the Term, the Court denied certiorari in all nine cases over Justice Thomas' lone dissent. Justice Thomas, citing his opinion in *Ziglar v. Abbasi* (discussed *infra*), would have granted review on the grounds that qualified immunity "appears to stray from the statutory text." *Baxter v. Bracey*, 140 S. Ct. 1862 (2020).

Following the death of George Floyd in May of 2020, reform legislation was introduced in Congress that would have, among other things, prevented law enforcement officials from raising the qualified immunity defense in federal civil rights suits. In 2021, the House passed the George Floyd Justice in Policing Act, but the bill did not have sufficient support in the Senate. On the second anniversary of Floyd's death, then-President Biden signed an executive order addressing some of the issues covered in the bill. The order, which did not mention qualified immunity, instructed federal agencies to revise their use-of-force policies, established a national registry of police officers who had been terminated because of misconduct, and provided federal funds to encourage police departments to limit chokeholds and no-knock warrants. President Trump has revoked the Biden executive order and shut down the registry. *See* Eli Stokols, *Biden Signs Executive Order for Federal Reform of Policing*, L.A. TIMES, May 26, 2022, at A1; Tom Jackman & Elizabeth Dwoskin, *Justice Dept. Deletes Database Tracking Federal Police Misconduct*, WASH. POST, Feb. 23, 2025, at C10.

The state legislatures in Colorado, Connecticut, and New Mexico, as well as the New York city council, have passed statutes that create causes of action similar to section 1983 but do not allow law enforcement officials to raise a qualified immunity defense. *See* Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 740-41 (2021). *See also Brown v. Yost*, 133 F.4th 725 (6th Cir. 2025) (ordering Ohio's Attorney General to stop blocking the circulation of a petition for a proposed ballot measure, which would amend the state constitution to create a cause of action similar to section 1983 but would foreclose any immunity defenses, including qualified immunity and sovereign immunity).

Add the following at the end of Note 2 following *Harlow v. Fitzgerald* on page 97:

In *Trump v. United States*, 603 U.S. 593 (2024), the Court invoked separation-of-powers concerns in holding that former presidents are entitled to absolute immunity from prosecution for actions taken during their time in office that were within their "'conclusive and preclusive' constitutional authority." In addition, they are entitled to "at least a *presumptive* immunity" from prosecution for all official acts during their time in office, which protects them unless, "[a]t a minimum," the government shows that prosecuting the official act "would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'" But the Court made clear that former presidents have no immunity from criminal prosecution for unofficial acts, and it rejected Trump's claim that the Constitution's Impeachment Judgment Clause, Art. I, § 3, cl. 7, does not permit prosecuting a president who has not been impeached and convicted by the Senate.

Applying those principles to charges brought by Special Counsel Jack Smith in connection with President Trump's actions to overturn the results of the 2020 presidential election, the Court found that absolute immunity protected Trump from conversations he had with Justice Department officials even if the investigations he requested were "'sham[s]' or proposed for an improper purpose." The Court concluded that conversations Trump had with former Vice President Pence during which he "'attempted to enlist the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results'" were official acts, and the Court remanded to the district court to decide whether the Special Counsel could make the showing necessary to overcome Trump's presumptive immunity. The Court also remanded to the district court to determine whether other actions alleged by the prosecution were official or unofficial acts: conversations Trump had with people outside the Executive branch, such as state officials; and his public communications on January 6.

Given the Justice Department's policy that sitting presidents may not be prosecuted in federal court, the district court granted the Special Counsel's motion to dismiss the case without prejudice. *See United States v. Trump*, 757 F. Supp. 3d 82 (D.D.C. 2024).

Add the following at the end of the first paragraph of Note 6 following *Harlow v. Fitzgerald* on page 99:

See also Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405 (2019) (pointing out that the Court's redefinition of qualified immunity in *Harlow v. Fitzgerald* came in a *Bivens* suit filed against federal officials that was based on "separation-of-powers concerns" and arguing that, "other than an intuitive belief that the law should treat state and federal officials the same way,… no particular legal principle appears to offer sufficient support for applying the *Harlow* standard to § 1983 suits on … federalism grounds").

Add the following at the end of Note 6 following *Harlow v. Fitzgerald* on page 100:

But cf. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9-10 (2017) (reporting that .6% of the 1183 section 1983 suits filed against law enforcement officials in five federal district courts in 2011 and 2012 were dismissed at the motion to dismiss stage on qualified immunity grounds and 2.6% were dismissed on summary judgment on qualified

immunity grounds, and concluding that "qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end"); Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1105-07 (2020) (concluding, based on the same sample of 1183 section 1983 suits and attorney interviews, that the qualified immunity defense delays and increases the costs of section 1983 litigation, but does not screen out insubstantial section 1983 claims by discouraging plaintiffs' attorneys from bringing such claims).

Recent empirical scholarship has also documented how often damages are paid by individual government employees in successful constitutional tort suits. *See* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 565-66 (2020) (studying 171 successful *Bivens* suits brought against Federal Bureau of Prisons employees between 2007 and 2017, and reporting that payments by individual employees were made in only 4.7% of the cases and accounted for only .32% of the money awarded to plaintiffs); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912-13 (2014) (finding that state and local governments paid 99.98% of the damages awarded to plaintiffs in section 1983 suits alleging police misconduct between 2006 and 2011).

Add the following at the end of the third paragraph of Note 8 following *Harlow v. Fitzgerald* on page 101:

See also Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 629 (2011) (finding, after examining the 190 federal appellate court opinions published in 2009 and 2010 that cited *Pearson*, that "courts continued to follow the *Saucier* sequence most of the time, although they exercised their *Pearson* discretion in a substantial minority [approximately 31%] of cases"); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 38 (2015) (reporting similar findings in a study of 844 published and unpublished federal appellate cases decided between 2009 and 2012, but noting that "the finding of constitutional violations (when granting qualified immunity) – the pure *Saucier* development of constitutional law – has decreased," and therefore "[t]he data … provide at least some support for the post-*Pearson* constitutional stagnation theory").

Add the following at the end of the fourth paragraph of Note 2 following *Safford Unified School District #1 v. Redding* on page 110:

In *Carroll v. Carman*, 574 U.S. 13 (2014) (per curiam), the Court repeated the equivocal caveat made in *Reichle v. Howards* and summarily reversed the Third Circuit's denial of qualified immunity on the grounds that the lower court "cited only a single [Third Circuit] case" that was distinguishable on its facts and was "even more perplexing in comparison to" contrary rulings made by other courts. *See also District of Columbia v. Wesby*, 583 U.S. 48 (2018) ("We have not yet decided what precedents – other than our own – qualify as controlling authority for purposes of qualified immunity. We express no view on that question here."); *Taylor v. Barkes*, 575 U.S. 822 (2015) ("Assuming for the sake of argument that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals, neither of the

Third Circuit decisions relied upon clearly established the right at issue."); *City and County of San Francisco v. Sheehan*, 575 U.S. 600 (2015) ("But even if 'a controlling circuit precedent could constitute clearly established federal law in these circumstances,' it does not do so here.") (quoting *Carroll v. Carman*, 574 U.S. 13 (2014) (per curiam)). For the argument that Supreme Court opinions like these have covertly broadened the qualified immunity defense, see Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62 (2016). For the argument that qualified immunity "disadvantages plaintiffs for arbitrary reasons, such as their circuit's population or publication rate," which "vary widely and influence the volume of clearly established law in a circuit," see INSTITUTE FOR JUSTICE, UNACCOUNTABLE (2024), *available at* https://ij.org/report/unaccountable/.

Add the following after the fifth paragraph of Note 2 following *Safford Unified School District #1 v. Redding* on page 110:

In *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam), the Court granted qualified immunity to a police officer who made a warrantless entry in pursuit of someone the officer believed had committed a jailable misdemeanor offense. The Court noted that "federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect." The Court distinguished both its ruling in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), and "the most relevant" Ninth Circuit opinion on the grounds that neither case involved hot pursuit. In addition, because *United States v. Santana*, 427 U.S. 38 (1976), approved of a warrantless entry in hot pursuit without "expressly limit[ing]" the holding to felony cases, the Court characterized the two pertinent Supreme Court precedents as "equivocal on the lawfulness of [the officer's] entry." Citing two California Court of Appeal decisions, the Court also thought it significant that the officer's actions were "lawful according to courts in the jurisdiction where he acted." Finally, the Court considered its holding "bolstered" by two federal district court opinions in California that "granted qualified immunity precisely because the law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established." (Note that the Court subsequently held that police have no "categorical" right to enter a home in pursuit of a fleeing misdemeanant absent exigent circumstances. *See Lange v. California*, 594 U.S. 295 (2021).)

In *Wood v. Moss*, 572 U.S. 744 (2014), a unanimous Supreme Court extended qualified immunity to two Secret Service agents who moved a group of protestors standing in front of an inn where then-President George W. Bush was dining while allowing a group of the President's supporters to remain in the area. In response to the plaintiffs' First Amendment claim of viewpoint discrimination, Justice Ginsburg's majority opinion found no court decision that "would alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation 'to ensure that groups with different viewpoints are at comparable locations at all times.'" The Court also reasoned that the protestors had a "direct line of sight to the outdoor patio where the President stopped to dine" and therefore "posed a potential security risk to the President, while the supporters, because of their location, did not."

In *Lane v. Franks*, 573 U.S. 228 (2014), a unanimous Supreme Court held that the First Amendment protects public employees who provide "truthful sworn testimony, compelled by subpoena, outside the course of [their] ordinary job responsibilities." Nevertheless, Justice Sotomayor's majority opinion dismissed Lane's wrongful termination suit on qualified immunity grounds, reasoning that the law "did not provide clear notice that subpoenaed testimony concerning information acquired through public employment is speech of a citizen entitled to First Amendment protection." In support of this finding, the Court cited precedent from the defendant's jurisdiction (the Eleventh Circuit) that restricted First Amendment protection to speech that was "made primarily in the employee's role as citizen," rather than "primarily in the role of employee," and therefore denied constitutional protection to a deputy sheriff who testified in a civil wrongful death suit only because he was subpoenaed. Justice Sotomayor distinguished two other Eleventh Circuit cases that had found public employees protected if they testified on matters of public concern on the ground that Lane, like the deputy sheriff, had testified because of a subpoena. "At best," the Court observed, "Lane can demonstrate only a discrepancy in Eleventh Circuit precedent, which is insufficient to defeat the defense of qualified immunity." Finally, the Court dismissed contrary decisions from other courts of appeals as "in direct conflict with Eleventh Circuit precedent."

In *City and County of San Francisco v. Sheehan*, 575 U.S. 600 (2015), the Court quoted *Ashcroft v. al-Kidd*'s reference to a "'robust consensus of cases of persuasive authority,'" but did so in a way that suggested – contrary to *al-Kidd* – that whether such a consensus suffices to overcome a claim of qualified immunity might be an open question. Writing for the six Justices who took a position on qualified immunity, Justice Alito's majority opinion in *Sheehan* described qualified immunity as an "exacting standard" and then said: "Finally, to the extent that a 'robust consensus of cases of persuasive authority' could itself clearly establish the federal right respondent alleges, no such consensus exists here." In a subsequent per curiam opinion, the Court repeated *Sheehan*'s equivocal statement. *See Taylor v. Barkes*, 575 U.S. 822 (2015) (per curiam) ("And 'to the extent that a "robust consensus of cases of persuasive authority"' in the Courts of Appeals 'could itself clearly establish the federal right respondent alleges,' the weight of that authority at the time of Barkes's death suggested that such a right did not exist.").

In reversing the denial of qualified immunity in *Sheehan*, the Court also discounted testimony from the plaintiff's expert claiming that the defendant police officers were not following their training for handling suspects who were experiencing mental illness. The Court thought that testimony did not "matter for purposes of qualified immunity": "[e]ven if an officer acts contrary to her training,… that does not itself negate qualified immunity where it would otherwise be warranted." Quoting the Ninth Circuit's opinion in *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002), the Court in *Sheehan* went on to say: "[r]ather, so long as 'a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot 'avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.'" *Cf. Frasier v. Evans*, 992 F.3d 1003 (10th Cir.) (reversing district court decision that denied qualified immunity because officers "actually knew from their training" that a constitutional right existed, and reasoning that qualified immunity is "judged by an objective standard and, therefore, what the

officer defendants subjectively understood or believed the law to be was irrelevant"), *cert. denied*, 142 S. Ct. 427 (2021).

In *Ziglar v. Abbasi*, 582 U.S. 120 (2017), the Supreme Court, by a vote of four-to-two, granted qualified immunity to federal officials who were sued under section 1985(3) for conspiring to violate the equal protection rights of several persons detained in the wake of 9/11 by subjecting them to harsh conditions of confinement because of their race, religion, ethnicity, and national origin. Justice Kennedy's majority opinion offered two reasons for concluding that "reasonable officials in petitioners' positions would not have known, and could not have predicted, that § 1985(3) prohibited their joint consultations and the resulting policies that caused the injuries alleged." First, in light of the intracorporate-conspiracy doctrine, "the fact that the [lower] courts are divided as to whether or not a § 1985(3) conspiracy can arise from official discussions between or among agents of the same entity demonstrates that the law on the point is not well established." Second, given the importance of fostering "open discussion among federal officers … so that they can reach consensus on the policies a department of the Federal Government should pursue," and the concern that allowing "those discussions, and the resulting policies, to be the basis for private suits seeking damages against the officials as individuals … would … chill the interchange and discourse that is necessary for the adoption and implementation of governmental policies," the issue whether or not "officials employed by the same governmental department … conspire when they speak to one another and work together in their official capacities" is "sufficiently open so that the officials in this suit could not be certain that § 1985(3) was applicable to their discussions and actions."

Justice Thomas, concurring in part and concurring in the judgment in *Abbasi*, wrote separately to express his "growing concern" with the qualified immunity doctrine and to suggest that the Court "reconsider our qualified immunity jurisprudence." Citing William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018), Justice Thomas pointed out that the Court has "not attempted to locate [the *Harlow*] standard in the common law as it existed in 1871,… and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine." Justice Thomas warned that, "[u]ntil we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress." Justices Breyer and Ginsburg dissented, agreeing with the Second Circuit that the officials were not entitled to qualified immunity on the section 1985(3) claim.

In *Hernández v. Mesa*, 582 U.S. 548 (2017) (per curiam), the Court vacated and remanded a case involving the fatal shooting of a fifteen-year-old Mexican national, asking the lower court to reconsider the availability of a *Bivens* claim under the Court's week-old decision in *Ziglar v. Abbasi*, 582 U.S. 120 (2017). The teenager and some friends had been running back and forth across a culvert of the Rio Grande on the border between the United States and Mexico, but he was on Mexican soil when he was shot by a U.S. Border Patrol agent from the American side of the border. The suit filed by his parents claimed that the agent violated their son's Fourth and Fifth Amendment rights by using deadly force against an unarmed person who presented no threat. Although the Justices declined to reach the merits of the constitutional claims, they held, quoting *White v. Pauly*, 580 U.S. 73, 77 (2017) (per curiam), that the agent

was not entitled to qualified immunity on the Fifth Amendment claim because "qualified immunity analysis … is limited to 'the facts that were knowable to the defendant officers' at the time they engaged in the conduct in question" and it was "undisputed … that Hernández's nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting." Justice Thomas dissented on the grounds that *Bivens* is not available in a case "involv[ing] cross-border conduct." In a separate dissent, Justice Breyer, joined by Justice Ginsburg, would have remanded on the *Bivens* and qualified immunity issues, but concluded that the Fourth Amendment applied to the case because "the entire culvert [has] sufficient involvement with, and connection to, the United States to subject the culvert to Fourth Amendment protections." When the case returned to the Supreme Court three years later, the Justices, in a five-to-four decision, held that a *Bivens* suit could not be based on a cross-border shooting. *See Hernández v. Mesa*, 589 U.S. 93 (2020) (discussed in Chapter 1.E., *supra*).

In *District of Columbia v. Wesby*, 583 U.S. 48 (2018), the Court concluded that police officers had probable cause to arrest a group of partygoers for unlawful entry despite the plaintiffs' claim that they thought the person who invited them to the party had permission to do so. The Court went on to hold, in an opinion written by Justice Thomas, that even if the officers lacked probable cause to arrest, they were entitled to qualified immunity because they "'reasonably but mistakenly conclude[d] that probable cause [wa]s present.'" Justice Thomas explained that "neither the panel majority nor the partygoers have identified a single precedent – much less a controlling case or robust consensus of cases – finding a Fourth Amendment violation 'under similar circumstances,'" and "it should go without saying that this is not an 'obvious case' where 'a body of relevant case law' is not needed."

Add the following at the end of the third paragraph of Note 3 following *Safford Unified School District #1 v. Redding* on page 112:

See also Taylor v. Riojas, 592 U.S. 7 (2020) (per curiam) (quoting *Hope* in concluding that no reasonable prison official could believe it was constitutional to house a prisoner for six days in two "shockingly unsanitary cells"; one of the cells was "covered, nearly floor to ceiling, in '"massive amounts" of feces,'" and the other was a "frigidly cold cell" in which the plaintiff was "left to sleep naked in sewage").

Add the following at the end of the third paragraph of Note 4 following *Safford Unified School District #1 v. Redding* on page 114:

See also Plumhoff v. Rickard, 572 U.S. 765 (2014) (holding that police officers were entitled to qualified immunity in an excessive force case the Court described as not "meaningfully distinguish[able]" from *Brosseau*, and reasoning that no case "decided between 1999 and 2004 … clearly established the unconstitutionality of using lethal force to end a high-speed car chase"); *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam) (observing, in granting qualified immunity in another excessive force case, that "cases involving car chases reveal the hazy legal backdrop against which [the officer] acted" there, and rejecting the argument that he violated clearly established law by firing at a fleeing vehicle before waiting to see whether spike strips would succeed in stopping the car, noting that the Court had never "den[ied] qualified immunity

because officers entitled to terminate a high-speed chase selected one dangerous alternative over another"); *White v. Pauly*, 580 U.S. 73 (2017) (per curiam) (noting, in reversing denial of qualified immunity to an officer who shot and killed an armed occupant of a house without first giving a warning, that the court below "failed to identify a case where an officer acting under similar circumstances … was held to have violated the Fourth Amendment," and concluding that "[c]learly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed"); *Kisela v. Hughes*, 584 U.S. 100 (2018) (per curiam) (reversing denial of qualified immunity to an officer who shot the plaintiff, who was standing outside holding a large kitchen knife, in order to protect a bystander (the plaintiff's roommate, who later told the police she did not believe she was in danger), noting that "[t]his is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment"); *City of Escondido v. Emmons*, 586 U.S. 38 (2019) (per curiam) (reversing denial of qualified immunity on the ground that the court of appeals "defined the clearly established right at a high level of generality" instead of "ask[ing] whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances" after he had been arrested for resisting a police officer); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021) (per curiam) (reversing denial of qualified immunity in another excessive force case because the one appellate court precedent relied on by the lower court was "materially distinguishable and thus does not govern the facts of this case"); *City of Tahlequah v. Bond*, 595 U.S. 9 (2021) (per curiam) (likewise reversing denial of qualified immunity in excessive force case because not "a single precedent" found "a Fourth Amendment violation under similar circumstances"). *See generally* Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PA. L. REV. 407 (2022) (surveying more than 500 section 1983 excessive force suits spanning more than 50 years, and concluding that, "over time, qualified immunity morphed from a narrow theory of executive privilege into a specific theory to limit civil lawsuits against police officers who use excessive force" – i.e., "an exculpatory doctrine of excessive force"); Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605 (2021) (reporting, based on a study of California law enforcement training materials, that officers are instructed on "the general principles" of Supreme Court opinions like *Graham v. Connor* and then are told "to apply those principles in the widely varying circumstances that come their way," but are not informed of the circuit court opinions that could clearly establish the law); Zina Makar, *Per Curiam Signals in the Supreme Court's Shadow Docket,* 98 WASH. L. REV. 427 (2023) (reporting that the Roberts Court has summarily reversed over a dozen qualified immunity decisions, "almost always favoring law enforcement by overruling lower courts' denials of summary judgment"; also noting that "not all constitutional violations are treated equally," and separately analyzing the Court's per curiam opinions involving "Fourth Amendment warrantless entries, Fourth Amendment uses of force, and Eighth Amendment conditions of confinement"); Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/ (finding that, since 2005, federal appellate courts have increasingly granted qualified immunity in excessive force cases, even in those involving unarmed civilians). *But cf. Lombardo v. City of St. Louis*, 594 U.S. 564 (2021) (per curiam) (reversing grant of summary judgment to police officers in fatal excessive force case, without reaching either the

merits of the excessive force claim or the defendants' entitlement to qualified immunity, on the grounds that the lower court may have considered "the use of a prone restraint … *per se* constitutional so long as an individual appears to resist officers' efforts to subdue him" – without considering other relevant circumstances, such as the fact that the individual was already in handcuffs and leg shackles when he was moved to the prone position and was kept in that position for fifteen minutes – and reasoning that "[s]uch a *per se* rule would contravene the careful, context-specific analysis required by this Court's excessive force precedent"). *But see Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam) (reversing grant of qualified immunity in an excessive force case on the grounds that the lower court "failed to view the evidence at summary judgment in the light most favorable to" the plaintiff "[b]y failing to credit evidence that contradicted some of its key factual conclusions" on issues such as whether the plaintiff's mother was "calm" or "agitated," what position the plaintiff was in when he was shot, and whether he was "shouting" and "verbally threatening" the defendant police officer); *State of Jones v. City of Martinsburg*, 961 F.3d 661 (4th Cir. 2020) (denying qualified immunity to five officers who fired 22 shots at Wayne Jones, a Black man experiencing homelessness who was stopped for walking on the street rather than the sidewalk, because a jury could reasonably conclude that Jones, who had been tased four times, was "both secured and incapacitated in the final moments before his death," and, referencing the deaths of Michael Brown in Ferguson and George Floyd in Minneapolis, admonishing that police must act "with respect for the dignity and worth of black lives"; concluding, "[t]his has to stop").

Add the following at the end of Note 4 following *Safford Unified School District #1 v. Redding* on page 114:

In *Heien v. North Carolina*, 574 U.S. 54 (2014), the Court determined that the reasonable suspicion required by the Fourth Amendment to justify a stop can be based on a police officer's erroneous but reasonable interpretation of state law – in that case, the belief that North Carolina required a vehicle to have two functioning brake lights. In response to the argument that the Court's holding would permit "a sloppy study of the laws" on the part of law enforcement officials, Chief Justice Roberts' opinion for the majority remarked that "[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes – whether of fact or of law – must be objectively reasonable." The Chief Justice went on to say that this Fourth Amendment "inquiry is not as forgiving" as the one used in "the distinct context" of qualified immunity. The Court provided no further explanation for this comparison, and it is therefore unclear whether it was based on the differences between qualified immunity and the merits of a Fourth Amendment claim outlined in *Anderson v. Creighton* and *Saucier v. Katz* or something else. Justice Kagan, joined by Justice Ginsburg, wrote a concurring opinion in *Heien*, agreeing with the majority that the Fourth Amendment's definition of a reasonable mistake is "more demanding" than the qualified immunity inquiry and explaining that the former requires a law that is "genuinely ambiguous," "'so doubtful in construction' that a reasonable judge could agree with the officer's view." For criticism of the Court's ruling in *Heien*, see Kit Kinports, Heien*'s Mistake of Law*, 68 ALA. L. REV. 121 (2016). For an empirical study of the more than 270 federal court opinions that cited *Heien* over the course of almost nine years, which reported that more than two-thirds of them found the officer's mistake to be reasonable and that some courts have extended *Heien* to

other law enforcement mistakes of law, see Wayne A. Logan, *The Harms of* Heien*: Pulling Back the Curtain on the Court's Search and Seizure Doctrine*, 77 VAND. L. REV. 1 (2024).

Add the following at the end of Note 5 following *Safford Unified School District #1 v. Redding* on page 116:

See also Leo Yu, *Piercing the Procedural Veil of Qualified Immunity: From the Guardians of Civil Rights to the Guardians of States' Rights*, 81 WASH. & LEE L. REV. 775 (2024) (discussing the circuit split on the question whether defendants must plead qualified immunity in section 1983 cases or whether plaintiffs must "*anticipate* and *overcome* the defendant's future qualified immunity argument by asserting sufficient facts at the pleading phase").

The Court in a per curiam reversal of the Fifth Circuit in *Johnson v. City of Shelby*, 574 U.S. 10 (2014) (per curiam), did not impose a heightened pleading requirement on plaintiff-police officers who challenged the constitutionality of their discharges but failed to cite section 1983: "no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim." "Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief'; they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted."

Add the following at the end of the fourth paragraph of Note 6 following *Safford Unified School District #1 v. Redding* on page 118:

See also Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2086 (2018) (reporting the results of a three-year study of all district court trials in federal civil rights cases, and finding that, where juries were instructed on qualified immunity or asked to resolve disputed issues of fact relevant to qualified immunity, the trial judge failed to instruct jurors on the burden of proof in almost 60% of cases and, in the 40% of cases where a burden-of-proof instruction was given, imposed the burden on the plaintiff almost three-quarters of the time).

Add the following at the end of the fifth paragraph of Note 6 following *Safford Unified School District #1 v. Redding* on page 119:

See also Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2068 (2018) (reporting the results of a three-year study of all district court trials in federal civil rights cases, and finding that, in the vast majority of cases in which qualified immunity was raised (more than 85%), juries received no instructions on qualified immunity and, where no instruction was given, "plaintiffs' win rate nearly tripled in cases that went to verdict").

Add the following at the end of Note 7 following *Safford Unified School District #1 v. Redding* on page 120:

For an empirical study of all interlocutory appeals challenging denials of qualified immunity between 2017 and 2020, which concluded that "the federal courts have steadily expanded the scope and availability of these appeals" and "have given defendants nearly every

opportunity to take qualified-immunity appeals, even if that means multiple appeals in a single action," see Bryan Lammon, *Reforming Qualified-Immunity Appeals*, 87 MO. L. REV. 1137 (2022).

For an empirical study of the more than 5,500 qualified immunity appeals decided by the federal circuit courts between 2010 and 2020, which found that the number of appeals increased during that time period and that 59% of the cases were "resolved solely in favor of government defendants," compared to 24% "resolved solely in favor of plaintiffs," see INSTITUTE FOR JUSTICE, UNACCOUNTABLE (2024), *available at* https://ij.org/report/unaccountable/.

Add the following at the end of the third paragraph of Note 8 following *Safford Unified School District #1 v. Redding* on page 121:

See also Plumhoff v. Rickard, 572 U.S. 765 (2014) (distinguishing *Johnson v. Jones* and allowing appeal of the denial of summary judgment in an excessive force case on the ground that the defendants' contentions that their use of force was not excessive under the Fourth Amendment and, in any event, did not violate clearly established law "raise legal issues … quite different from any purely factual issues that the trial court might confront if the case were tried" and "requiring appellate courts to decide such issues is not an undue burden").

Chapter 3. Sovereign Immunity

A. Introduction

Add the following at the end of Note 4 on page 140:

The Supreme Court has granted certiorari in a case raising the question whether the New Jersey Transit Corporation is an arm of the state of New Jersey for sovereign immunity purposes. *See Galette v. NJ Transit Corporation*, No. 24-1021 (cert. granted, July 3, 2025).

Add the following at the end of the first paragraph of Note 5 on page 140:

The Supreme Court has agreed to consider whether a government contractor is entitled to file an interlocutory appeal to challenge a decision denying its claim that it is entitled to sovereign immunity for work it did for Immigration and Customs Enforcement at a private immigration detention facility. *See The GEO Group, Inc. v. Menocal*, No. 24-758 (cert. granted, June 2, 2025).

B. Prospective Injunction Suits Filed Against State Officials

Add the following at the end of Note 3 on page 153:

In *Whole Women's Health v. Jackson*, 595 U.S. 30 (2021), the Court considered a constitutional challenge to the Texas Heartbeat Act (S.B. 8), which authorizes private civil actions to enforce the statute's ban on abortions after a fetal heartbeat can be detected. The Court refused to allow the plaintiffs to sue to enjoin state court clerks from docketing S.B. 8

cases and state judges from hearing them. The Court distinguished *Ex parte Young* on the ground that judges and clerks "do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties." Quoting *Ex parte Young*, the majority noted that "'an injunction against a state court' or its 'machinery' 'would be a violation of the whole scheme of our Government.'" *Id.* at 39 (quoting *Ex parte Young*, 209 U.S. 123, 163 (1908)).

Four Justices disagreed with the majority's position concerning court clerks, observing that, "by design, the mere threat of even unsuccessful suits brought under S.B. 8 chills constitutionally protected conduct," and, therefore, "clerks who issue citations and docket S.B. 8 cases are unavoidably enlisted in the scheme to enforce S.B. 8's unconstitutional provisions, and thus are sufficiently 'connect[ed]' to such enforcement to be proper defendants." *Id.* at 60 (Roberts, C.J., concurring in part and dissenting in part) (quoting *Young*, 209 U.S. at 157).

The majority did read *Ex parte Young* to allow the plaintiffs to seek to enjoin state licensing officials authorized to enforce provisions in the state's Health and Safety Code, including S.B. 8. Only Justice Thomas disagreed, on the ground that S.B. 8 envisions enforcement solely through private suits and "denies enforcement authority to any government official."

For the suggestion that the common law writ of prohibition – "a tool by which superior courts block[] lower courts from exercising authority over matters outside their jurisdiction" – could be a mechanism for judicial review of private enforcement schemes, see James E. Pfander, *Judicial Review of Unconventional Enforcement Regimes*, 102 TEX. L. REV. 769 (2024).

C. Waiver and Abrogation

Add the following at the end of Note 2 following *Quern v. Jordan* on page 169:

Cf. Lightfoot v. Cendant Mortgage Co., 580 U.S. 82 (2017) (holding that statutory language authorizing Fannie Mae "to sue and be sued … in any court of competent jurisdiction, State or Federal," did not give the federal courts original jurisdiction in every case involving Fannie Mae; given the statute's reference to a "court of competent jurisdiction," "Fannie Mae's sue-and-be-sued clause is most naturally read" to authorize suit only in a "state or federal court already endowed with subject-matter jurisdiction over the suit").

In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023), the Court held that the Bankruptcy Code unequivocally expressed Congress' intent to abrogate the sovereign immunity of all governmental units, including Native American tribes, even though the statute does not specifically mention tribes. The Court relied on one provision in the statute that expressly abrogates the sovereign immunity of "governmental unit[s]" for certain purposes and another that defines "governmental unit" by "rattl[ing] off a long list of governments that vary in geographic location, size, and nature" and then ending with "a broad catchall phrase, sweeping in 'other foreign or domestic government[s].'" *But cf. United States v. Miller*, 145 S. Ct. 839 (2025) (reasoning that sovereign immunity is "'jurisdictional in nature'" and does not "create any new substantive rights," and therefore holding that the Bankruptcy

Code provision abrogating sovereign immunity extends only to a "federal cause of action" and not to "state-law claims nested within that federal claim").

In *Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339 (2023), the Court applied the clear statement rule to the Puerto Rico Oversight, Management, and Economic Stability Act of 2016 (PROMESA), 48 U.S.C. § 2101, a statute intended to help alleviate the financial crisis resulting from Puerto Rico's rising debts by creating an Oversight Board to "oversee[] Puerto Rico's finances" and by allowing Puerto Rico "to gain bankruptcy protections similar to those available under the [Bankruptcy] Code." "[A]ssum[ing] without deciding" that Puerto Rico and the Board are protected by sovereign immunity, Justice Kagan's majority opinion noted that the Court had found the clear statement rule satisfied in "only two situations": (1) "when a statute says in so many words that it is stripping immunity from a sovereign entity"; and (2) when, even though the statute does not "expressly declare[] sovereigns non-immune," it "creates a cause of action and authorizes suit against a government on that claim," such that "recognizing immunity would … negate[] [that] authorization[]" by leading to the "automatic[]" dismissal of "[t]he very suits allowed against governments." The Court noted that PROMESA did not fall within the first situation because it did not "provide that the Board or Puerto Rico is subject to suit," except in one type of proceeding not relevant to the case. And the Court rejected the respondent's argument that the second situation applied given provisions in the statute creating "a judicial review scheme" – for example, the requirement that any actions against the Board be brought in the Federal District Court for the District of Puerto Rico. The Court explained that those provisions "serve a function without our reading an abrogation of immunity into PROMESA" because they apply in suits brought against the Board under statutes that do clearly abrogate sovereign immunity, such as Title VII's ban on employment discrimination.

In *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42 (2024), the Court unanimously held that a consumer may sue a federal agency for alleged credit-reporting errors that violate the Fair Credit Reporting Act. In finding that the statute unequivocally expressed Congress' intent to abrogate the Federal Government's sovereign immunity under the second situation outlined in *Centro de Periodismo Investigativo, Inc.*, the Court reasoned that the statute defines a "person" to include "any … government … agency" and creates a damages cause of action for consumers injured by "[a]ny person" who willfully or negligently fails to comply with the statute.

Add the following at the end of Note 3 following *Quern v. Jordan* on page 170:

See also Katherine Mims Crocker, *Reconsidering Section 1983's Nonabrogation of Sovereign Immunity*, 73 FLA. L. REV. 523 (2021) (criticizing both *Will* and *Quern* on the grounds that "the Court invented the crystal-clarity standard so long after Section 1983's enactment" and that the opinions "contravene[] commonsense interpretive practice," "offend[] foundational democratic values," and "rest[] on inappropriate assumptions that members of Congress during Reconstruction thought about federalism the same way members of the Court a century later did").

Add the following at the end of Note 6 following *Quern v. Jordan* on page 174:

In *Franchise Tax Board v. Hyatt*, 578 U.S. 171 (2016), the Supreme Court agreed to consider whether decisions like *Alden v. Maine* undermined the Court's previous holding in *Nevada v. Hall*, 440 U.S. 410 (1979), that sovereign immunity does not protect a state from being sued in the courts of another state. Although the Justices were equally divided on that issue, the Court did decide that a state sued in another state's courts is entitled to the same immunities that would be available to the forum state under its laws – in that case, a statutory cap on compensatory damages.

When the case returned to the Supreme Court three years later, the Court voted to overrule *Nevada v. Hall* by a vote of five-to-four. Holding that states are immune from private suits brought in another state's courts even though "no constitutional provision explicitly grants that immunity," Justice Thomas' opinion for the majority quoted *Alden v. Maine*'s observation that "'the Constitution was understood … to preserve the States' traditional immunity from private suits'" and concluded that "[i]nterstate sovereign immunity is … integral to the structure of the Constitution." *Franchise Tax Board v. Hyatt*, 587 U.S. 230, 243, 246 (2019) (quoting *Alden v. Maine*, 527 U.S. 706, 724 (1999)).

In *Torres v. Texas Department of Public Safety*, 597 U.S. 580 (2022), the Court held that Congress does have the power to authorize suits against nonconsenting states pursuant to its Article I War Powers, Art. I, § 8, cls. 1, 12-13. The Court therefore upheld a provision in the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) that gives veterans the right to sue their employers, including state and local governments, to collect damages for discrimination on the basis of military service. The majority relied on its holding in *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482 (2021), that, because the eminent domain power given the Federal Government by the Fifth Amendment's Takings Clause "is 'complete in itself,'" the states "consented to the exercise of that power – in its entirety – in the plan of the Convention" and therefore "have no [sovereign] immunity left to waive or abrogate when it comes to condemnation suits by the Federal Government and its delegatees." Similarly, the Court reasoned in *Torres*, when the states ratified the Constitution, they "implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military" and therefore "sacrifice[d] their sovereign immunity for the good of the common defense." For criticism of the Court's "novel … implied 'structural waiver'" theory on the ground that it is "inconsistent with the original public meaning of the Constitution," see Anthony J. Bellia Jr. & Bradford R. Clark, *State Sovereign Immunity and the New Purposivism*, 65 WM. & MARY L. REV. 485 (2024). *See also* Ernest A. Young, *State Sovereign Immunity After the Revolution*, 102 TEX. L. REV. ONLINE 697 (2024) (arguing that "plan-of-the-Convention waiver is, in both principle and effect, virtually indistinguishable from the sort of legislative abrogation that the Court rejected in *Seminole Tribe*").

Chapter 4. Local Liability

A. Congressional Intent

Add the following at the end of Note 7 on page 194:

The impact of the Supreme Court's decision in *Ashcroft v. Iqbal* on supervisory liability in section 1983 cases continues to bedevil the lower courts. The Fifth Circuit, like the Seventh Circuit, interprets *Iqbal* broadly. *See Carnaby v. City of Houston*, 636 F.3d 183, 189 (5th Cir. 2011) (rejecting the claim that one of the defendant police officers "fail[ed] to supervise the other officers on the scene" because, after *Iqbal*, "[b]eyond [a supervisor's] own conduct, the extent of his liability as a supervisor is similar to that of a municipality that implements an unconstitutional policy" and there was "no evidence" in this case that the supervisor "established any sort of policy during this one incident").

But other courts continue to take the view that section 1983 liability can be imposed on supervisors who act with the state of mind necessary to prove the particular constitutional violation alleged by the plaintiff. *See Turkmen v. Hasty*, 789 F.3d 218, 250 (2d Cir. 2015) (refusing to dismiss claims filed by Arab and Muslim plaintiffs who were detained in New York following the 9/11 attacks and alleged that high-ranking federal and local officials violated, inter alia, the plaintiffs' substantive due process and equal protection rights by continuing to detain them despite being aware of the lack of evidence linking them to terrorism, and relying on the Ninth Circuit's opinion in *Starr v. Baca* in noting that "*Iqbal* does not preclude … claims premised on deliberate indifference when the underlying constitutional violation requires no more than deliberate indifference"), *rev'd on other grounds sub nom. Ziglar v. Abbasi*, 582 U.S. 120 (2017) (assuming "for purposes of this case" that deliberate indifference was the "correct" standard for evaluating whether the warden of the detention facility violated the Fifth Amendment by allowing the guards to abuse the plaintiffs); *Barkes v. First Correctional Medical, Inc.*, 766 F.3d 307, 320 (3d Cir. 2014) (holding that, at least for Eighth Amendment claims, liability can be imposed on a supervisory official who, "by virtue of his or her *own* deliberate indifference to *known* deficiencies in a government policy or procedure, has allowed to develop an environment in which there is an unreasonable risk that a constitutional injury will occur, and … such an injury does occur," and reasoning that any other approach "would immunize from liability prison officials who were deliberately indifferent to a substantial risk that inmates' serious medical conditions were being mistreated" and thereby "would subvert the Supreme Court's command" that the Eighth Amendment is violated whenever "*any* prison official…, 'acting with deliberate indifference, expose[s] a prisoner to a sufficiently substantial risk of serious damage to his future health'") (quoting *Farmer v. Brennan*, 511 U.S. 825, 844 (1994)), *rev'd on other grounds sub nom. Taylor v. Barkes*, 575 U.S. 822 (2015) (acknowledging that the court of appeals found the plaintiffs "had alleged a cognizable theory of supervisory liability," but refusing to "express [a] view" on that question). *Cf. Morales v. Chadbourne*, 793 F.3d 208, 221 (1st Cir. 2015) (noting in a Fourth Amendment case that the necessary "'affirmative link between the behavior of a subordinate and the action or inaction of his supervisor'" can be demonstrated by showing that the supervisor was "'a primary violator or direct participant in the rights-violating incident,' or that 'a responsible official supervises, trains or hires a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation'").

D. Innocent Agents

Add to end of Note 3 on page 249:

Staub has been applied to Title VII actions and ADEA suits against governmental employers. *See*, *e.g.*, *Morris v. McCarthy*, 825 F.3d 658 (D.C. Cir. 2016) (holding that the federal EPA could be held liable for racial discrimination notwithstanding the presence of an innocent agent: "the supervisor's biased recommendation may still influence the ultimate decision if the final decisionmaker 'takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.'"); *Vogel v. Pittsburgh Public School District*, 40 F. Supp.3d 592 (W.D. Pa. 2014).

Add to end of Note 4 on page 249:

Several Circuits have "held or assumed that cat's paw liability would be available under § 1983," *Kregler v. City of New York*, 987 F. Supp.2d 357 (S.D.N.Y. 2013), both before and after the Supreme Court's holding in *Staub*. *See*, *e.g.*, *Campion, Barrow & Assocs., Inc. v. City of Springfield, Ill.,* 559 F.3d 765 (7th Cir. 2009) (stating that "evidence could support a finding that X (the [City] Council) relied on Y's (the Mayor's or [an alderman's]) intent, making it permissible to base municipal liability on Y's discriminatory animus."); *Arendale v. City of Memphis,* 519 F.3d 587 (6th Cir. 2008) ("When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, this Court has held that the employer may be held liable under a 'rubber-stamp' or 'cat's paw' theory of liability."). Courts in these Circuits have also sometimes concluded or assumed that a cat's paw theory of liability, like that discussed in *Staub*, could result in municipal liability under § 1983. *See*, *e.g.*, *Polion v. City of Greensboro*, 26 F. Supp.3d 1197 (S.D. Ala. 2014) (assuming a municipality could be held liable under § 1983 for act of innocent agent in employment context). *See also Brnovich v. Democratic National Committee*, 594 U.S. 647 (2021) ("A 'cat's paw' is a 'dupe' who is 'used by another to accomplish his purposes.' A plaintiff in a 'cat's paw case typically seeks to hold the plaintiff 's employer liable for 'the animus of a supervisor who was not charged with making the ultimate [adverse] employment decision.' The 'cat's paw' theory has no application to legislative bodies. The theory rests on the agency relationship that exists between an employer and a supervisor, but the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents.").

Add the following at the end of Note 6 on page 250:

For an article that criticizes recent opinions holding that the grant of qualified immunity to a police officer forecloses a failure-to-train claim because "local governments cannot train officers about law that is not 'clearly established'" and argues that those rulings "conflat[e] qualified immunity and municipal liability," creating "backdoor municipal immunity" in contravention of *Owen*, see Joanna C. Schwartz, *Backdoor Municipal Immunity*, 132 YALE L.J.F. 136 (2022).

Add new Note on page 250:

8. Is *Heller* Consistent with Subsequent Supreme Court Cases? In *Lozman v. City of Riviera Beach*, 585 U.S. 87 (2018), the Court potentially undermined its holding in *Heller*. There, the plaintiff (Lozman) was arrested by a police officer at the direction of city officials for disrupting a public meeting. Even though the arresting officer was innocent of wrongdoing under § 1983, having probable cause and not having acted with discriminatory animus, the Supreme Court ruled that the City could still be liable under § 1983for its own "premeditated plan to intimidate [Lozman] in retaliation for his" speech. Justice Kennedy's explanation did not mention *Heller*, nor did it explain exactly how a municipality might be held liable for the act of its innocent agent. Could an explanation rest in the final authority analysis? Assuming the final authority analysis is used to support municipal liability, after all, a high-ranking individual would be responsible. This could satisfy both a cat's paw theory and the Court's conclusion in *Heller*. Can the same be said of liability based on formal policies (like that in *Monell*) or liability premised on the deliberate indifference standard (recognized in *Harris*)? Do either necessarily implicate a single responsible individual? In *Heller*, remember, the plaintiff argued that the City's own regulations supported its liability.

Chapter 5. The Relationship Between State and Federal Law in Section 1983 Litigation

A. Section 1988(a), Statutes of Limitations, and Survivorship Rules

Add the following at the end of Note 5 on page 270:

See also McDonough v. Smith, 588 U.S. 109 (2019) (analogizing to *Heck v. Humphrey* and holding that a plaintiff's section 1983 claim alleging that fabricated evidence was used against him in a criminal proceeding accrued when those proceedings terminated in his favor – i.e., when he was acquitted after his second trial – and not when he first became aware that tainted evidence had been introduced against him); *Reed v. Goertz*, 598 U.S. 230 (2023) (concluding that a prisoner's section 1983 procedural due process claim seeking post-conviction DNA testing of evidence found at the scene of a crime accrued "when the state litigation ended and deprived Reed of his asserted liberty interest in DNA testing," i.e., "when the Texas Court of Criminal Appeals denied Reed's motion for rehearing").

B. Notice-of-Claim Requirements

Add the following at the end of Note 3 on page 281:

In *Williams v. Reed*, 145 S. Ct. 465 (2025), the Court held that a state statute requiring plaintiffs to exhaust their administrative remedies before filing suit in state court could not be interpreted to "in effect immunize[] state officials from § 1983 claims challenging delays in the administrative process." Quoting *Felder*, the Court reasoned that "'a state law that immunizes government conduct otherwise subject to suit under §1983 is preempted, even where the federal civil rights litigation takes place in state court.'" For Supreme Court case law rejecting a general exhaustion requirement in a section 1983 case filed in federal court, see Note 3 on page 464 in Chapter 8.A.[3] of the textbook.

C. The Right to Jury Trial in Section 1983 Cases

Add the following to the end of Note 1 on page 293:

See also Perttu v. Richards, 145 S. Ct. – (2025) (holding that, in cases subject to the Prison Litigation Reform Act (discussed in Chapter 8.A.[4] of the textbook), incarcerated plaintiffs have the right to a jury trial concerning their exhaustion of administrative remedies when disputed facts regarding exhaustion are "intertwined with the merits of the underlying suit").

Chapter 6. Remedies Under § 1983

A. Compensatory Damages

Replace Note 1 on pages 306-07 with the following:

1. Nominal Damages. Are nominal damages always required for constitutional violations? Or are they only proper when compensatory damages are also demanded? In *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021), two students at a small state college challenged college policies limiting student speech under § 1983 and the First Amendment. They sought declaratory and injunctive relief as well as nominal damages from school officials, but not compensatory damages. While the case was pending, the college revised the polices and one of the students graduated. The District Court and the Eleventh Circuit agreed the case was rendered moot; their "claim for nominal damages cannot save their otherwise moot constitutional challenge to the Prior Policies."

In an opinion by Justice Thomas, the Supreme Court reversed, holding that a stand-alone claim for nominal damages was proper and that the plaintiff need not also or prove compensatory damages. Further, the availability of nominal damages, like compensatory damages, satisfied Article III's standing requirements, in particular redressability, and prevented the case from being rendered moot (*see* Chapter 6.C.[1][c], *infra*). Justice Thomas explained:

> Early courts required the plaintiff to prove actual monetary damages in every case: "[I]njuria & damnum [injury and damage] are the two grounds for the having [of] all actions, and without these, no action lieth." Later courts, however, reasoned that *every* legal injury necessarily causes damage, so they awarded nominal damages absent evidence of other damages (such as compensatory, statutory, or punitive damages), and they did so where there was no apparent continuing or threatened injury for nominal damages to redress. The latter approach was followed both before and after ratification of the Constitution.
>
> Admittedly, the rule allowing nominal damages for a violation of any legal right, though "decisively settled," was not universally followed—as is true for most common-law doctrines. And some courts only followed the rule in part, recognizing the availability of nominal damages but holding that the improper denial of nominal damages could be harmless error. Yet, even among these courts, many adopted the rule in full whenever a

person proved that there was a violation of an "important right." Nonetheless, the prevailing rule, "well established" at common law, was "that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage."

That this rule developed at common law is unsurprising in the light of the noneconomic rights that individuals had at that time. A contrary rule would have meant, in many cases, that there was no remedy at all for those rights, such as due process or voting rights, that were not readily reducible to monetary valuation. By permitting plaintiffs to pursue nominal damages whenever they suffered a personal legal injury, the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights.

Nominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages. They are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages.

The argument that a claim for compensatory damages is a prerequisite for an award of nominal damages also rests on the flawed premise that nominal damages are purely symbolic, a mere judicial token that provides no actual benefit to the plaintiff. That contention is not without some support. But this view is against the weight of the history discussed above, and we have already expressly rejected it. Despite being small, nominal damages are certainly concrete. The dissent says that "an award of nominal damages does not change [a plaintiff's] status or condition at all." But we have already held that a person who is awarded nominal damages receives "relief on the merits of his claim" and "may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages." Because nominal damages are in fact damages paid to the plaintiff, they "affec[t] the behavior of the defendant towards the plaintiff" and thus independently provide redress. True, a single dollar often cannot provide full redress, but the ability "to effectuate a partial remedy" satisfies the redressability requirement.

Applying this principle here is straightforward. For purposes of this appeal, it is undisputed that Uzuegbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him. Because "every violation [of a right] imports damage," *Webb*, 29 F.Cas. at 509, nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms.

Add to end of Note 3 on page 309:

The Supreme Court in *Comcast Corp. v. National Association of African American Owned Media*, 589 U.S. 327 (2020), unanimously ruled that the plaintiff has the burden in a § 1981 case

to prove that racial discrimination is a "but for" cause of its injury as opposed to merely playing "some role" as held by the Ninth Circuit.

Add new Note 4 on page 309:

4. Damages Caused by Fourth Amendment Violations. In *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017), police officers entered a shack used as a dwelling without a search warrant and without announcing the presence. When one of the occupants brandished a weapon he and his co-occupant were shot multiple times by the police officers. The Ninth Circuit concluded that while the officers were entitled to qualified immunity for their violation of the knock-and-announce rule, they were responsible for provoking the occupants' threatening response and therefore were liable for the shooting regardless of whether they (the officers) otherwise used excessive force. The Supreme Court, per Justice Alito, unanimously (Gorsuch, J., not participating) ruled that although the Ninth Circuit's provocation rule conflicted with established excessive force jurisprudence, the officers might still be held responsible for the shooting if it were proximately caused by the unlawful warrantless entry:

> Proper analysis of this proximate cause question required consideration of the "foreseeability or the scope of the risk created by the predicate conduct," and required the court to conclude that there was "some direct relation between the injury asserted and the injurious conduct alleged." Unfortunately, the Court of Appeals' proximate cause analysis appears to have been tainted by the same errors that cause us to reject the provocation rule. The court reasoned that when officers make a "startling entry" by "barg [ing] into" a home "unannounced," it is reasonably foreseeable that violence may result. But this appears to focus solely on the risks foreseeably associated with the failure to knock and announce, which could not serve as the basis for liability since the Court of Appeals concluded that the officers had qualified immunity on that claim. By contrast, the Court of Appeals did not identify the foreseeable risks associated with the *relevant* constitutional violation (the warrantless entry); nor did it explain how, on these facts, respondents' injuries were proximately caused by the warrantless entry. In other words, the Court of Appeals' proximate cause analysis, like the provocation rule, conflated distinct Fourth Amendment claims and required only a murky causal link between the warrantless entry and the injuries attributed to it. On remand, the court should revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset.

Replace Note 3 on pages 314-15 with the following case and accompanying Note:

NIEVES v. BARTLETT
Supreme Court of the United States
587 U.S. 391 (2019)

[The plaintiff (Bartlett) sued (seeking damages) two police officers under § 1983 and the First Amendment for a disorderly conduct arrest he claimed was premised on his refusal to speak

with one of the arresting officers. After the arrest, one of the officers allegedly said to Bartlett that he "bet you wish you would have talked to me now." The State eventually dropped the charge against Bartlett. The District Court granted summary judgment to the officers, holding that probable cause defeated the First Amendment claim. The Ninth Circuit reversed.]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

"[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech. *Hartman v. Moore*, 547 U.S. 250, 256, (2006). If an official takes adverse action against someone based on that forbidden motive, and "non-retaliatory grounds are in fact insufficient to provoke the adverse consequences," the injured person may generally seek relief by bringing a First Amendment claim. [*See*, *e.g.*, *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977).]

To prevail on such a claim, a plaintiff must establish a "causal connection" between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury." It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.

For a number of retaliation claims, establishing the causal connection between a defendant's animus and a plaintiff's injury is straightforward. Indeed, some of our cases in the public employment context "have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other," shifting the burden to the defendant to show he would have taken the challenged action even without the impermissible motive. But the consideration of causation is not so straightforward in other types of retaliation cases.

In *Hartman*, for example, we addressed retaliatory prosecution cases, where "proving the link between the defendant's retaliatory animus and the plaintiff's injury ... 'is usually more complex than it is in other retaliation cases.' " Unlike most retaliation cases, in retaliatory prosecution cases the official with the malicious motive does not carry out the retaliatory action himself—the decision to bring charges is instead made by a prosecutor, who is generally immune from suit and whose decisions receive a presumption of regularity. Thus, even when an officer's animus is clear, it does not necessarily show that the officer "induced the action of a prosecutor who would not have pressed charges otherwise."

To account for this "problem of causation" in retaliatory prosecution claims, *Hartman* adopted the requirement that plaintiffs plead and prove the absence of probable cause for the underlying criminal charge. As *Hartman* explained, that showing provides a "distinct body of highly valuable circumstantial evidence" that is "apt to prove or disprove" whether retaliatory animus actually caused the injury.

As a general matter, we agree [that this same principle applies to arrests]. [R]etaliatory arrest claims face some of the same challenges we identified in *Hartman*: Like retaliatory prosecution cases, "retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." The causal inquiry is complex because protected speech is often a "wholly legitimate consideration" for officers when deciding whether to make an arrest. Officers frequently must make "split-second judgments" when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is "ready to cooperate" or rather "present[s] a continuing threat."

In addition, "[l]ike retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case." And because probable cause speaks to the objective reasonableness of an arrest, its absence will—as in retaliatory prosecution cases—generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite.

To be sure, … the two claims give rise to complex causal inquiries for somewhat different reasons. Unlike retaliatory prosecution cases, retaliatory arrest cases do not implicate the presumption of prosecutorial regularity or necessarily involve multiple government actors (although this case did). But regardless of the source of the causal complexity, the ultimate problem remains the same. For both claims, it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct. Because of the "close relationship" between the two claims, their related causal challenge should lead to the same solution: The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest.

Adopting *Hartman*'s no-probable-cause rule in this closely related context addresses those familiar concerns. Absent such a showing, a retaliatory arrest claim fails. But if the plaintiff establishes the absence of probable cause, "then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation."

Our conclusion is confirmed by the common law approach to similar tort claims. When defining the contours of a claim under § 1983, we look to "common-law principles that were well settled at the time of its enactment."

As the parties acknowledge, when § 1983 was enacted in 1871, there was no common law tort for retaliatory arrest based on protected speech. We therefore turn to the common law torts that provide the "closest analogy" to retaliatory arrest claims. *Heck v. Humphrey*, 512 U.S. 477, 484, (1994) [*see* main text, *infra*, at 493]. The parties dispute whether the better analog is false imprisonment or malicious prosecution. At common law, false imprisonment arose from a "detention without legal process," whereas malicious prosecution was marked "by *wrongful institution* of legal process." *Wallace v. Kato*, 549 U.S. 384, 389–390 (2007) [*see* main text,

infra, at 507]. Here, both claims suggest the same result: The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim.

Malicious prosecution required the plaintiff to show that the criminal charge against him "was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice." It has long been "settled law" that malicious prosecution requires proving "the want of probable cause."

For claims of false imprisonment, the presence of probable cause was generally a complete defense for peace officers. In such cases, arresting officers were protected from liability if the arrest was "privileged." At common law, peace officers were privileged to make warrantless arrests based on probable cause of the commission of a felony or certain misdemeanors.

Although probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. In such cases, an unyielding requirement to show the absence of probable cause could pose "a risk that some police officers may exploit the arrest power as a means of suppressing speech."

When § 1983 was adopted, officers were generally privileged to make warrantless arrests for misdemeanors only in limited circumstances. Today, however, "statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests" in a much wider range of situations—often whenever officers have probable cause for "even a very minor criminal offense."

For example, at many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest. In such a case, because probable cause does little to prove or disprove the causal connection between animus and injury, applying *Hartman*'s rule would come at the expense of *Hartman*'s logic.

For those reasons, we conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been. That showing addresses *Hartman*'s causal concern by helping to establish that "non-retaliatory grounds [we]re in fact insufficient to provoke the adverse consequences." And like a probable cause analysis, it provides an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard. Because this inquiry is objective, the statements and motivations of the particular arresting officer are "irrelevant" at this stage. After making the required showing, the plaintiff's claim may proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause.

In light of the foregoing, Bartlett's retaliation claim cannot survive summary judgment. As an initial matter, the record contains insufficient evidence of retaliation on the [officers]. The *only* evidence of retaliatory animus identified by the Ninth Circuit was Bartlett's affidavit stating that Sergeant Nieves said "bet you wish you would have talked to me now." In any event, Bartlett's claim against both officers cannot succeed because they had probable cause to arrest him.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I do not agree that "a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." That qualification has no basis in either the common law or our First Amendment precedents.

JUSTICE GORSUCH, concurring in part and dissenting in part.

The common law tort of false arrest translates more or less into a *Fourth* Amendment claim. That's because our precedent considers a warrantless arrest unsupported by probable cause—the sort that gave rise to a false arrest claim at common law—to be an unreasonable seizure in violation of the Fourth Amendment. But the *First* Amendment operates independently of the Fourth and provides different protections. It seeks not to ensure lawful authority to arrest but to protect the freedom of speech.

Everyone accepts that a detention based on race, *even one otherwise authorized by law*, violates the Fourteenth Amendment's Equal Protection Clause. Following our lead, the courts of appeals have recognized that § 1983 plaintiffs alleging racially selective arrests in violation of the Fourteenth Amendment don't have to show a lack of probable cause, even though they might have to show a lack of probable cause to establish a violation of the Fourth Amendment.

I can think of no sound reason why the same shouldn't hold true here. Like a Fourteenth Amendment selective arrest claim, a First Amendment retaliatory arrest claim serves a different purpose than a Fourth Amendment unreasonable arrest claim, and that purpose does not depend on the presence or absence of probable cause. We thus have no legitimate basis for engrafting a no-probable-cause requirement onto a First Amendment retaliatory arrest claim.

JUSTICE GINSBURG, concurring in the judgment in part and dissenting in part.

Arrest authority, as several decisions indicate, can be abused to disrupt the exercise of First Amendment speech and press rights. *See*, *e.g., Lacey v. Maricopa County*, 693 F. 3d 896, 907–910 (9th Cir. 2012) (en banc) (newspaper publishers alleged they were arrested in nighttime raid after publishing story on law enforcement's investigation of the newspaper); *Roper v. New York*, 2017 WL 2483813, *1 (S.D.N.Y., June 7, 2017) (photographers documenting Black Lives Matter protest alleged they were arrested for standing in street and failing to use crosswalk; sidewalks and crosswalks were blocked by police); *Morse v. San Francisco Bay Area Rapid Transit Dist. (BART)*, 2014 WL 572352, *1–*7 (N.D. Cal., Feb. 11, 2014) (only journalist arrested at protest was journalist critical of Bay Area Rapid Transit Police). Given the array of

laws proscribing, *e.g.,* breach of the peace, disorderly conduct, obstructing public ways, failure to comply with a peace officer's instruction, and loitering, police may justify an arrest as based on probable cause when the arrest was in fact prompted by a retaliatory motive. If failure to show lack of probable cause defeats an action under 42 U.S.C. § 1983, only entirely baseless arrests will be checked. I remain of the view that the Court's decision in Mt. Healthy strikes the right balance.

JUSTICE SOTOMAYOR, dissenting.

Prevailing First Amendment standards have long governed retaliatory arrest cases in the Ninth Circuit, and experience there suggests that trials in these cases are rare—the parties point to only a handful of cases that have reached trial in more than a decade. Even accepting that, every so often, a police officer who made a legitimate arrest might have to explain that arrest to a jury, that is insufficient reason to curtail the First Amendment. No legal standard bats a thousand, and district courts already possess helpful tools to minimize the burdens of litigation in cases alleging constitutionally improper motives. In addition, the burden of a (presumably indemnified) officer facing trial pales in comparison to the importance of guarding core First Amendment activity against the clear potential for abuse that accompanies the arrest power.

What exactly the Court means by "objective evidence," "otherwise similarly situated," and "the same sort of protected speech" is far from clear. I hope that courts approach this new standard commonsensically. It is hard to see what point is served by requiring a journalist arrested for jaywalking to point to specific other jaywalkers who got a free pass, for example, if statistics or common sense confirm that jaywalking arrests are extremely rare. Otherwise, there will be little daylight between the comparison-based standard the Court adopts and the absolute bar it ostensibly rejects.

NOTE

1. Nature of Evidence Needed to Plead the Exception. Justice Sotomayor complains in dissent that the objective evidence needed for the exception based on a lack of prior enforcement "is far from clear." In *Gonzalez v. Trevino*, 602 U.S. 653 (2024), the Court in a per curiam opinion addressed this concern by ruling that the objective evidence needed to support the exception need not be qualitatively comparable to the facts charged. The plaintiff (Gonzalez) in *Trevino* had been charged with tampering with evidence for attempting to steal a document, only to have the charges later dismissed. Gonzalez conceded that probable cause existed, but argued unconstitutional selective enforcement under the First Amendment. "Gonzalez alleged that she had reviewed the past decade's misdemeanor and felony data for Bexar County (where Castle Hills is located [and she was arrested]) and that her review had found that the Texas anti-tampering statute had never been used in the county to criminally charge someone for trying to steal a nonbinding or expressive document." The Fifth Circuit ruled that Gonzalez's claim should have been dismissed, since she failed to present " 'comparative evidence' of 'otherwise similarly situated individuals who engaged in the same criminal conduct but were not arrested.' "

The Supreme Court disagreed. "We recognized the *Nieves* exception to account for 'circumstances where officers have probable cause to make arrests, but typically exercise their

discretion not to do so.' To fall within the exception, a plaintiff must produce evidence to prove that his arrest occurred in such circumstances. The only express limit we placed on the sort of evidence a plaintiff may present for that purpose is that it must be objective in order to avoid 'the significant problems that would arise from reviewing police conduct under a purely subjective standard.' " The Court then observed that "Gonzalez provided that sort of evidence. She was charged with intentionally 'remov[ing] . . . a governmental record.' Gonzalez's survey is a permissible type of evidence because the fact that no one has ever been arrested for engaging in a certain kind of conduct—especially when the criminal prohibition is longstanding and the conduct at issue is not novel—makes it more likely that an officer has declined to arrest someone for engaging in such conduct in the past."

Add new Note 6 on page 315:

6. Retaliatory Arrest Pursuant to Official Policy. In *Lozman v. City of Riviera Beach*, 585 U.S. 87 (2018), the plaintiff (Lozman) was arrested with probable cause for disrupting a public meeting. Even though the arresting officer assumedly possessed probable cause and acted in good faith, Lozman claimed that the City itself had him arrested based on his speech. The Supreme Court, per Justice Kennedy, ruled that where the plaintiff alleged that the municipality's "premeditated plan [was] to intimidate [the plaintiff] in retaliation for his" speech, the limitations found in *Hartman v. Moore*, 547 U.S. 250 (2006), did not apply. Justice Kennedy explained:

> The fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman's claim from the typical retaliatory arrest claim. An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. An official policy also can be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation. For these reasons, when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.
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> In addition, Lozman's allegations, if proved, alleviate the problems that the City says will result from applying *Mt. Healthy* in retaliatory arrest cases. The causation problem in arrest cases is not of the same difficulty where, as is alleged here, the official policy is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made. In determining whether there was probable cause to arrest Lozman for disrupting a public assembly, it is difficult to see why a city official could have legitimately considered that Lozman had, months earlier, criticized city officials or filed a lawsuit against the City. So in a case like this one it is unlikely that the connection between the alleged animus and injury will be "weakened ... by [an official's] legitimate consideration of speech." This unique class of retaliatory arrest claims, moreover, will require objective evidence of a policy motivated by retaliation to survive summary judgment.

See also Tanzin v. Tanvir, 592 U.S. 43 (2020) ("There is no doubt that damages claims have always been available under § 1983 for clearly established violations of the First Amendment.").

C. Prospective Relief Against State and Local Officials

[1] Article III Limitations: Standing, Ripeness and Mootness

Add new paragraph following first paragraph on page 329:

Although federal courts' equitable powers are wide-ranging, they are not unlimited. In particular, the Supreme Court in *Trump v. CASA, Inc*., 604 U.S. __ (2025), ruled that so-called "universal injunctions," that is, injunctions that "prohibit[] the Government from enforcing the law against anyone, anywhere," ordinarily exceed a federal court's equitable power. Consequently, a federal court injunction or declaration usually can only prohibit a government actor from taking action toward particular, named parties. Should the plaintiffs seek broader relief to prohibit the government from acting at all, a class action must generally be certified. *See* Section 6.C[e], *infra*. To be sure, sometimes a universal injunction will be needed to provide a plaintiff with complete relief. But this is an exception and not the rule.

In *CASA* individual plaintiffs and various States sued the federal government to block enforcement of President Trump's new (and plainly unconstitutional, they claimed) rejection of the birthright-citizenship right found in the Fourteenth Amendment. Several lower courts universally enjoined Trump's new rule, thus fully prohibiting its enforcement across the United States, and the Trump administration appealed. The Supreme Court concluded that relative to the individual plaintiffs these universal injunctions were improper.

The Court relied heavily on historical practices, including cases involving States as defendants. These "early refusals to grant relief to nonparties," the Court observed, "are consistent with the party-specific principles that permeate our understanding of equity. '[N]either declaratory nor injunctive relief' … can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs."

When a universal injunction is necessary to afford complete relief, in contrast, it still can be proper. The State plaintiffs in *CASA*, for example, claimed that because "[c]hildren often move across state lines or are born outside their parents' State of residence," a universal injunction was needed to afford complete relief. "Given the cross-border flow … a 'patchwork injunction'," they argued, "would prove unworkable." The Court recognized this possibility in *CASA* and remanded to the lower courts to "determine whether a narrower injunction is appropriate."

In the absence of class certification or a credible claim of needed complete relief, § 1983 plaintiffs are largely left with the tools of preclusion and stare decisis to achieve something akin to universal enforcement. Unlike with the federal government, where collateral estoppel is improper, preclusion principles might be used against States and local governments. Circuits are split over their propriety under § 1983. *See* Chapter 8.A, *infra*. Stare decisis, meanwhile, is a possibility with published Court of Appeals decisions. District Court decisions, in contrast, are

not binding and are not entitled to stare decisis effect. *See Camreta v. Greene*, 563 U. S. 692, 709, n. 7 (2011).

Add new paragraph at end of page 329:

Still, statutory limitation periods can be sometimes applied to retroactive equity actions filed under *Ex parte Young*. This was made clear in *Reed v. Goertz*, 598 U.S. 230 (2023), where an inmate (Reed) sought potentially exculpatory evidence under Texas's post-conviction DNA testing law. A state trial court in a post-conviction proceeding had rejected Reed's effort because, it said, the items he wanted to test "were not preserved through an adequate chain of custody." Reed's appeal then proved unsuccessful, as did his appellate petition for rehearing. Reed then filed a § 1983 suit in federal court challenging Texas's "stringent chain-of-custody requirement" as a violation of procedural due process.[2]

The Supreme Court expressed no reservations about the application of Texas's two-year statute of limitations (borrowed under 42 U.S.C. § 1988(b)) to Reed's claim to equitable relief. Even though his official capacity case against the prosecutor proceeded under *Ex parte Young* and only sought equitable relief "eliminat[ing] the state prosecutor's justification for denying DNA testing," the state's statute of limitations was found to apply. The only question was *when* the limitations period began to run. The answer, the Court ruled, was when the procedural due process violation was complete. Because Procedural due process demands that a "protected interest in life, liberty, or property" be denied without "[]adequate state process," the claim "is not complete when the deprivation occurs" but "only when 'the State fails to provide due process.'" For Reed, this combination was complete "when the state litigation ended—when the Texas Court of Criminal Appeals denied Reed's motion for rehearing."[3]

Add to Note 1 following Professor Nichol's quote on page 335:

[2] The Court applied *Reed* in *Gutierrez v. Saenz*, 604 U.S. __ (2025), to hold that a death-row inmate retains Article III standing to challenge Texas's post-conviction DNA-discovery process under procedural due process and § 1983 notwithstanding that the defendant-prosecutor asserts that unchallenged and independent state-law grounds prohibit the inmate's DNA-testing request. "That a prosecutor might eventually find another reason … to deny a prisoner's request for DNA testing does not vitiate his standing to argue that the cited reasons violated his rights under the Due Process Clause."

[3] The Court in *Reed* expressed doubt about whether "a plaintiff [like Reed] may forgo full appellate review in the state-court system and still bring a procedural due process suit challenging a State's post-conviction DNA testing law." "[I]t may be 'difficult' as a practical matter," the Court noted, 'to criticize the State's procedures when [the prisoner] has not invoked them.'" The Court made a similar point about administrative remedies in a footnote in *Williams v. Reed*, 604 U.S. __ (2025), stating that because procedural due process claims often require administrative exhaustion, "premature procedural due process claims will [not] necessarily prevail." "'[A] procedural due process claim is not complete when the deprivation occurs. Rather, the claim is complete only when the State fails to provide due process." Thus, "a plaintiff who asserts a 'due process claim without exhausting' will 'usually lose' because of the requirement that the challenged procedural deprivation must have already occurred, except 'in an unusual case' where 'you're actually challenging the inability to exhaust.'"

Diamond Alternative Energy v. EPA, 604 U.S. __ (2025) (Jackson, J., dissenting) (complaining that "[t]he Court shelves its usual case-selection standards .. rests its decision on a theory of standing that the Court has refused to apply in cases brought by less powerful plaintiffs. This case gives fodder to the unfortunate perception that moneyed interests enjoy an easier road to relief in this Court than ordinary citizens").

Add to end of Note 1 on page 340:

The Supreme Court in *Susan B. Anthony List v. Driehaus,* 573 U.S. 149 (2014), unanimously ruled (per Justice Thomas) that political activists who were accused of making false political statements and brought before a state investigatory agency for violating Ohio's "false statements" law, only to have the charges later withdrawn, had standing to challenge the law's future application. In so holding, the Court made direct reference to *Clapper*'s footnote 5 (*see* page 338 of the main text): "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." The Court continued:

> One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. Instead, we have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent. Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder."
>
> First, [the challengers] have alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest." Next, [their] intended future conduct is "arguably ... proscribed by [the] statute" they wish to challenge. The Ohio false statement law sweeps broadly, and covers the subject matter of [the challengers'] intended speech. Finally, the threat of future enforcement of the false statement statute is substantial. Most obviously, there is a history of past enforcement here. We have observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not "'chimerical.'" *Cf. Clapper,* 568 U.S., at –.
>
> The credibility of that threat is bolstered by the fact that authority to file a complaint with the Commission is not limited to a prosecutor or an agency. Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents. And [the challengers], who intend to criticize candidates for political office, are easy targets.
>
> Finally, Commission proceedings are not a rare occurrence. [T]he prospect of future enforcement is far from "imaginary or speculative." We take the threatened Commission proceedings into account because administrative action, like arrest or prosecution, may

> give rise to harm sufficient to justify pre-enforcement review. The burdens that Commission proceedings can impose on electoral speech are of particular concern here.
>
> Although the threat of Commission proceedings is a substantial one, we need not decide whether that threat standing alone gives rise to an Article III injury. The burdensome Commission proceedings here are backed by the additional threat of criminal prosecution. We conclude that the combination of those two threats suffices to create an Article III injury under the circumstances of this case.
>
> [Ohio] contend[s] that "prudential ripeness" factors confirm that the claims at issue are nonjusticiable. But we have already concluded that [the challengers] have alleged a sufficient Article III injury. To the extent [Ohio] would have us deem [the] claims nonjusticiable "on grounds that are 'prudential,' rather than constitutional," "[t]hat request is in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.' "
>
> In any event, we need not resolve the continuing vitality of the prudential ripeness doctrine in this case because the "fitness" and "hardship" factors are easily satisfied here. First, [the] challenge to the Ohio false statement statute presents an issue that is "purely legal, and will not be clarified by further factual development." And denying prompt judicial review would impose a substantial hardship on [the challengers], forcing them to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other.

See also Spokeo, Inc. v. Robins, 578 U.S. 330 (2016) ("an injury in fact must be both concrete *and* particularized"). Does this mean that *Clapper*'s "certainly impending" standard is merely an alternative way of establishing standing? Is a "substantial risk" sufficient? *See* Marty Lederman, Susan B. Anthony List, Clapper *footnote 5, and the state of Article III standing doctrine,* SCOTUSblog, (June 17, 2014) (http://www.scotusblog.com/2014/06/commentary-susan-b-anthony-list-clapper-footnote-5-and-the-state-of-article-iii-standing-doctrine/). Or must the harm distinctly be "imminent"?

In *Carney v. Adams*, 592 U.S. 53 (2020), the Court vacated on standing grounds a Third Circuit decision that had invalidated a Delaware law restricting judicial appointments to members of the two major parties. The plaintiff, a then-politically unaffiliated lawyer, had been a registered Democrat his whole life, a number of judicial openings had materialized for which he "would have been eligible" had he applied while a Democrat, "he did not apply for any of them," he only became unaffiliated eight days before filing suit to challenge the Delaware law, and then only because he read a law review article stating the law was likely unconstitutional. *Id*. In this "highly fact-specific case," the Court stated, the plaintiff lacked standing to challenge the law. The Court was careful to point out that generally a plaintiff's showing "that he is likely to apply … in the reasonably foreseeable" future (but for the challenged law) and is otherwise "'able and ready' to perform" is sufficient to establish standing under Article III. But under the unique facts of the case at hand, the Court concluded that "in the context set forth by the evidence, [the

plaintiff] has not shown that he was 'able and ready' to apply in the imminent future." Does this mean that "imminent" means the same thing as "reasonably foreseeable"?

In *Trump v. New York*, 592 U.S. 125 (2020), the Court dismissed on standing grounds a challenge to President Trump's memorandum directing the Secretary of Commerce "to the maximum extent feasible and consistent with the discretion delegated to the executive branch" to prepare a Census report that excluded aliens from the count. The Court concluded that "[a]t present, this case is riddled with contingencies and speculation that impede judicial review." Given the "guesswork," and contingencies involving "both legal and practical constraints, … any prediction about future injury just that—a prediction." "Any prediction how the Executive Branch might eventually implement this general statement of policy is 'no more than conjecture' at this time," the Court observed, and insufficient to support Article III standing. Justices Breyer, Sotomayor and Kagan dissented.

In *California v. Texas*, 593 U.S. 659 (2021), the Court dismissed on standing grounds Texas's (and several other States'), as well as individual plaintiffs', challenges to the Affordable Care Act's "minimum essential insurance" provision was unconstitutional, with the result that all of the Affordable Care Act necessarily collapsed. Because Congress had previously repealed the tax penalty (the mandate) attached to the minimum essential insurance requirement, however, the Court found that neither the States nor the individuals possessed Article III standing. " With the penalty zeroed out, the IRS can no longer seek a penalty from those who fail to comply. Because of this, there is no possible Government action that is causally connected to the plaintiffs' injury—the costs of purchasing health insurance." As for Texas and the other States, they "have failed to show that the challenged minimum essential coverage provision, without any prospect of penalty, will harm them by leading more individuals to enroll in these programs." In sum, without a penalty, there was no way to causally connect the purchase of insurance with the Affordable Care Act.

Add new Note 6 on page 341:

6. Policies Authorizing Challenged Action. The Court has often stated that it disfavors facial challenges to laws. A law, the Court has noted, must be unconstitutional in all of its applications to be subjected to a facial challenge. The result is that plaintiffs are generally forced to file "as-applied" challenges, which then gives rise to the problems described in *Clapper*. In *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), the Court may have relaxed this demanding standard for facial challenges and thereby made it less difficult to establish the requisite threatened injury. *Patel* involved a Fourth Amendment challenge to a city ordinance that authorized warrantless and suspicion-less administrative searches of hotel guest registries. In a 5 to 4 opinion authored by Justice Sotomayor, the Court concluded that a facial challenge brought by group of motel operators, who had been subjected to the law in the past, was proper:

> A facial challenge is an attack on a statute itself as opposed to a particular application. While such challenges are "the most difficult ... to mount successfully," the Court has never held that these claims cannot be brought under any otherwise enforceable provision of the Constitution. Instead, the Court has allowed such challenges to proceed under a diverse array of constitutional provisions.

She continued: "when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant."

Justice Scalia dissented and argued that facial challenges are generally improper: "Although we have at times described our holdings as invalidating a law, it is always the application of a law, rather than the law itself, that is before us." Justice Alito separately dissented, likewise arguing that a facial challenge was improper: "Before entering a judgment with such serious safety and federalism implications, the Court must conclude that every application of this law is unconstitutional—*i.e.,* that 'no set of circumstances exists under which the [law] would be valid.'"

Add new Note 7 on page 341:

7. Police and Prosecutorial Discretion. In *United States v. Texas*, 599 U.S. 670 (2023), the Court reiterated that neither individuals nor states generally have Article III standing to challenge a law enforcement agency's decision not to arrest or prosecute: "this Court has long held 'a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.'" (Quoting *Linda R. S. v. Richard D.*, 410 U. S. 614, 619 (1973)). This remains true even if an otherwise valid injury (like the expenditure of funds) was found to exist. Consequently, Louisiana and Texas were found to lack standing to challenge the Biden Administration's new guidelines targeting only violent aliens even if it reduced the number of arrests and forced the states to expend more money. Importantly, the Court also outlined the five exceptions to this rule (with the first being the most relevant to § 1983 litigation): "*First*, the Court has adjudicated selective-prosecution claims under the Equal Protection Clause. In those cases, however, a party typically seeks to prevent his or her own prosecution, not to mandate additional prosecutions." Next, "the standing analysis might differ when Congress elevates de facto injuries to the status of legally cognizable injuries redressable by a federal court." "*Third*, the standing calculus might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions." "*Fourth*, a challenge to an Executive Branch policy that involves both the Executive Branch's arrest or prosecution priorities and the Executive Branch's provision of legal benefits or legal status could lead to a different standing analysis." And last, "policies governing the continued detention of noncitizens who have already been arrested arguably might raise a different standing question than arrest or prosecution policies."

[a] Prudential Limitations

Add the following to the end of the last paragraph on page 342:

The Court in *June Medical Services v. Russo*, 591 U.S. 290 (2020), ruled that unlike Article III challenges, prudential third-party standing challenges may be waived by a party's concession.

[b] Intervenors' Standing

Add the following to footnote 34 on page 352:

See also Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that laws banning same-sex marriage and prohibiting its recognition violate the Fourteenth Amendment).

Add the following to the end of Note 1 on page 354:

See also Wittman v. Personhuballah, 578 U.S. 539 (2016) (holding that individual members of Congress did not have standing to challenge re-districting plan); *Virginia House of Delegates v. Bethune Hill*, 587 U.S. 658 (2019) (holding that one house of Virginia legislature did not have standing in its own right to appeal redistricting order).

Add the following to the end of Note 2 on page 354:

In *Berger v. North Carolina State Conference of NAACP*, 597 U.S. 179 (2022), the Court ruled that North Carolina legislators who were "expressly authorized [by State law] to defend the State's practical interests in litigation … challenging a North Carolina statute or provision of the North Carolina Constitution" could under Federal Rule of Civil Procedure 24(a) intervene in section 1983 litigation in federal court even though the State was already being represented. The Court explained:

> a plaintiff who chooses to name this or that official defendant does not necessarily and always capture all relevant state interests. Instead and as we have seen, where a State chooses to divide its sovereign authority among different officials and authorize their participation in a suit challenging state law, a full consideration of the State's practical interests may require the involvement of different voices with different perspectives. To hold otherwise would risk allowing a private plaintiff to pick its preferred defendants and potentially silence those whom the State deems essential to a fair understanding of its interests.

It added that "a presumption of adequate representation is inappropriate when a duly authorized state agent seeks to intervene to defend a state law." Consequently, States would seem to have a wide degree of latitude to identify which officials may participate as defendants in section 1983 litigation. While the plaintiff has the initial choice within the contours of *Ex parte Young*, 209 U.S. 123 (1908), *see* Chapter 3.B., *supra*, States may intervene with additional official defendants.

[c] Mootness

Add the following new Notes following Note 1 on page 359:

1a. Executive Changes and Corrections During COVID-19. In a series of "shadow docket" rulings (that is, emergency rulings before certiorari without full briefing) handed down during the COVID-19 crisis, the Supreme Court concluded that executive changes to State pandemic

rules and orders did not necessarily moot constitutional challenges. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) (per curiam order) ("It is clear that this matter is not moot.); *Tandon v. Newsom*, 593 U.S. 61 (2021) ("even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. … [S]o long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions."); *South Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (Gorsuch, J.), ("Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner.").

1b. Executive Assurances. Following the September 11, 2001 terrorist attacks the federal government established a "No Fly List" that prevented named individuals from traveling by air. This list was challenged for a number of constitutional reasons, including religious persecution, and resulted in years-long litigation in the federal courts. In *Federal Bureau of Investigation v. Fikre*, 601 U.S. 234 (2024), the federal government attempted to moot a pending case seeking injunctive relief by assuring the plaintiff that his name had been taken off the list and "will not be placed on the No Fly List in the future based on the currently available information."[4] The Court, in a unanimous decision authored by Justice Gorsuch, ruled this was not sufficient to moot the case. It explained that a defendant cannot automatically moot a case "by the simple expedient of suspending its challenged conduct after it is sued. Instead, our precedents hold, a defendant's 'voluntary cessation of a challenged practice' will moot a case only if the defendant can show that the practice cannot 'reasonably be expected to recur.'"

Justice Gorsuch added that this is a "formidable burden." "Were the rule more forgiving, a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off; it might even repeat 'this cycle' as necessary until it achieves all of its allegedly 'unlawful ends.'" Thus, "[t]o show that a case is truly moot, a defendant must prove 'no reasonable expectation' remains that it will 'return to [its] old ways.'"

Applying these principles to the case at hand, Justice Gorsuch concluded that "this case is not moot. To appreciate why, it is enough to consider one aspect of Mr. Fikre's complaint. He contends that the government placed him on the No Fly List for constitutionally impermissible reasons, including his religious beliefs. … Accepting these as-yet uncontested allegations, the government's representation that it will not relist Mr. Fikre based on 'currently available information' may mean that his past actions are not enough to warrant his relisting. But … none of that speaks to whether the government might relist him if he does the same or similar things in the future. Put simply, the government's sparse declaration falls short of demonstrating that it cannot reasonably be expected to do again in the future what it is alleged to have done in the past."

[4] The Supreme Court noted in *Culley v. Marshall*, 601 U.S. 377 (2024), that a government's attempt to moot a case for money damages by undoing its prior or continuing wrong necessarily must fail, since claims for money damages cannot be mooted by a government's voluntary cessation or correction.

Justice Gorsuch also rejected the government's claims about the plaintiff's possible future actions. "Nor can a defendant's speculation about a plaintiff 's actions make up for a lack of assurance about its own. … In all cases, it is the defendant's 'burden to establish' that it cannot reasonably be expected to resume *its* challenged conduct—whether the suit happens to be new or long lingering, and whether the challenged conduct might recur immediately or later at some more propitious moment." "What matters is not whether a defendant repudiates its past actions, but what repudiation can prove about its future conduct."

See also West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022) (holding that burden is on party claiming mootness to prove it and that "'voluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"); *Lackey v. Stinnie*, 604 U.S. __ (2025) (stating that proving mootness because of legislative repeal also places a "formidable burden" on the defense).

1c. Plaintiff's Voluntary Cessation. Plaintiffs who voluntarily moot cases are subject to the same equitable concerns that motivate the voluntary cessation doctrine. In *Acheson Hotels v. Laufer*, 601 U.S. 1 (2023), for example, the Supreme Court ruled that a case that was voluntarily dismissed after the grant of certiorari by the plaintiff (Laufer) who had prevailed in the lower courts was mooted by the plaintiff's action. The Court expressed "concern about litigants manipulating the jurisdiction of this Court," but concluded that it was "not convinced … that Laufer abandoned her case in an effort to evade our review."

Add the following to the end of Note 2 on page 359:

The Supreme Court in *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016), ruled that "in accord with Rule 68 ... an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists" under Article III. *Compare Gutierrez v. Saenz*, 604 U.S. __ (2025) (holding that "a procedural due process claim like the one [here] is not mooted by the defendant's mid-appeal promise that, no matter the result of a lawsuit, the ultimate outcome will not change. Holding otherwise would allow all manner of defendants to manufacture mootness by ensuring that, no matter what procedures a court requires the defendant to employ, the same substantive outcome will result.)"

Add new Note 4 on page 359:

4. Claims for Nominal Damages. Can a claim for nominal damages avoid mootness where the challenged law or policy has been repealed? *See*, *e.g.*, *New York State Rifle & Pistol Ass'n v. City of New York*, 590 U.S. 336 (2020) (case rendered moot where local law barring transportation of guns was changed to allow the challenged conduct). In *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021), two students at a small state college challenged college policies limiting student speech under § 1983 and the First Amendment. They sought declaratory and injunctive relief as well as nominal damages from school officials, but not compensatory damages. While the case was pending, the college revised the polices and one of the students graduated. The District Court and the Eleventh Circuit agreed the case was rendered moot; their "claim for nominal damages cannot save their otherwise moot constitutional challenge to the Prior Policies." The Supreme

Court, in an opinion by Justice Thomas, reversed, holding that where nominal damages may be recovered, see Chapter 6.A., *supra*, the repeal of a challenged law or policy does not moot the case. Like claims to compensatory damages, which plainly keep cases alive, "nominal damages are redress."

Note that nominal damages are not automatic. They still cannot, for example, be sought from States or their officials in official-capacity actions because of *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) (discussed in Chapter 3.C., *supra*), and its extension of sovereign immunity principles to section 1983; and when sought from officials in their personal capacities would appear to still be subject to qualified immunity (discussed in Chapter 2.B. *supra*) notwithstanding the Court's holding in *Uzuegbunam*. *See*, *e.g.*, *Walker v. Schult*, 45 F.4th 598 (2d Cir. 2022) (holding that nominal damage claims are subject to qualified immunity); *but see* James Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L.REV. 1601 (2011) (arguing that qualified immunity should not apply to claims for nominal damages).

[d] Mootness on Appeal

Add the following to the end of Note 4 on page 368:

In *Chapman v. Doe*, 143 S. Ct. 857 (2023) (Jackson, J., dissenting), Justice Jackson dissented from the Court's per curiam order of vacatur to a petitioner (Chapman) who had "contributed to the mootness of this case insofar as she stipulated to its dismissal" in the courts below. Justice Jackson complained that the Court's "recent practices reflect a sharp uptick in the number of vacaturs awarded," and worried about the Court's use of vacatur when "the equities generally do not favor [it]." In that case, the plaintiff (Doe) challenged Chapman's interference with her (Doe's) use of Missouri's judicial bypass law for abortions. Just before the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), the Eighth Circuit rejected Chapman's claim to immunity. After *Dobbs*, however, the parties agreed to voluntarily dismiss the case and jointly request vacatur of the Eighth Circuit's decision in the Supreme Court.

Vacatur was not warranted under these facts, Justice Jackson explained, because Chapman, who lost below, had caused the mootness by joining the voluntary dismissal. "[T]his form of relief is discretionary, and Chapman had other viable options including relying on her original request that the Court grant a petition for certiorari, vacate the Eighth Circuit's judgment, and remand in light of *Dobbs*—our ordinary process for addressing intervening developments in the law." Justice Jackson added that "[i]njudicious awards of *Munsingwear* vacatur can … incentivize gamesmanship, as it, for example, enables parties to disclaim potential mootness before the lower court, and, if unsuccessful on the merits at that stage, argue mootness on appeal to eliminate the adverse decision through vacatur."

Add the following to the end of Note 7 on page 369:

New York State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) ("in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.").

Add new paragraphs to the end of Note 8 on page 370:

In *Acheson Hotels v. Laufer*, 601 U.S. 1 (2023), the Supreme Court, per Justice Barrett, vacated under *Munsingwear* a case that was mooted after the grant of certiorari by the prevailing party's (Laufer) voluntary dismissal of her complaint in the District Court. Justice Jackson concurred but expressed her continuing reservations over the Court's approach to vacatur. *See also Azar v. Garza*, 584 U.S. 726 (2018) (vacating a lower court injunction allowing a detained pregnant minor (Garza) to seek an abortion where "Garza and her lawyers ... took voluntary, unilateral action to have Doe undergo an abortion sooner than initially expected" before the government sought certiorari and a stay from the Supreme Court).

[e] Avoiding Mootness

Add to the end of Note 4 on page 381:

In *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), the Court rejected the argument that a voluntary membership organization whose members did not "control[] and fund[]" the organization could not satisfy the Article III requirements for associational/organizational standing. "Where, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates." Consequently, it would appear that an organization need not afford voting rights to members in order to make use of associational standing. Nor need the members pay dues.

Add New Note following Note 4 on page 381:

5. Injuries to Organizations. In *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), the Court in a unanimous decision authored by Justice Kavanaugh reiterated that while organizations and associations may assert their own injuries (as well as those of their members) to satisfy Article III standing, they still "must satisfy the usual standards for injury in fact, causation, and redressability that apply to individuals." "Like an individual," the Court stated, "an organization may not establish standing simply based on the 'intensity of the litigant's interest' or because of strong opposition to the government's conduct, 'no matter how longstanding the interest and no matter how qualified the organization.' A plaintiff must show 'far more than simply a setback to the organization's abstract social interests.'" Justice Kavanaugh accordingly rejected an association of doctors claim that its "incurring costs to oppose" federal governmental action legalizing medicinal abortions was enough to satisfy injury-in-fact: "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather

information and advocate against the defendant's action. An organization cannot manufacture its own standing in that way." Justice Thomas concurred to add that the Court's associational standing doctrine itself should be reexamined: "[i]n an appropriate case, we should explain just how the Constitution permits associational standing."

[2] Statutory Limits on Prospective Relief

[a] Prison Litigation Reform Act

Add to the end of Note 2 on page 386:

See also Lomax v. Ortiz-Marquez, 140 S. Ct. 1721 (2020) (holding that Prison Litigation Reform Act's three-strikes provision that bans in forma pauperis (IFP) status after three dismissals in federal court includes dismissals without prejudice).

[b] The Tax Injunction Act

Add the following to the end of Note 1 on page 393:

The Court in *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1 (2015), unanimously ruled, per Justice Thomas, that the Tax Injunction Act does not restrict a prospective action challenging a state law that requires internet retailers to report tax-related information to purchasers and government officials. Justice Thomas reasoned that the requirement did not "restrain" the assessment of any tax. Justice Ginsburg concurred, but emphasized the reporting requirement fell on the seller, who was not responsible for paying the tax: " A different question would be posed ... by a suit to enjoin reporting obligations imposed on a taxpayer or tax collector, *e.g.,* an employer or an in-state retailer ..."

Chapter 7. Federal Abstention in Favor of State Proceedings

A. Avoiding Constitutional Issues

Add the following to the end of Note 9 on page 403:

In *McKesson v. Doe*, 592 U.S. 1 (2020), the plaintiff, a police officer, brought a diversity action under Louisiana tort law based on injuries he suffered during a protest organized by the defendant. The defense in part relied on the First Amendment, and the District Court dismissed the action. The Fifth Circuit reversed, concluding that under Louisiana law the defendant could plausibly be held liable for negligence and that the First Amendment did not protect the defendant. The Supreme Court vacated and remanded for further proceedings following the certification of the Louisiana-law negligence question to the Louisiana Supreme Court: "We think that the Fifth Circuit's interpretation of state law is too uncertain a premise on which to address the question presented. The constitutional issue, though undeniably important, is implicated only if Louisiana law permits recovery under these circumstances in the first place." Observing that "[f]ederal courts have only rarely resorted to state certification procedures," the Court advised that here "[t]wo aspects of this case, taken together, persuade us that the Court of

Appeals should have certified …. First, the dispute presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts. … Second, certification would ensure that any conflict in this case between state law and the First Amendment is not purely hypothetical." The Court added that it "express[ed] no opinion on the propriety of the Fifth Circuit certifying or resolving on its own any other issues of state law that the parties may raise on remand."

B. Deference to Pending State Proceedings

Replace Note 4 on pages 423-24:

4. "Coercive" Versus "Remedial" Proceedings. The Court in *Dayton Christian Schools* in note 3 distinguished its prior holding in *Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982), which had ruled that § 1983 generally does not require exhaustion of administrative remedies: "Unlike *Patsy,* the administrative proceedings here are coercive rather than remedial." Most federal courts, relying on this language, have refused to invoke *Younger* abstention (and its effective "exhaustion of administrative remedies" requirement) where state administrative proceedings are "remedial" rather than "coercive."

The Supreme Court in *Sprint Communications v. Jacobs,* 571 U.S. 69 (2013), unanimously lent its support to this distinction, though it chose to avoid the literal language used in *Dayton Christian Schools*.[5] The substantive question there revolved around which of two communications companies (Sprint and Windstream) should be responsible for Iowa's intrastate access charge. Sprint filed an action (which is later tried to withdraw) before Iowa's Utilities Review Board (IUB) arguing that Windstream should bear the cost. After the Board ruled against it, Sprint both sought review in state court and filed an original action in federal court challenging the Board's jurisdiction. The Eighth Circuit affirmed the District Court's abstention under *Younger.*

The Supreme Court, per Justice Ginsburg, reversed, stating that "[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter." "Circumstances fitting the *Younger* doctrine ... are 'exceptional'; they include [1] 'state criminal prosecutions,' [2] 'civil enforcement proceedings,' and [3] 'civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions'." After finding that the IUB action clearly did not fall into the first or third category, Justice Ginsburg turned to the second:

> Our decisions applying *Younger* to instances of civil enforcement have generally concerned state proceedings "akin to a criminal prosecution" in "important respects." Such enforcement actions are characteristically initiated to sanction the federal plaintiff,

[5] Justice Ginsburg noted that although the Court had "referenced" the "'coercive' rather than 'remedial'" distinction in *Dayton Christian Schools,* and lower courts tended to use the language, she did "not find the inquiry necessary or inevitably helpful, given the susceptibility of the designations to manipulation."

> *i.e.,* the party challenging the state action, for some wrongful act. In cases of this genre, a state actor is routinely a party to the state proceeding and often initiates the action.
>
> The IUB proceeding does not resemble the state enforcement actions this Court has found appropriate for *Younger* abstention. It is not "akin to a criminal prosecution." Nor was it initiated by "the State in its sovereign capacity." A private corporation, Sprint, initiated the action. No state authority conducted an investigation into Sprint's activities, and no state actor lodged a formal complaint against Sprint.
>
> The IUB's adjudicative authority ... was invoked to settle a civil dispute between two private parties, not to sanction Sprint for commission of a wrongful act. Although Sprint withdrew its complaint, administrative efficiency, not misconduct by Sprint, prompted the IUB to answer the underlying federal question.

Add to the end of the first paragraph in Note 3 on page 429:

The Supreme Court in *Sprint Communications v. Jacobs,* 561 U.S. 69 (2013), stated that it "assume[d] without deciding, as the Court did in *NOPSI,* that an administrative adjudication and the subsequent state court's review of it count as a 'unitary process' for *Younger* purposes."

C. § 1983 Claims for Money Damages

Add to the end of Note 1 on page 438:

In *Office of the U.S. Trustee v. John Q. Hammons Fall 2006, LLC*, 602 U.S. 487 (2024), the Court rejected a claim that unconstitutional bankruptcy fees must be refunded because of the due process clause and Court's holding in *McKesson* and related tax-refund cases. The Court ruled that even if fees are the same as taxes for purposes of due process, *McKesson* holds "that if there was a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, the availability of a predeprivation hearing constitute[s] a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause." Because the challengers "acknowledge that they had the opportunity to challenge their fees before they paid them," *McKesson* and due process therefore did not require a refund.

Chapter 8. Prior and Parallel State Proceedings

A. Preclusion

Add new Note on page 447:

5a. Raising Challenges That Could Have Been Joined in A Prior Action. In *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), the Supreme Court invalidated two Texas restrictions on abortion rights. In the course of doing so, the Court (per Justice Breyer) rejected the state's claim that a prior unsuccessful facial federal challenge to one aspect of the law by some of the same plaintiffs precluded their subsequent renewal of their challenge:

> The doctrine of claim preclusion ... prohibits "successive litigation of the very same claim" by the same parties. [The plaintiffs'] postenforcement as-applied challenge is not "the very same claim" as their preenforcement facial challenge. The Restatement of Judgments notes that development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim. ... The Restatement adds that, where "important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought."
>
> We find this approach persuasive. Imagine a group of prisoners who claim that they are being forced to drink contaminated water. These prisoners file suit against the facility where they are incarcerated. If at first their suit is dismissed because a court does not believe that the harm would be severe enough to be unconstitutional, it would make no sense to prevent the same prisoners from bringing a later suit if time and experience eventually showed that prisoners were dying from contaminated water. Such circumstances would give rise to a new claim that the prisoners' treatment violates the Constitution. Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable.
>
> When individuals claim that a particular statute will produce serious constitutionally relevant adverse consequences before they have occurred—and when the courts doubt their likely occurrence—the factual difference that those adverse consequences *have in fact occurred* can make all the difference.

Justice Breyer also rejected the state's claim that the plaintiffs were required to join all of their challenges to all of the Texas abortion law's requirements in that first proceeding:

> This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts normally treat challenges to distinct regulatory requirements as "separate claims," even when they are part of one overarching "[g]overnment regulatory scheme." That approach makes sense. ... Such a rule would encourage a kitchen-sink approach to any litigation challenging the validity of statutes. That outcome is less than optimal—not only for litigants, but for courts.[6]

Add new Note on page 448:

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[6] Justice Breyer also observed that under Federal Rule of Civil Procedure 54(c), a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Consequently, the plaintiffs' request for "such other and further relief as the Court may deem just, proper, and equitable." supported invalidating Texas's law "across the board." "Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners' as-applied claims."

6a. Using Collateral Estoppel Offensively Against Government. Can collateral estoppel be offensively asserted in § 1983 suits against states and their local governments? In *United States v. Mendoza,* 464 U.S. 154 (1984), the Supreme Court ruled as a matter of federal law that collateral estoppel cannot be used offensively against the federal government and its agencies. Thus, a federal governmental loss in one federal court cannot be used in another federal court by a new party to bind the federal government. *See also Trump v. CASA, Inc*., 604 U.S. __ (2025) (noting that "non-mutual offensive issue preclusion is unavailable against the United States"). Among other things, this allows different Circuits to reach different conclusions about the legality of federal programs and facilitates Supreme Court review.

What about states and their local subdivisions? Does the same logic apply? This question has become even more important following the Supreme Court's holding in *Trump v. CASA, Inc*., 604 U.S. __ (2025), that "universal injunctions" that "prohibit[] the Government from enforcing the law against anyone, anywhere" ordinarily exceed a federal court's equitable power. In the absence of a universal injunction, collateral estoppel used by non-parties could mimic what is otherwise improper broader relief.

The Circuits are presently split. The Sixth and Ninth Circuits have concluded that federal law[7] does not prohibit the offensive use of collateral estoppel against States and their agents. *See Chambers v. Ohio Department of Human Services,* 145 F.3d 793 (6th Cir. 1998); *Coeur D'Alene Tribe of Idaho v. Hammond,* 384 F.3d 674 (9th Cir. 2004). The Eleventh Circuit, meanwhile, has ruled to the contrary. *See Demaree v. Fulton County School District,* 515 Fed. Appx. 859 (11th Cir. 2013) (holding that the question is a federal one and that federal law prohibits the use of non-mutual collateral estoppel against states and local governments).

[2] Takings Claims in Federal Court

Replace *San Remo Hotel v. City and County of San Francisco* with the following principal case and Notes on pages 454-60:

KNICK V. TOWNSHIP OF SCOTT
Supreme Court of the United States
588 U.S. 180 (2019)

[Scott, Pennsylvania passed an ordinance requiring that "[a]ll cemeteries ... be kept open and accessible to the general public during daylight hours." A local landowner, Knick, whose 90-acre rural property has a small family graveyard, was notified that she was violating the ordinance because she would not allow the public to access the graveyard in accordance with the ordinance. Knick sought declaratory and injunctive relief in state court on the ground that the ordinance effected a taking of her property. However, Knick did not bring an inverse condemnation action under state law seeking compensation. Scott then stayed enforcement of its ordinance, which the state court ruled defeated Knick's claim to equitable relief. Knick then filed

[7] For judgments rendered by State courts, of course, State law supplies the collateral estoppel rule of decision.

an action in Federal District Court under § 1983 and the Takings Clause of the Fifth Amendment. The District Court dismissed her claim under under *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), and the Third Circuit affirmed.]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), we held that a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights—and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law.

The *Williamson County* Court anticipated that if the property owner failed to secure just compensation under state law in state court, he would be able to bring a "ripe" federal takings claim in federal court. But as we later held in *San Remo Hotel*, *L. P.* v. *City and County of San Francisco*, 545 U. S. 323 (2005), a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit. The takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning.

The *San Remo* preclusion trap should tip us off that the state-litigation requirement rests on a mistaken view of the Fifth Amendment. The Civil Rights Act of 1871, after all, guarantees "a federal forum for claims of unconstitutional treatment at the hands of state officials," and the settled rule is that "exhaustion of state remedies 'is *not* a prerequisite to an action under [42 U. S. C.] § 1983.' " But the guarantee of a federal forum rings hollow for takings plaintiffs, who are forced to litigate their claims in state court.

We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time.

In *Williamson County*, a property developer brought a takings claim under § 1983 against a zoning board that had rejected the developer's proposal for a new subdivision. *Williamson County* held that the developer's Fifth Amendment claim was not "ripe" for two reasons. First, the developer still had an opportunity to seek a variance from the appeals board, so any taking was therefore not yet final. Knick does not question the validity of this finality requirement, which is not at issue here.

The second holding of *Williamson County* is that the developer had no federal takings claim because he had not sought compensation "through the procedures the State ha[d] provided for doing so." That is the holding Knick asks us to overrule.

The unanticipated consequences of this ruling were not clear until 20 years later, when this Court decided *San Remo*. In that case, the takings plaintiffs complied with *Williamson County* and brought a claim for compensation in state court. The complaint made clear that the plaintiffs sought relief only under the takings clause of the State Constitution, intending to reserve their Fifth Amendment claim for a later federal suit if the state suit proved unsuccessful. When that happened, however, and the plaintiffs proceeded to federal court, they found that their federal claim was barred. This Court held that the full faith and credit statute, 28 U. S. C. § 1738, required the federal court to give preclusive effect to the state court's decision, blocking any subsequent consideration of whether the plaintiff had suffered a taking within the meaning of the Fifth Amendment. The adverse state court decision that, according to *Williamson County*, gave rise to a ripe federal takings claim simultaneously barred that claim, preventing the federal court from ever considering it.

[We hold that] [c]ontrary to *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it.

We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken. The Tucker Act, which provides the standard procedure for bringing such claims, gives the Court of Federal Claims jurisdiction to "render judgment upon any claim against the United States founded either upon the Constitution" or any federal law or contract for damages "in cases not sounding in tort." 28 U. S. C. § 1491(a)(1). We have held that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." *United States* v. *Causby*, 328 U. S. 256, 267 (1946). And we have explained that "the act of taking" is the "event which gives rise to the claim for compensation." *United States* v. *Dow*, 357 U. S. 17, 22 (1958).

[T]he same reasoning applies to takings by the States. The availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim—just as the existence of a state action for battery does not bar a Fourth Amendment claim of excessive force. The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right. And that is key because it is the existence of the Fifth Amendment right that allows the owner to proceed directly to federal court under § 1983.

Just two years after *Williamson County*, in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), the Court returned to the understanding that the Fifth Amendment right to compensation automatically arises at the time the government takes property without paying for it. Relying heavily on *Jacobs* and other Fifth

Amendment precedents neglected by *Williamson County*, *First English* held that a property owner is entitled to compensation for the temporary loss of his property. We explained that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.' "

A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank. The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care.

In sum, because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time. The "general rule" is that plaintiffs may bring constitutional claims under § 1983 "without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available." This is as true for takings claims as for any other claim grounded in the Bill of Rights.

Williamson County drew that understanding of the Clause from *Ruckelshaus* v. *Monsanto Co.*, [467 U.S. 986 (1984),] a decision from the prior Term. *Monsanto* did not involve a takings claim for just compensation. The plaintiff there sought to enjoin a federal statute because it effected a taking, even though the statute set up a special arbitration procedure for obtaining compensation, and the plaintiff could bring a takings claim pursuant to the Tucker Act if arbitration did not yield sufficient compensation. The Court rejected the plaintiff's claim because "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Id.*, at 1016 (footnote omitted). That much is consistent with our precedent: Equitable relief was not available because monetary relief was under the Tucker Act.

Other than *Monsanto*, the principal case to which *Williamson County* looked was *Parratt* v. *Taylor*, 451 U. S. 527 (1981). Like *Monsanto*, *Parratt* did not involve a takings claim for just compensation. Indeed, it was not a takings case at all. *Parratt* held that a prisoner deprived of $23.50 worth of hobby materials by the rogue act of a state employee could not state a due process claim if the State provided adequate post-deprivation process. But the analogy from the due process context to the takings context is strained. It is not even possible for a State to provide pre-deprivation due process for the unauthorized act of a single employee. That is quite different from the taking of property *by the government* through physical invasion or a regulation that destroys a property's productive use.

Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally

unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking.

We conclude that a government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under § 1983 at that time. That does not as a practical matter mean that government action or regulation may not proceed in the absence of contemporaneous compensation. Given the availability of post-taking compensation, barring the government from acting [through equitable relief] will ordinarily not be appropriate. But because the violation is complete at the time of the taking, pursuit of a remedy in federal court need not await any subsequent state action. Takings claims against local governments should be handled the same as other claims under the Bill of Rights. *Williamson County* erred in holding otherwise.

Williamson County was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence.

Because of its shaky foundations, the state-litigation requirement [it created] has been a rule in search of a justification for over 30 years. We eventually abandoned the view that the requirement is an element of a takings claim and recast it as a "prudential" ripeness rule. See *Horne* v. *Department of Agriculture*, 569 U. S. 513, 525–526 (2013). No party defends that approach here. Respondents have taken a new tack, adopting a § 1983–specific theory at which *Williamson County* did not even hint. The fact that the justification for the state-litigation requirement continues to evolve is another factor undermining the force of *stare decisis*.

The state-litigation requirement has also proved to be unworkable in practice. *Williamson County* envisioned that takings plaintiffs would ripen their federal claims in state court and then, if necessary, bring a federal suit under § 1983. But, as we held in *San Remo*, the state court's resolution of the plaintiff's inverse condemnation claim has preclusive effect in any subsequent federal suit. The upshot is that many takings plaintiffs never have the opportunity to litigate in a federal forum that § 1983 by its terms seems to provide. That significant consequence was not considered by the Court in *Williamson County*.

Our holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court.
Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed.

The state-litigation requirement of *Williamson County* is overruled. A property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government.

JUSTICE THOMAS, concurring.

[A]s the Court correctly explains, the United States' concerns about injunctions may be misplaced. Injunctive relief is not available when an adequate remedy exists at law. And even when relief is appropriate for a particular plaintiff, it does not follow that a court may enjoin or invalidate an entire regulatory "program."

Still, "[w]hen the government repudiates [its] duty" to pay just compensation, its actions "are not only unconstitutional" but may be "tortious as well." *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 717 (1999) (plurality opinion). I do not understand the Court's opinion to foreclose the application of ordinary remedial principles to takings claims and related common-law tort claims, such as trespass. I therefore join it in full.

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

Williamson County was rooted in an understanding of the Fifth Amendment's Takings Clause stretching back to the late 1800s. On that view, a government could take property so long as it provided a reliable mechanism to pay just compensation, even if the payment came after the fact. No longer. The majority today holds, in conflict with precedent after precedent, that a government violates the Constitution whenever it takes property without advance compensation—no matter how good its commitment to pay. That conclusion has no basis in the Takings Clause. Its consequence is to channel a mass of quintessentially local cases involving complex state-law issues into federal courts. And it transgresses all usual principles of *stare decisis*. I respectfully dissent.

[T]he Takings Clause is different because it does not prohibit takings; to the contrary, it permits them provided the government gives just compensation. So when the government "takes and pays," it is not violating the Constitution at all. Put another way, a Takings Clause violation has two necessary elements. First, the government must take the property. Second, it must deny the property owner just compensation. If the government has not done both, no constitutional violation has happened. All this is well-trod ground. Even the majority (despite its faulty analogy) does not contest it.

Similarly well-settled—until the majority's opinion today—was the answer to a follow-on question: At what point has the government denied a property owner just compensation, so as to complete a Fifth Amendment violation? For over a hundred years, this Court held that advance or contemporaneous payment was not required, so long as the government had established reliable procedures for an owner to later obtain just compensation (including interest for any time elapsed).

Williamson County followed from those decisions as night the day. Consistent with the century's worth of precedent I have recounted above, the Court found that no Fifth Amendment violation had yet occurred. … So the property owner's claim was "not yet ripe": The owner could not "claim a violation of the [Takings] Clause until it [had] used the procedure and been denied."

So contrary to the majority's portrayal, *Williamson County* did not result from some inexplicable confusion about "how the Takings Clause works." Far from it. *Williamson County* built on a long line of decisions addressing the elements of a Takings Clause violation.

[T]he majority lays claim to another line of decisions—involving the Tucker Act—but with no greater success. The Tucker Act waives the Federal Government's sovereign immunity and grants the Court of Federal Claims jurisdiction over suits seeking compensation for takings. See 28 U. S. C. § 1491(a)(1). According to the majority, this Court's cases establish that such an action "*is* a claim for a violation of the Fifth Amendment"—that is, for a constitutional offense that has already happened because of the absence of advance payment. But again, the precedents say the opposite. The Tucker Act is the Federal Government's equivalent of a State's inverse condemnation procedure, by which a property owner can obtain just compensation. The former, no less than the latter, *forestalls* any constitutional violation by ensuring that an owner gets full and fair payment for a taking.

The majority's overruling of *Williamson County* will have two damaging consequences. It will inevitably turn even well-meaning government officials into lawbreakers. And it will subvert important principles of judicial federalism.

To begin with, today's decision means that government regulators will often have no way to avoid violating the Constitution. There are a "nearly infinite variety of ways" for regulations to "affect property interests." And under modern takings law, there is "no magic formula" to determine "whether a given government interference with property is a taking." For that reason, a government actor usually cannot know in advance whether implementing a regulatory program will effect a taking, much less of whose property. Until today, such an official could do his work without fear of wrongdoing, in any jurisdiction that had set up a reliable means for property owners to obtain compensation. Even if some regulatory action turned out to take someone's property, the official would not have violated the Constitution. But no longer. Now, when a government undertakes land-use regulation (and what government doesn't?), the responsible employees will almost inescapably become constitutional malefactors. That is not a fair position in which to place persons carrying out their governmental duties.

Still more important, the majority's ruling channels to federal courts a (potentially massive) set of cases that more properly belongs, at least in the first instance, in state courts—where *Williamson County* put them. The regulation of land use, this Court has stated, is "perhaps the quintessential state activity." And a claim that a land-use regulation violates the Takings Clause usually turns on state-law issues.

State courts are—or at any rate, are supposed to be—the "ultimate expositors of state law." The corollary is that federal courts should refrain whenever possible from deciding novel or difficult state-law questions. That stance, as this Court has long understood, respects the "rightful independence of the state governments," "avoid[s] needless friction with state policies," and promotes "harmonious relation[s] between state and federal authority." *Railroad Comm'n of Tex.* v. *Pullman Co.* (1941) [discussed at page 395 in Chapter 7, *supra*]. For that reason, this Court has promoted practices of certification and abstention to put difficult state-law issues in state judges' hands. We may as well not have bothered. Today's decision sends a flood of

complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes. It betrays judicial federalism.

[I]n highlighting the preclusion concern, the majority only adds to the case for respecting *stare decisis*—because that issue can always be addressed by Congress. When "correction can be had by legislation," Justice Brandeis once stated, the Court should let stand even "error[s on] matter[s] of serious concern." Here, Congress can reverse the *San Remo* preclusion rule any time it wants [by amending the federal Full Faith and Credit law], and thus give property owners an opportunity—*after* a state-court proceeding—to litigate in federal court.

NOTES

1. Injunctive Relief in Takings Cases? One of the Court's primary concerns with overruling *Williamson County* was the potential avalanche of federal cases in federal court could result. The majority felt that the limited availability of declaratory and injunctive relief ameliorated this concern. After all, every State, except Ohio, provides a tort of inverse condemnation, meaning that damages are available and the irreparable harm needed for equitable relief would be missing. The result is that although the Court's holding in *Knick* creates immediate claims for money damages under the Takings Clause, those damage claims already existed under state-law inverse condemnation theories anyway.

2. Shifting Takings Claims to Federal District Courts. The dissent worries that the majority's holding will shift an enormous number of Takings claims for damages from local to federal courts. Is this concern justified? Are federal courts more efficient that local courts? Are federal judges more property-oriented than local judges? Will plaintiffs be eager to proceed to federal court? What about claims against States and their agencies, which are protected by constitutional sovereign immunity? *See* Chapter 3.A., *supra*. The Court states, after all, that it is speaking only to claims against local regulatory authorities.

3. Using Section 1983 With Takings Claims. Perhaps the most significant result following from the majority's holding in *Knick* is that § 1983 can now be used to prosecute Takings claims, at least those Takings claims against municipal defendants. *Knick* makes clear that a Takings claim is ripe upon the interference with property; there is no need to first proceed under state law to seek compensation. Along with the availability of § 1983 comes federal attorney-fee shifting under 42 U.S.C. §1988(b), discussed in Chapter 9, *infra.* Because of *Williamson County* and *San Remo Hotel*, § 1983 and federal fee-shifting were effectively removed from the Takings calculus. Now, whether the Takings claim for damages is pressed in federal or local court, attorney-fee shifting would appear to be available under § 1983.

4. Takings Claims Against States. Section 1983, of course, cannot be used against States or their "arms." *See* Chapter 3, *supra*. Does the Fifth Amendment's takings clause therefore create a direct constitutional action against States? The Supreme Court in *Devillier v. Texas*, 601 U.S. 285 (2024), ruled that so long as a viable state-law cause of action exists, such as inverse condemnation, the answer is no. Thus, when States effect takings, property owners are still expected to utilize the State-law remedies that are available.

The *Devillier* Court explained, in a unanimous decision by Justice Thomas, that "constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts. Instead, constitutional rights are generally invoked defensively in cases arising under other sources of law, or asserted offensively pursuant to an independent cause of action designed for that purpose, see, *e.g.*, 42 U.S.C. § 1983." Although it recognized that several cases from the early twentieth century had allowed the takings clause to be pursued directly in equitable actions seeking injunctions, it stated that "the mere fact that the Takings Clause provided the substantive rule of decision for the equitable claims in those cases does not establish that it creates a cause of action for damages, a remedy that is legal, not equitable, in nature." Still, the Court observed, "the absence of a case relying on the Takings Clause for a cause of action does not by itself prove there is no cause of action. It demonstrates only that constitutional concerns do not arise when property owners have other ways to seek just compensation." Because Texas supplied such a "way to seek just compensation" through inverse condemnation, the Court concluded that it did not have to decide "what would happen if a property owner had no cause of action to vindicate his rights under the Takings Clause." Instead, property owners' pursuing their claims "under the Takings Clause through the cause of action available under Texas law" is constitutionally sufficient.

5. Exhaustion of Administrative Remedies? *Williamson County* also established that in the context of an uncompensated takings challenge to local zoning requirements a Fifth Amendment challenger must first "ripen" its claims by exhausting its administrative remedies, something that commonly requires seeking a variance. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (noting that the "central question in resolving the ripeness issue ... is whether petitioner obtained a final decision from the Council determining the permitted use for the land"); *Urban Developers LLC v. City of Jackson*, 468 F.3d 281 (5th Cir. 2006) (observing that landowner must use available state procedures for seeking permit or variance). Does *Knick* change override this requirement, too?

In *Pakdel v. City and County of San Francisco*, 594 U.S. 474 (2021), the Court in a unanimous per curiam opinion ruled it does. There, owners were denied the permit needed to convert their tenancy-in-common apartment into a condominium. Rather than pursue available administrative remedies, they brought suit under the Takings Clause and 42 U.S.C. § 1983 in federal court. The Ninth Circuit ruled that their claim was not ripe under *Williamson County* because they had failed to timely pursue their available administrative remedies. The Supreme Court disagreed:

> When a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a "final" decision. After all, until the government makes up its mind, a court will be hard pressed to determine whether the plaintiff has suffered a constitutional violation. In the decision below, however, the Ninth Circuit required petitioners to show not only that the San Francisco Department of Public Works had firmly rejected their request for a property-law exemption (which they did show), but *also* that they had complied with the agency's administrative procedures for seeking relief. Because the latter requirement is at odds with "the settled rule ... that exhaustion of state remedies is *not* a prerequisite to an action under 42 U.S.C. § 1983," *Knick*, we vacate and remand.

The finality requirement is relatively modest. All a plaintiff must show is that "there [is] no question ... about how the 'regulations at issue apply to the particular land in question.'" In this case, there is no question about the city's position: Petitioners must "execute the lifetime lease" or face an "enforcement action." And there is no question that the government's "definitive position on the issue [has] inflict[ed] an actual, concrete injury" of requiring petitioners to choose between surrendering possession of their property or facing the wrath of the government.

The rationales for the finality requirement underscore that nothing more than *de facto* finality is necessary. This requirement ensures that a plaintiff has actually "been injured by the Government's action" and is not prematurely suing over a hypothetical harm. Along the same lines, because a plaintiff who asserts a regulatory taking must prove that the government "regulation has gone 'too far,'" the court must first "kno[w] how far the regulation goes." Once the government is committed to a position, however, these potential ambiguities evaporate and the dispute is ripe for judicial resolution.

The Ninth Circuit's contrary approach—that a conclusive decision is not "final" unless the plaintiff *also* complied with administrative processes in obtaining that decision—is inconsistent with the ordinary operation of civil-rights suits. … That guarantee includes "the settled rule" that "exhaustion of state remedies is *not* a prerequisite to an action under ... § 1983."

The Ninth Circuit's demand that a plaintiff seek "an exemption through the prescribed [state] procedures," plainly requires exhaustion. In fact, this rule mirrors our administrative-exhaustion doctrine, which "provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." As we have often explained, this doctrine requires "*proper* exhaustion"—that is, "compliance with an agency's deadlines and other critical procedural rules." Otherwise, parties who would "prefer to proceed directly to federal court" might fail to raise their grievances in a timely fashion and thus deprive "the agency [of] a fair and full opportunity to adjudicate their claims." Or, in the words of the Ninth Circuit below, parties might "make an end run ... by sitting on their hands until every applicable deadline has expired before lodging a token exemption request that they know the relevant agency can no longer grant."

Whatever policy virtues this doctrine might have, administrative "exhaustion of state remedies" is not a prerequisite for a takings claim when the government has reached a conclusive position. To be sure, we have indicated that a plaintiff 's failure to properly pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision. *See*, *e.g., Williamson County* ("The Commission's refusal to approve the preliminary plat ... leaves open the possibility that [the plaintiff] may develop the subdivision according to the plat after obtaining the variances"). But, contrary to the Ninth Circuit's view, administrative missteps do not defeat ripeness once the government has adopted its final position. It may very well be

> …that misconduct during the administrative process is relevant to "evaluating the *merits* of the ... clai[m]" or the measure of damages. For the limited purpose of ripeness, however, ordinary finality is sufficient.

Pakdel's meaning and application are not perfectly clear. Some lower courts have continued to require administrative exhaustion after *Pakdel*, *see*, *e.g.*, *North Mill Street v. City of Aspen*, 6 F.4th 1216 (10th Cir. 2021), while others have interpreted *Pakdel* to be a finality requirement as opposed to an exhaustion/forfeiture rule. *See*, *e.g.*, *Black Hill Holdings v. City of St. George*, 764 F. Supp.3d 1106 (D. Utah 2025). Others have attempted a hybrid solution to delineate *Pakdel*'s reach. In *Megladon v. Village of Pinecrest*, 661 F.Supp.3d 1214, 1235 (S.D. Fla. 2023), for instance, the Court explained that "the Court [*in Pakdel*] appears to have arrived at an understandable bright line: A plaintiff in [a regulatory takings case] must pursue any available variances from the initial-level reviewer (in this case, from the Village), but he need not then exhaust (as the County seems to prefer) an endless stream of second- and third- or even fourth-level reviews."

[3] Adjudicative Decisions by State Agencies

Add to end of Note 3 on top of page 465:

The scope of *Patsy*'s no-exhaustion requirement was questioned in *Williams v. Reed*, 604 U.S. __, 145 S. Ct. 465 (2025), where the plaintiffs challenged Alabama's requirement that unemployment compensation claimants first exhaust their state administrative remedies before challenging awards and denials in state court. The plaintiffs had attempted to exhaust their administrative remedies only to find them, they claimed, "unlawfully delayed." In one instance the state agency "never scheduled a hearing or otherwise acted on [a plaintiff's] appeal, even after [the plaintiff] attempted to follow up by email and phone calls numerous times." These delays and inaction, the plaintiffs claimed in Alabama state court, violated Fourteenth Amendment procedural due process and § 1983.

Alabama's state court ruled that it lacked jurisdiction in the absence of proper exhaustion before the state agency, a holding that the Alabama Supreme Court affirmed. Before the U.S. Supreme Court, the plaintiffs "broadly [agued] that this Court's § 1983 precedents—especially *Patsy v. Board of Regents of Fla.*, 457 U.S. 496 (1982), and *Felder v. Casey*, 487 U.S. 131 (1988)—categorically bar[red] both federal and state courts from applying state administrative-exhaustion requirements to § 1983 claims." *Patsy* had rejected a federal court's attempt to require prior exhaustion of Florida's administrative remedies, while *Felder* had rejected a Wisconsin court's attempt to force plaintiffs to comply with that state's notice-of-claim requirement because of its exhaustive effect. *See* Chapter 5.B., *supra*.

The Supreme Court in *Williams v. Reed* (per Justice Kavanaugh) avoided this no-exhaustion-allowed argument by ruling more narrowly that Alabama's exhaustion requirement acted to impermissibly immunize local officials from § 1983 claims in Alabama courts. This effective immunity, the Supreme Court explained, "created a catch-22: Because the claimants cannot sue until they complete the administrative process, they can *never* sue under § 1983 to obtain an order expediting the administrative process. This Court's precedents do not permit

States to immunize state officials from § 1983 suits in that way. See *Haywood v. Drown*, 556 U.S. 729 (2009); *Howlett v. Rose*, 496 U.S. 356 (1990). On that narrow ground, we reverse." *See* Chapter 5.B., Note 3, page 280, *supra*. The Court explained that it was "the unusual circumstances presented here—where a state court's application of a state exhaustion requirement in effect immunizes state officials from § 1983 claims challenging delays in the administrative process—[that] state courts may not deny those § 1983 claims on failure-to-exhaust grounds."[8]

Justice Thomas, joined by Justices Alito, Gorsuch and Barrett, dissented. First, the Court's no-immunity precedents, they argued, did not prohibit states from employing neutral procedural rules in their own courts. The majority was thus incorrect, they argued, to rely on cases like *Haywood* and *Howlett*. *See* Chapter 5.B., Note 3, page 280, *supra*. Next, the dissent argued that neither *Patsy* nor *Felder* prohibits a state from imposing neutral exhaustion requirements in their own courts. "[P]etitioners badly misread both decisions. *Patsy* addressed whether *federal courts* can impose an exhaustion requirement for § 1983 cases in the absence of a congressional directive to do so. The Court held that they cannot, reasoning that federal courts may create exhaustion requirements only where doing so is consistent with congressional intent. … *Felder* too is inapposite. … [A]lthough *Felder* noted that the statute 'impose[d] an exhaustion requirement,' it treated that fact as one of multiple 'interrelated' factors that caused the Wisconsin statute to 'burden' § 1983 claimants. The exhaustion requirement was not an independently fatal problem, so *Felder*'s language on exhaustion should not be overread."

Given Justice Kavanaugh's emphasis on the "unusual circumstances" presented and the "narrowness" of the majority's opinion, may it be said that at least one other Justice will be willing in the future to join the four-Justice dissent's interpretation of *Patsy* and *Felder*? Assuming that exhaustion requirements are otherwise neutral toward § 1983 claims, and assuming circumstances are not "unusual" (that is, exhaustion is not rendered futile by government inaction that violates procedural due process), would states then be allowed to require that § 1983 plaintiffs first exhaust administrative remedies before proceeding to state court? Would these same state-law exhaustion requirements be enforceable in a § 1983 action in federal court?

Add the following to the end of Note 4 on page 465:

[8] The majority also stated in a footnote that because procedural due process claims often require administrative exhaustion, "premature procedural due process claims will [not] necessarily prevail." "'[A] procedural due process claim is not complete when the deprivation occurs. Rather, the claim is complete only when the State fails to provide due process." (Quoting *Reed v. Goertz*, 598 U.S. 230, 236 (2023)). "Therefore, … a plaintiff who asserts a 'due process claim without exhausting' will 'usually lose' because of the requirement that the challenged procedural deprivation must have already occurred, except 'in an unusual case' where 'you're actually challenging the inability to exhaust.'"

The Court in an opinion by Justice Alito in *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138 (2015), ruled that the federal Trademark Trial and Appeal Board's findings in a trademark matter are entitled to preclusive effect. The fact that its procedures differed from those used in federal court did not counsel otherwise: "Procedural differences, by themselves ... do not defeat issue preclusion. ... Nor is there reason to think that the state agency in *Elliott* used procedures identical to those in federal court .... Rather than focusing on whether procedural differences exist—they often will—the correct inquiry is whether the procedures used in the first proceeding were fundamentally poor, cursory, or unfair." Justice Thomas, joined by Justice Scalia, dissented, arguing that administrative preclusion should be disfavored.

Replace last paragraph in Note 2 on page 470 with following:

In *Ross v. Blake*, 578 U.S. 632 (2016), the Supreme Court recognized that exhaustion is not required when an administrative process is not "available." "[W]e note as relevant here three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief. Given prisons' own incentives to maintain functioning remedial processes, we expect that these circumstances will not often arise. But when one (or more) does, an inmate's duty to exhaust 'available' remedies does not come into play."

"First," the Court explained, "an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates. Suppose, for example, that a prison handbook directs inmates to submit their grievances to a particular administrative office—but in practice that office disclaims the capacity to consider those petitions. … So too if administrative officials have apparent authority, but decline ever to exercise it." "Next, an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use. In this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it." "And finally, the same is true when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."

Because the prison offered two competing administrative mechanisms to prisoners, the Court questioned the true availability of administrative review. "First, did Maryland's standard grievance procedures potentially offer relief to [the inmate] or, alternatively, did the IIU [administrative] investigation into his assault foreclose that possibility? Second, even if the former, were those procedures knowable by an ordinary prisoner in [the inmate's] situation, or was the system so confusing that no such inmate could make use of it? And finally, is there persuasive evidence that Maryland officials thwarted the effective invocation of the administrative process through threats, game-playing, or misrepresentations, either on a system-wide basis or in the individual case?" The case was remanded for further proceedings.

Add new Note 7 on page 472:

7. Jury Trials for "Intertwined" Exhaustion Issues. In *Perttu v. Richards*, 605 U.S. __ (2025), the Court in an opinion by the Chief Justice ruled that proper exhaustion under the Prison Litigation Reform Act (PLRA) can present factual questions for juries as well as legal issues for

courts. There, an inmate (Richards) who claimed to have been sexually abused by a prison employee (Perttu) was also allegedly prevented from satisfying the prison's "available" administrative remedies. Richards sued in federal court under § 1983 for both the sexual abuse and "his First Amendment right to file grievances," only to have the trial court dismiss based on his failure to properly exhaust. In dismissing that trial court found that Richards had offered no credible excuse for not exhausting; his "witnesses 'lacked credibility' [and were] … 'wholly conclusory.'"

The Supreme Court concluded that whether Richards had presented a legitimate excuse for not exhausting his administrative remedies and whether these remedies were truly "available," *see* Note 2, *supra*, presented merits questions under the PLRA rather than mere pleading problems and pure legal questions for the court. "In some cases the question whether a prisoner has exhausted [his administrative] procedures is intertwined with the merits of the prisoner's lawsuit." The Court explained that "PLRA exhaustion is a standard affirmative defense subject to 'the usual practice under the Federal Rules.'" Because it is "not a 'pleading requirement'" it is subject "to the usual practice for resolving factual disputes intertwined with the merits" of a case. And "when the PLRA was enacted, the usual practice in the federal courts across a variety of contexts was to resolve factual disputes that are intertwined with the merits at the merits stage [as opposed to pre-trial dismissal]. The PLRA's complete silence on that question is therefore 'strong evidence' that this 'usual practice should be followed.'" Because "the usual practice of the federal courts in cases of intertwinement is to send common issues to the jury," the Court concluded, administrative exhaustion questions that overlap the merits of inmates' § 1983 claims must also be presented to juries (at least when otherwise timely requested).

Justice Barrett complained in dissent (joined by Justices Thomas, Alito and Kavanaugh) that the majority had misinterpreted both the Seventh Amendment (in prior cases) and the PLRA (in the case at hand). Further, the majority's decision only frustrated the PLRA's dual design to "reduce the quantity and improve the quality of prisoner suits." After all, she observed, "any prisoner can potentially obtain full jury review of the very threshold question that was designed to streamline prisoner litigation. All he has to do is find a way to transform his inability to use the prison system into a claim for relief."

[5] Appealing Adjudicative Decisions

Add the following to footnote 32 on page 483:

See also Artis v. District of Columbia, 583 U.S. 71 (2018) (holding that 28 U.S.C. 1367(d) "stops the clock" on state statutes of limitations during the pendency of federal proceedings and for an additional 30 days following the dismissal of those federal proceedings).

B. Habeas Corpus and § 1983

[1] Injunctive Relief

Add the following Note 4 to page 492:

4. Unavailability of Alternative Methods of Execution. In *Nelson v. Campbell*, 541 U.S. 637 (2004), the Court ruled that "[a] suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself—by simply altering its method of execution, the State can go forward with the sentence." It added, however, that "[i]f as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter [Nelson] were unable or unwilling to concede acceptable alternatives for gaining venous access," the challenge might "call into question the death sentence itself" and be improper under section 1983.

In *Nance v. Ward*, 597 U.S. 159 (2022), the Supreme Court in a closely-divided opinion answered this question by ruling that the absence of any State law authorizing the proposed alternative method of execution, or even the presence of a State law barring, it does not force death row inmates to use habeas corpus. In holding that a death row inmate may still use section 1983 to challenge the method of execution "even if the alternative route [proposed by the inmate] necessitates a change in state law," the Court observed that the "requested relief still places [the] execution in Georgia's control. Assuming it wants to carry out the death sentence, the State can enact legislation approving what a court has found to be a fairly easy-to-employ method of execution." Consequently, section 1983 may be used to challenge a method of execution even when the challenged method is a singular, statutorily mandated procedure. That an inmate's success would force the State to enact a new law authorizing alternatives does not convert the action to one that must proceed under habeas corpus.

The Supreme Court also reiterated its prior admonitions that section 1983 should not be tolerated as a means of circumventing habeas corpus and delaying execution, stating that it did "not for a moment countenance 'last-minute' claims relied on to forestall an execution." Further, "outside the stay context, courts have a variety of tools—including the 'substantive [and] procedural limitations' that the Prison Litigation Reform Act imposes—to streamline §1983 actions and protect 'the timely enforcement of a sentence.'"

Finally, and interestingly since there is presently disagreement in the lower courts on the question of whether statutes of limitations apply to section 1983 equity actions challenging executions, *see* Chapter 6.C.[1], *supra*, it added that "all §1983 suits must be brought within a State's statute of limitations for personal-injury actions." *See also Holmberg v. Armbrecht*, 327 U.S. 392 (1946) ("statutes of limitations are not controlling measures of equitable relief"). Because the lower courts had not addressed this question, however, the Court remanded it for further consideration.

[2] Damages

Add the following to the end of the first paragraph of Note 3 on page 500:

The Supreme Court in *Manuel v. City of Joliet*, 580 U.S. 357 (2017), ruled (per Kagan, J.), that "pretrial detention can violate the Fourth Amendment not only when it precedes, but also

when it follows, the start of legal process in a criminal case." Consequently, so-called "malicious prosecution" claims may be brought under the Fourth Amendment. Justice Kagan explained:

> The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement. And for that reason, it cannot extinguish the detainee's Fourth Amendment claim—or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause. If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.

Justice Kagan elaborated using "the facts alleged in this case. Police officers initially arrested Manuel without probable cause, based solely on his possession of pills that had field tested negative for an illegal substance. So ... Manuel could bring a claim for wrongful arrest under the Fourth Amendment. And the same is true ... as to a claim for wrongful detention—because Manuel's subsequent weeks in custody were *also* unsupported by probable cause, and so *also* constitutionally unreasonable. No evidence of Manuel's criminality had come to light in between the roadside arrest and the County Court proceeding initiating legal process; ... And that means Manuel's ensuing pretrial detention, no less than his original arrest, violated his Fourth Amendment rights."

The Supreme Court in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), which is excerpted, *infra*, ruled that a Due Process challenge to the fabrication and use of evidence in a criminal indictment and prosecution may also proceed as a malicious prosecution claim, at least where the § 1983 plaintiff experiences a deprivation through incarceration or some other "restrictions on his ability to travel and other restraints not shared by the public generally." It noted, however, that (as in *Manuel*) it was not deciding whether a "distinct constitutional malicious prosecution claim" exists, and was not addressing the contours of malicious prosecution claims under the Fourth Amendment. The scope of malicious prosecution claims under the Fourth Amendment therefore remains open.

Add new Note 3a. to page 500:

3a. Probable Cause to Support Some But Not All Charges. In *Chiaverini v. City of Napoleon*, 602 U.S. 556 (2024), the Court addressed whether a Fourth Amendment wrongful arrest and detention claim – which it deemed to be equivalent to a common-law malicious prosecution claim – could proceed based on one of the supporting charges lacking probable cause when other valid charges remained. The Sixth Circuit had ruled that "a single valid charge in a proceeding would insulate officers from a Fourth Amendment malicious-prosecution claim relating to any other charges, no matter how baseless." The Supreme Court, in an opinion by Justice Kagan,

disagreed. "Consistent with both the Fourth Amendment and traditional common-law practice, courts should evaluate suits like [this, where probable cause supports some of the charges but not all] charge by charge." Justice Kagan explained that "if an invalid charge—say, one fabricated by police officers—causes a detention either to start or to continue, then the Fourth Amendment is violated. And that is so even when a valid charge has also been brought (although, … that [valid] charge may well complicate the causation issue." Id. Consequently, the Sixth Circuit's categorical bar to a Fourth Amendment malicious prosecution claim because of the existence of charges that are supported by probable cause was found to be erroneous. Whether the unsupported charged could be said to have caused the illegal seizure, Justice Kagan observed, presented a separate problem, one the Court had not agreed to consider when it granted review. "So," Justice Kagan concluded, "we leave the causation question in the hands of the Sixth Circuit, as it further considers [the] Fourth Amendment malicious-prosecution claim."

Add following citation to *Vasquez Arroyo v. Starks* (10th Cir. 2009) in Note 8 on page 506:

The Supreme Court in *Olivier v. City of Brandon*, No. 24-993 (U.S., July 3, 2025), granted review to consider "[w]hether, as the Fifth Circuit and at least four others hold in conflict with five other circuits, *Heck v. Humphrey* bars § 1983 claims by plaintiffs even where they never had access to federal habeas relief."

Add New Note on page 507:

10. Heck's Application to Damage Claims. Can *Heck*'s prohibition be extended to § 1983 claims seeking only declaratory and injunctive relief? In *Olivier v. City of Brandon*, No. 22-60566 (5th Cir., Aug. 25, 2023), where a speaker who had once been convicted under a city's no-protest ordinance attempted to enjoin enforcement of the ordinance in a subsequent pre-enforcement suit under § 1983, the Fifth Circuit ruled it could. The Supreme Court granted certiorari to consider "Whether … this Court's decision in *Heck v. Humphrey* bars § 1983 claims seeking purely prospective relief where the plaintiff has been punished before under the law challenged as unconstitutional." *See Olivier v. City of Brandon*, No. 24-993 (U.S., July 3, 2025).

Replace Notes 3 and 4 on page 514 with the following principal case and related Notes:

McDONOUGH v. SMITH
Supreme Court of the United States
588 U.S. 109 (2019)

[McDonough was the commissioner of a county elections board who was investigated and prosecuted for forging ballots by Smith. Smith allegedly fabricated evidence during the investigation and used it to win a grand jury indictment. McDonough was acquitted. McDonough the sued Smith under § 1983 and the Fourteenth Amendment for fabricating the evidence. The District Court dismissed the case under New York's three-year statute of limitations, ruling that McDonough's claim accrued when he learned the evidence was false and had been used against him. The Second Circuit agreed.]

JUSTICE SOTOMAYOR delivered the opinion for the Court.

The statute of limitations for a fabricated-evidence claim like McDonough's does not begin to run until the criminal proceedings against the defendant (*i.e.,* the § 1983 plaintiff) have terminated in his favor. This conclusion follows both from the rule for the most natural common-law analogy (the tort of malicious prosecution) and from the practical considerations that have previously led this Court to defer accrual of claims that would otherwise constitute an untenable collateral attack on a criminal judgment.

An accrual analysis begins with identifying "the specific constitutional right" alleged to have been infringed. Though McDonough's complaint does not ground his fabricated-evidence claim in a particular constitutional provision, the Second Circuit treated his claim as arising under the Due Process Clause. McDonough's claim, this theory goes, seeks to vindicate a "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer." We assume without deciding that the Second Circuit's articulations of the right at issue and its contours are sound, having not granted certiorari to resolve those separate questions.[9]

[T]his Court often decides accrual questions by referring to the common-law principles governing analogous torts. These "principles are meant to guide rather than to control the definition of § 1983 claims," such that the common law serves " 'more as a source of inspired examples than of prefabricated components.'" [M]alicious prosecution is the most analogous common-law tort here.

Common-law malicious prosecution requires showing, in part, that a defendant instigated a criminal proceeding with improper purpose and without probable cause. The essentials of McDonough's claim are similar: His claim requires him to show that the criminal proceedings against him—and consequent deprivations of his liberty[10]—were caused by Smith's malfeasance

[9] [n.2] In accepting the Court of Appeals' treatment of McDonough's claim as one sounding in denial of due process, we express no view as to what other constitutional provisions (if any) might provide safeguards against the creation or use of fabricated evidence enforceable through a 42 U.S.C. § 1983 action. Moreover, because the Second Circuit understood McDonough's due process claim to allege a deprivation of liberty, we have no occasion to consider the proper handling of a fabricated-evidence claim founded on an allegation that the use of fabricated evidence was so egregious as to shock the conscience, or caused harms exclusively to "interests other than the interest in freedom from physical restraint." Accordingly, we do not address what the accrual rule would be for a claim rooted in other types of harm independent of a liberty deprivation, as no such claim is before us.

[10] [n.4] McDonough's distinct constitutional malicious prosecution claim … is not before us. This Court has not defined the elements of such a § 1983 claim, see *Manuel* v. *Joliet*, 580 U. S. 357 (2017), and this case provides no occasion to opine on what the elements of a constitutional malicious prosecution action under § 1983 are or how they may or may not differ from those of a fabricated-evidence claim. Similarly, while noting that only McDonough's malicious prosecution claim was barred on absolute-immunity grounds below, we make no statement on whether or how the doctrine of absolute immunity would apply to McDonough's fabricated-evidence claim. Any further consideration of that question is properly addressed by the Second Circuit on remand, subject to ordinary principles of waiver and forfeiture.

in fabricating evidence. At bottom, both claims challenge the integrity of criminal prosecutions undertaken "pursuant to legal process."[11]

We follow the analogy where it leads: McDonough could not bring his fabricated-evidence claim under § 1983 prior to favorable termination of his prosecution. As *Heck* explains, malicious prosecution's favorable-termination requirement is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments. The requirement likewise avoids allowing collateral attacks on criminal judgments through civil litigation. These concerns track "similar concerns for finality and consistency" that have motivated this Court to refrain from multiplying avenues for collateral attack on criminal judgments through civil tort vehicles such as § 1983. Because a civil claim such as McDonough's, asserting that fabricated evidence was used to pursue a criminal judgment, implicates the same concerns, it makes sense to adopt the same rule.

This case differs from *Heck* because the plaintiff in *Heck* had been convicted, while McDonough was acquitted. Although some claims do fall outside *Heck*'s ambit when a conviction is merely "anticipated," *Wallace*, however, McDonough's claims are not of that kind. [H]is claims challenge the validity of the criminal proceedings against him in essentially the same manner as the plaintiff in *Heck* challenged the validity of his conviction. And the pragmatic considerations discussed in *Heck* apply generally to civil suits within the domain of habeas corpus, not only to those that challenge convictions. The principles and reasoning of *Heck* thus point toward a corollary result here: There is not "'a complete and present cause of action,'" to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing. Only once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*, will the statute of limitations begin to run.

The soundness of this conclusion is reinforced by the consequences that would follow from the Second Circuit's approach, which would impose a ticking limitations clock on criminal defendants as soon as they become aware that fabricated evidence has been used against them. Such a rule would create practical problems in jurisdictions where prosecutions regularly last nearly as long as—or even longer than—the relevant civil limitations period. A significant number of criminal defendants could face an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them. The first option is obviously undesirable, but from a criminal defendant's perspective the latter course, too, is fraught with peril: He risks tipping his hand as to his defense strategy, undermining his privilege against self-incrimination, and taking on discovery obligations not required in the criminal context. Moreover, as noted above, the parallel civil litigation that would result if plaintiffs chose the second option would run counter to core principles of federalism, comity, consistency, and judicial economy.

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[11] [n.5] Smith urges the Court to steer away from the comparison to malicious prosecution, noting that the Second Circuit treats malicious prosecution claims and fabricated-evidence claims as distinct. But two constitutional claims may differ yet still both resemble malicious prosecution more than any other common-law tort; comparing constitutional and common-law torts is not a one-to-one matching exercise.

Smith suggests that stays and ad hoc abstention are sufficient to avoid the problems of two-track litigation. Such workarounds are indeed available when claims falling outside *Heck*'s scope nevertheless are initiated while a state criminal proceeding is pending, see Wallace; Heck, but Smith's solution is poorly suited to the type of claim at issue here. When, as here, a plaintiff's claim "necessarily" questions the validity of a state proceeding, there is no reason to put the onus to safeguard comity on district courts exercising case-by-case discretion—particularly at the foreseeable expense of potentially prejudicing litigants and cluttering dockets with dormant, unripe cases. The accrual rule we adopt today, by contrast, respects the autonomy of state courts and avoids these costs to litigants and federal courts.

In deferring rather than inviting such suits, we adhere to familiar principles. The proper approach in our federal system generally is for a criminal defendant who believes that the criminal proceedings against him rest on knowingly fabricated evidence to defend himself at trial and, if necessary, then to attack any resulting conviction through collateral review proceedings. McDonough therefore had a complete and present cause of action for the loss of his liberty only once the criminal proceedings against him terminated in his favor.

Smith's counterarguments do not sway the result. First, Smith argues that *Heck* is irrelevant to McDonough's claim, relying on this Court's opinion in *Wallace*. The Court [there] rejected the plaintiff's reliance on *Heck*, stating that the *Heck* rule comes "into play only when there exists 'a conviction or sentence that has *not* been ... invalidated,' that is to say, an 'outstanding criminal judgment.' " The Court thus declined to adopt the plaintiff's theory "that an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside," because doing so in the context of an action for false arrest would require courts and litigants "to speculate about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict—all this at a time when it can hardly be known what evidence the prosecution has in its possession."

Wallace did not displace the principles in *Heck* that resolve this case. A false-arrest claim, *Wallace* explained, has a life independent of an ongoing trial or putative future conviction—it attacks the arrest only to the extent it was without legal process, even if legal process later commences. That feature made the claim analogous to common-law false imprisonment. By contrast, a claim like McDonough's centers on evidence used to secure an indictment and at a criminal trial, so it does not require "speculat[ion] about whether a prosecution will be brought." It directly challenges—and thus necessarily threatens to impugn—the prosecution itself.

Second, Smith notes (1) that a fabricated-evidence claim in the Second Circuit (unlike a malicious prosecution claim) can exist even if there is probable cause and (2) that McDonough was acquitted. In other words, McDonough theoretically could have been prosecuted without the fabricated evidence, and he was not convicted even with it. Because a violation thus could exist no matter its effect on the outcome, Smith reasons, "the date on which that outcome occurred is irrelevant."

Smith is correct in one sense. One could imagine a fabricated-evidence claim that does not allege that the violation's consequence was a liberty deprivation occasioned by the criminal proceedings themselves. To be sure, the argument for adopting a favorable-termination requirement would be weaker in that context. That is not, however, the nature of McDonough's claim.

As already explained, McDonough's claim remains most analogous to a claim of common-law malicious prosecution, even if the two are not identical. *Heck* explains why favorable termination is both relevant and required for a claim analogous to malicious prosecution that would impugn a conviction, and that rationale extends to an ongoing prosecution as well: The alternative would impermissibly risk parallel litigation and conflicting judgments. If the date of the favorable termination was relevant in *Heck*, it is relevant here.

It does not change the result, meanwhile, that McDonough suffered harm prior to his acquittal. The Court has never suggested that the date on which a constitutional injury first occurs is the only date from which a limitations period may run. To the contrary, the injury caused by a classic malicious prosecution likewise first occurs as soon as legal process is brought to bear on a defendant, yet favorable termination remains the accrual date.

Third and finally, Smith argues that the advantages of his rule outweigh its disadvantages as a matter of policy. In his view, the Second Circuit's approach would provide more predictable guidance, while the favorable-termination approach fosters perverse incentives for prosecutors (who may become reluctant to offer favorable resolutions) and risks foreclosing meritorious claims (for example, where an outcome is not clearly "favorable"). These arguments are unconvincing. We agree that clear accrual rules are valuable but fail to see how assessing when proceedings terminated favorably will be, on balance, more burdensome than assessing when a criminal defendant "learned that the evidence was false and was used against him" and deprived him of liberty as a result. And while the risk of foreclosing certain claims and the potential incentive effects that Smith identifies could be valid considerations in other contexts,[12] they do not overcome the greater danger that plaintiffs will be deterred under Smith's theory from suing for redress of egregious misconduct, nor do they override the guidance of the common law and precedent.

JUSTICE THOMAS, with whom JUSTICE KAGAN and JUSTICE GORSUCH join, dissenting.

We granted certiorari to decide when "the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run." McDonough, however,

[12] [n.10] Because McDonough's acquittal was unquestionably a favorable termination, we have no occasion to address the broader range of ways a criminal prosecution (as opposed to a conviction) might end favorably to the accused. To the extent Smith argues that the law in this area should take account of prosecutors' broad discretion over such matters as the terms on which pleas will be offered or whether charges will be dropped, those arguments more properly bear on the question whether a given resolution should be understood as favorable or not. Such considerations might call for a context-specific and more capacious understanding of what constitutes "favorable" termination for purposes of a § 1983 false-evidence claim, but that is not the question before us.

declined to take a definitive position on the "threshold inquiry in a [42 U.S.C.] § 1983 suit": "identify[ing] the specific constitutional right' at issue." [B]ecause the constitutional basis for McDonough's claim is unclear, we are unable to confirm that he has a constitutional claim at all.

Further complicating this case, McDonough raised a malicious-prosecution claim alongside his fabrication-of-evidence claim. The District Court dismissed that claim on grounds of absolute immunity. McDonough has not fully explained the difference between that claim and his fabrication claim, which he insists is both analogous to the common-law tort of malicious prosecution and distinct from his dismissed malicious-prosecution claim.

The better course would be to dismiss this case as improvidently granted and await a case in which the threshold question of the basis of a "fabrication-of-evidence" claim is cleanly presented. Moreover, even if the Second Circuit were correct that McDonough asserts a violation of the Due Process Clause, it would be preferable for the Court to determine the claim's elements before deciding its statute of limitations.

NOTES

1. Is *Wallace* Now Limited to Arrest? The majority in *McDonough* asserted that *Wallace* is distinguishable as a false arrest case. False arrest, the *McDonough* Court stated, "has a life independent of an ongoing trial or putative future conviction—it attacks the arrest only to the extent it was without legal process, even if legal process later commences." A constitutional challenge that goes beyond an arrest "without legal process" and "directly challenges—and thus necessarily threatens to impugn—the prosecution itself," like that in *McDonough*, presents a different problem and produces a different result. *See generally* Terressa Ravenell & Riley H. Ross III, *Policing Symmetry*, 99 N.C.L. REV. 379 (2021).

2. *Thompson v. Clark*. The Supreme Court completed the distinction between Fourth Amendment claims that challenge only arrests "without legal process" and those that constitute challenges akin to malicious prosecutions in *Thompson v. Clark*, 596 U.S. 36 (2022), where the section 1983 plaintiff claimed that "the police officers who initiated the criminal proceedings had 'maliciously prosecuted' him without probable cause." Relying heavily on the common law as it existed in 1871 when section 1983 was enacted, the Court observed that malicious prosecution then required that "(i) the suit or proceeding was 'instituted without any probable cause'; (ii) the 'motive in instituting' the suit 'was malicious,' which was often defined in this context as without probable cause and for a purpose other than bringing the defendant to justice; and (iii) the prosecution 'terminated in the acquittal or discharge of the accused.'"

Fourth Amendment malicious prosecution claims, the Supreme Court concluded, accordingly also must include an allegation that probable cause was lacking. "[W]hether a plaintiff bringing a Fourth Amendment claim under §1983 for malicious prosecution must establish malice (or some other mens rea) in addition to the absence of probable cause," meanwhile, was left for future decisions. Nor was whether "the plaintiff also has to prove that the malicious prosecution resulted in a seizure of the plaintiff" decided. In the latter regard, the Court

offered without deciding that "the Due Process Clause could be an appropriate analytical home for a malicious prosecution claim under §1983" that did not involve a physical seizure.

Before *Thompson v. Clark*, the Supreme Court had been careful to avoid deciding whether a "distinct constitutional malicious prosecution claim" exists. Instead, it used analogies to common law torts like malicious prosecution and false arrest to address procedural problems, in particular accrual and timing, that surround constitutional challenges to a State's criminal process. *Thompson v Clark* marks the first Supreme Court decision that makes clear a constitutional claim under the Fourth Amendment can be made against investigatory actions that cause prosecution and extended detention.

3. Favorable Termination. *McDonough v. Smith* holds that a claim subject to *Heck* cannot be brought "under § 1983 prior to favorable termination of [] prosecution." Because the acquittal in that case obviously sufficed, the Court noted that it had "no occasion to address the broader range of ways a criminal prosecution (as opposed to a conviction) might end favorably to the accused." Lower courts thereafter split over the answer, with the Second Circuit in *Thompson v. Clark* going so far as too hold that "some affirmative indication of [] innocence" was required to constitute a favorable termination within the meaning of *McDonough*. Dismissal of charges could never suffice. The Supreme Court in *Thompson v. Clark*, 596 U.S. 36 (2022), found this approach untenable. "[R]equiring the plaintiff to show that his prosecution ended with an affirmative indication of innocence would paradoxically foreclose a §1983 claim when the government's case was weaker and dismissed without explanation before trial." Consequently, it ruled that "a Fourth Amendment claim under §1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence. A plaintiff need only show that the criminal prosecution ended without a conviction."

4. Accrual of Malicious Prosecution Claims. The accrual of malicious prosecution-type constitutional claims differs from that of those that challenge arrests. The Supreme Court in *McDonough v. Smith* ruled that claims predicated on malicious prosecution do not accrue until after criminal proceedings were terminated in favor of the defendant. Thus, unlike the false arrest claim in *Wallace v. Kato* the statute of limitations does not begin to run commensurate with the arrest. It only begins to run with favorable termination.

5. Procedural Due Process Claims. The Supreme Court in *Reed v. Goertz*, 598 U.S. 230 (2023), where an inmate (Reed) sought to use Texas's DNA testing law in hopes of overturning his conviction, re-iterated the logic behind its holding in McDonough in the context of procedural due process. As it did in *McDonough* with the plaintiff's malicious prosecution claim, the Court concluded that Reed's procedural due process challenge to Texas's DNA testing requirements did not accrue until the state court's disposition, including appeals, was complete. The Court explained, quoting *McDonough*, that if the inmate's constitutional challenge accrued before the state's appellate process was over, "the plaintiff would likely continue to pursue relief in the state system and simultaneously file a protective federal §1983 suit challenging that ongoing state process. That parallel litigation would 'run counter to core principles of federalism, comity, consistency, and judicial economy.'"

Chapter 9. Attorney's Fees

A. Prevailing Party

Add the following to the end of Note 6 on page 524:

Compare Justice Kavanaugh's ruling in *Thole v. U.S. Bank NA*, 590 U.S. 538 (2020) ("If Thole and Smith were to *win* this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more. The plaintiffs therefore have no concrete stake in this lawsuit. To be sure, their attorneys have a stake in the lawsuit, but an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."), *with* Justice Alito's dissent in *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (Alito, J., dissenting) ("On the other hand, dismissing the case as moot means that petitioners are stuck with the attorney's fees they incurred in challenging a rule that the City ultimately abandoned—and which it now admits was not needed for public safety. That is so because "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." Section 1988 attorney's fees are an important component of civil rights enforcement. The prospect of an award of attorney's fees ensures that "private attorneys general" can enforce the civil rights laws through civil litigation, even if they 'cannot afford legal counsel.'").

Add the following new Note 8 on page 524:

8. Attorney's Fees and Finality for Appeal. The Supreme Court has long held that a pending motion for attorney's fees is collateral to the merits of a case and therefore does not render a judgment anything less than final for purposes of appeal. Consequently, a losing party must perfect its appeal within the required time period notwithstanding a pending motion for attorney's fees. The Supreme Court reiterated this point in *Ray Haluch Gravel Co. v. Central Pension Fund,* 571 U.S. 177 (2014), where it also elaborated on the Federal Rules of Civil Procedure supporting this result:

> Rule 58(e) ... provides that the entry of judgment ordinarily may not be delayed, nor may the time for appeal be extended, in order to tax costs or award fees. Rule 58(e) further provides that if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect as a timely motion under Rule 59 for purposes of Federal Rule of Appellate Procedure 4 (a)(4). This delays the running of the time to file an appeal until the entry of the order disposing of the fee motion. Rule 4(a)(4)(A)(iii).

Replace *Sole v. Wyner* and accompanying Notes on pages 525-29 with the following principal case and Notes:

LACKEY v. STINNIE
Supreme Court of the United States

604 U.S. __ (2025)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Respondents are Virginia drivers whose licenses were suspended due to their failure to pay court fines or costs. The drivers sued the Commissioner of the Virginia Department of Motor Vehicles under 42 U.S.C. § 1983, arguing that the Virginia statute requiring suspension of their licenses was unconstitutional. The District Court preliminarily enjoined the Commissioner from enforcing the statute. But before the case reached final judgment, the Virginia General Assembly repealed the challenged law, rendering the action moot. The question presented is whether the drivers are "prevailing part[ies]" who qualify for an award of attorney's fees under § 1988(b).

In December 2018, the District Court granted a preliminary injunction, prohibiting the Commissioner from enforcing the statute against the drivers or future class members. The court explained that the drivers had made "a clear showing that [they were] likely to succeed" on their procedural due process claim, though it noted that they need not "establish a certainty of success." The court also determined that the remaining preliminary injunction factors—the risk of irreparable harm, the balance of equities, and the public interest—weighed in the drivers' favor. The Commissioner did not appeal the grant of the preliminary injunction.

In April 2019, about four months before a bench trial was scheduled to begin, the Commissioner moved to dismiss as moot or, in the alternative, stay the case. The Virginia General Assembly had recently adopted Budget Amendment No. 33, which "eliminate[d] the suspension of drivers' licenses for failure to pay court fines and costs through July 1, 2020, but [did] not repeal [the statute being challenged]." The Commissioner represented that the General Assembly was likely to repeal the law during the next legislative session. The District Court granted a stay, reasoning in part that doing so served the interests of judicial economy and enabled the court to avoid "weigh[ing] in on sensitive constitutional questions about license suspension schemes about which other courts ha[d] disagreed."

In April 2020, the Virginia General Assembly repealed [the statute] and required the permanent reinstatement of licenses suspended under the law. As a result, the parties agreed that the action had become moot and stipulated to dismissal. The drivers, however, asserted that they were entitled to attorney's fees under § 1988(b), so the parties jointly requested that the court retain jurisdiction to resolve that dispute. [The District Court denied the fee request, but the Fourth Circuit sitting en banc reversed, holding that preliminary relief can support a fee award under § 1988(b).]

Since 1796, this Court has maintained that "the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorneys' fees in federal courts." The principle that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser" became known as the "American Rule." Federal courts may depart from this rule only when "there is express statutory authorization" to do so.

In 1976, Congress adopted the Civil Rights Attorney's Fees Awards Act. The law provides that, in actions brought under certain civil rights statutes—including 42 U.S.C. §

1983—"the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." § 1988(b).

When interpreting a statute, we begin with the text. As we have previously recognized, the phrase "prevailing party" in § 1988(b) is a "legal term of art." *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 603 (2001). We assume that "when Congress 'borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word.'"

At the time § 1988(b) was adopted, Black's Law Dictionary defined "prevailing party" as the party "who successfully prosecutes the action or successfully defends against it." Black's Law Dictionary 1352 (rev. 4th ed. 1968). It explained that prevailing party status "does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it." A prevailing party, in other words, is "[t]he party ultimately prevailing when the matter is finally set at rest." Black's Law Dictionary 1352.

Preliminary injunctions, however, do not conclusively resolve legal disputes. In awarding preliminary injunctions, courts determine if a plaintiff is *likely* to succeed on the merits—along with the risk of irreparable harm, the balance of equities, and the public interest. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," and "to balance the equities as the litigation moves forward." "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." Such relief is also "customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." As a result, we have previously cautioned against "improperly equat[ing] 'likelihood of success' with 'success'" and treating preliminary injunctions as "tantamount to decisions on the underlying merits."

The transient nature of preliminary injunctions is most apparent when a court reaches a different conclusion upon full consideration of the merits. For example, in one of our more recent cases interpreting § 1988, *Sole v. Wyner*, 551 U.S. 74, 78–79 (2007), protesters sought a preliminary injunction against a state regulation of beach attire in order to assemble nude in the form of a peace sign. The day after the complaint was filed, the District Court held a hearing and granted the preliminary injunction. The preliminary injunction permitted the protest to occur and thus preserved the participants' rights until a final determination could be made on the merits of their claim. Ultimately, however, the court declined to award a permanent injunction, ruling that the regulation was no more burdensome than necessary to protect the public. [This Court therefore ruled that an award of attorney's fees under § 1988(b) based on the preliminary injunction was improper.]

Because preliminary injunctions do not conclusively resolve the rights of parties on the merits, they do not confer prevailing party status. A plaintiff who secures a preliminary injunction has achieved only temporary success at an intermediary "stage[ ] of the suit." Black's Law Dictionary 1352. It cannot yet be said that he will "ultimately prevail[ ] when the matter is finally set at rest" or that he will have "successfully maintained" his claim "at the end." And

external events that render a dispute moot do not convert a temporary order designed to preserve the status of the parties into a conclusive adjudication of their rights.

This conclusion is consistent with our precedents interpreting § 1988(b). We have held that, for the purposes of § 1988(b), a plaintiff "prevails" when a court grants enduring judicial relief that constitutes a "material alteration of the legal relationship of the parties." For example, we have ruled that a plaintiff may qualify as a "prevailing party" based on an award of nominal damages, or a final victory on a material even if not predominant claim. By contrast, a party does not qualify as a "prevailing party" when a court of appeals overturns directed verdicts and discovery orders entered against him, or when a court enters a declaratory judgment but does not modify the defendant's behavior toward the plaintiff, *Rhodes v. Stewart*, 488 U.S. 1, 3–4 (1988) (*per curiam*) (holding that no fees were available under § 1988 when the judgment afforded no relief to the plaintiff due to mootness).

Two of our more recent decisions highlight the requirements that the change in legal relationship be judicially sanctioned and enduring. In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, we rejected the "catalyst theory[.] In *Sole v. Wyner*, we decided that "a plaintiff who gain[ed] a preliminary injunction after an abbreviated hearing, but [was] denied a permanent injunction after a dispositive adjudication on the merits," did not qualify as a "prevailing party" within the meaning of § 1988(b).

We recognize that neither opinion resolves this case, but our holding today follows naturally from these precedents. In *Sole*, we established that the change in the legal relationship between the parties must be "enduring." In *Buckhannon*, we established that the change must be "judicially sanctioned." Today, we establish that the enduring nature of that change must itself be judicially sanctioned. A plaintiff who wins a transient victory on a preliminary injunction does not become a "prevailing party" simply because external events convert the transient victory into a lasting one. Rather, a plaintiff "prevails" under the statute when a court conclusively resolves a claim by granting enduring judicial relief on the merits that materially alters the legal relationship between the parties.

The rule we establish today also serves the interests of judicial economy. A straightforward, bright-line rule is easy to administer, reducing the risk of "a second major litigation" over attorney's fees. The drivers, however, suggest that our rule promotes simplicity at the cost of creating perverse incentives. They fear that government defendants who have lost at the preliminary injunction stage will strategically moot litigation rather than risk a fee award were they to ultimately lose on the merits. We found similar concerns to be "entirely speculative" when we rejected the catalyst theory in *Buckhannon*. We reiterate that such risk could arise in only a small number of contexts. After all, if a plaintiff "has a cause of action for damages, a defendant's change in conduct will not moot the case." And even if the plaintiff seeks only injunctive relief, voluntary cessation of the challenged conduct does not moot an action "unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" [See] *FBI v. Fikre*, 601 U.S. 234, 241 (2024) (characterizing this burden as "formidable"). A survey asking public interest organizations to self-report on the impact of *Buckhannon* does not change our minds. See *post* (Jackson, J., dissenting).

It is Congress's job to craft policy and ours to interpret the words that codify it. "Atextual judicial supplementation is particularly inappropriate when ... Congress has shown that it knows how to adopt the omitted language or provision." Congress has shown that it knows how to empower courts to award attorney's fees to plaintiffs who have enjoyed some success but have not prevailed in a judgment on the merits. In the Freedom of Information Act, for example, Congress authorized courts to assess attorney's fees when a complainant has "substantially prevailed," even if through "a voluntary or unilateral change in position by the agency." 5 U.S.C. § 552(a)(4)(E).

[T]he drivers argue that the availability of fees while litigation is ongoing suggests that § 1988(b) includes no finality requirement. The dissent likewise points to our statement in *Buckhannon* that a " 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits." We have recognized that "Congress contemplated the award of fees *pendente lite* in some cases." *Hanrahan v. Hampton*. For example, we have explained that, in school desegregation cases, "many final orders may issue in the course of the litigation" because injunctive relief "must prove its efficacy ... over a period of time and often with frequent modifications." *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 723 (1974). Our decisions simply indicate that attorney's fees may be awarded when conclusive, enduring judicial relief is meted out on an incremental basis. Key language on which the dissent relies—our statement that a party prevails when it "succeed[s] on any significant claim affording it some of the relief sought," including relief on the merits *pendente lite*—explained our rejection of the "central issue test," which would have required a party to prevail on its central claim in order to be awarded attorney's fees. It did not refer to preliminary relief.

The availability of fees following the entry of a court-ordered consent decree is fully consistent with the rule we announce today. A consent decree reflects the parties' own resolution of the merits, but it is approved and given force of law by the court. Violation of a consent decree is enforceable by a citation for contempt. So a consent decree is like a final judgment in the relevant ways: It conclusively resolves the claim, bears a judicial *imprimatur*, and may grant enduring relief that materially alters the legal relationship between the parties.

A preliminary injunction, which temporarily preserves the parties' litigating positions based in part on a prediction of the likelihood of success on the merits, does not render a plaintiff a "prevailing party." Nor do external events that moot the action and prevent the court from conclusively adjudicating the claim. Because the drivers in the present case gained only preliminary injunctive relief before this action became moot, they do not qualify as "prevailing part[ies]" eligible for attorney's fees under § 1988(b).

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR joins, dissenting.

The Court maintains that [its]holding "follows naturally from" our precedents. But that will come as a surprise to the eleven Courts of Appeals that have previously considered this issue; all of them agree that at least *some* preliminary injunctions trigger fee eligibility under § 1988(b).

Nothing in § 1988(b)'s text compels the conclusion that a plaintiff who obtains preliminary injunctive relief is *never* eligible for a fee award.

According to the majority's preferred dictionary, a "prevailing party" is one "'who successfully prosecutes the action or successfully defends against it.'" (Quoting Black's Law Dictionary 1352 (rev. 4th ed. 1968)). But the majority's analysis inexplicably conflates the requirement for success *when the suit ends* (which is what the dictionary definition says) with a requirement that the suit end *by virtue of* a "conclusive" judicial ruling on the merits of the plaintiff 's claims (which is nowhere in *Black's Law Dictionary* or anywhere else).

[A]ccording to *Black's Law Dictionary*, a "prevailing party" is simply a "part[y] to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of his original contention." Black's Law Dictionary, at 1352. *Ballentine's Law Dictionary* is substantially similar; it defines "prevailing party" as "[t]he party who is successful or partially successful in an action, so as to be entitled to costs." Ballentine's Law Dictionary 985 (3d ed. 1969).

Significantly for present purposes, both dictionaries further emphasize that "[t]o be [a prevailing party] does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit ... the party who has made a claim against the other, has successfully maintained it." Black's Law Dictionary, at 1352; accord, Ballentine's Law Dictionary, at 985.

Take this case, for example. At the point it ended—when the District Court dismissed the litigation as moot—respondents had secured a preliminary injunction against the Commissioner of the Virginia Department of Motor Vehicles. That order enabled respondents to drive their cars on Virginia's highways for sixteen months, over the Commissioner's objection. And, because the District Court's interim award had facilitated respondents' access to the road as licensed drivers, they had prevailed on the merits of their claim in every meaningful sense.

[T]he text of § 1988(b), contemporary dictionary definitions, and our precedents require far less [than the majority demands]. All of the Courts of Appeals to consider the question—eleven in total—understood this and thus correctly held that, for fee-shifting purposes, it is possible for a party to prevail based on a preliminary ruling. The majority's reading of "prevailing party" in § 1988(b) makes obtaining a court's conclusive final judgment the hallmark of that status in a manner that is both novel and in many ways anathema to the legal term of art that Congress actually chose.

A court's entry of a preliminary injunction—which *does* require a judge to make a preliminary assessment of the merits—provides a basis for prevailing party status that is at least as strong as a consent decree or a default judgment. Plaintiffs seeking the "extraordinary remedy" of a preliminary injunction must make a "clear showing" that they are "likely to succeed on the merits." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 22 (2008).

Nor could a Congress that wished to authorize fee awards for civil rights victories have intended the absurdities that will result from the majority's categorical preclusion of preliminary injunctive relief from § 1988(b). One example is the plaintiff who requests a preliminary injunction to achieve an interim result, given the timeframe at issue. "When protestors seek an injunction to exercise their First Amendment rights at a specific time and place—say to

demonstrate at a Saturday parade—a preliminary injunction will give them all the court-ordered relief they need and the end of the parade will moot the case." *McQueary v. Conway*, 614 F.3d 591, 599 (CA6 2010). Thus, the Courts of Appeals regularly hold that plaintiffs who successfully obtain a preliminary injunction that permits them to engage in the otherwise prohibited conduct "prevail" for fee-shifting purposes. See, *e.g.*, *Young v. Chicago*, 202 F.3d 1000, 1000–1001 (CA7 2000) (*per curiam*) (awarding fees to plaintiffs who obtained a preliminary injunction to protest a political convention even though the "suit became moot before a definitive determination of its merits" could be made).

[I]t is actually the majority's categorical rule that will promote wasteful litigation and incentivize litigants to manipulate fee liability. Under the majority's rule, a plaintiff who has incurred substantial attorney's fees in order to secure a preliminary injunction that provides all the relief he needs will face a choice: He may either concede that the litigation has run its course and pay his own fees, or he may seek to litigate the case to final judgment in order to secure a fee award. No one would blame a plaintiff with a strong case for choosing the latter option. But such additional litigation is an inefficient waste of judicial resources if the plaintiff has already achieved his objective at an earlier part of the case.

Worse still, the majority's rule … facilitates the strategic mooting of cases by defendants to avoid paying attorney's fees. … [P]recluding fee shifting in this scenario is manifestly inequitable, because it leaves respondents "holding the bag" for considerable litigation fees despite—and largely because of—their having succeeded in obtaining preliminary relief. Ironically, it was the strength of respondents' challenge as verified by the court's preliminary order that prompted both the change in law and the Commissioner's robust effort to stiff the plaintiffs with respect to attorney's fees. Moreover, it is hardly a revelation that lawyers who would otherwise be willing to litigate meritorious civil rights cases (*i.e.,* matters in which interim relief is critical due to ongoing civil rights violations) will likely be discouraged from taking on such representations if fee awards can be so easily thwarted.

The majority dismisses concerns about strategic mooting as both "'entirely speculative'" and likely to "arise in only a small number of contexts." But, as I have shown, the facts of this very case belie the majority's nonchalance, particularly in light of the *Buckhannon* experience. Research suggests that the Court's rejection of the catalyst theory in that case had the predictable practical effect of discouraging public interest organizations and private attorneys from taking on civil rights actions. Similarly, a multitude of legal advocacy groups have filed *amicus* briefs in this case to explain that losing the ability to recoup fees for securing interim relief will jeopardize their missions.

NOTES

1. Prevailing Defendants. In a footnote to its opinion the majority observed that "[a] different body of caselaw addresses when a *defendant* is a 'prevailing party' for the purposes of other fee-shifting statutes. Our decision today should not be read to affect our previous holding that a defendant need not obtain a favorable judgment on the merits to prevail, nor to address the question we left open of whether a defendant must obtain a preclusive judgment in order to prevail. See *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 431–434 (2016). As we have explained, '[p]laintiffs and defendants come to court with different objectives.'" In *CRST Van*

Expedited the Court ruled that dismissals that are not technically "on the merits" may support a defendant's right to shifted attorneys' fees. *See* Section A[2] and new Note 4 added to page 533, *infra*. Although the § 1988(b) was not at issue in that Title VII case, the Court observed that "it has been the Court's approach to interpret the ["prevailing party" requirement contained in various fee-shifting statutes] in a consistent manner." *CRST Van Expedited*.

2. Mootness. As explained in Chapter 6.C[c], *supra*, mootness is not automatic when government voluntarily chooses to repeal an unconstitutional law or otherwise ceases challenged conduct. This "voluntary cessation" doctrine – which holds that mootness principles do not apply to government's voluntary cessation of unconstitutional action – has accordingly become extremely important to the matter of shifting attorney's fees under § 1988(b). Note that in *Lackey* the plaintiffs agreed that the case was moot. Lawyers in that same situation today are well-advised to challenge mootness under the voluntary cessation doctrine lest they forfeit their ability to recover fees under 42 U.S.C. § 1988(b).

3. Mootness After Judgment. Mootness after judgment presents a distinct problem for fee-shifting. Ordinarily a mooting event post-judgment will result in not only dismissal of any appeal, but also vacatur of the underlying judgment. Should this happen, *Lackey* would seem to dissolve any attorney fee award with or without supporting preliminary relief. But not all post-judgment mooting events require vacatur, as explained in Chapter 6.C[d], *supra*. Where the losing party is responsible for causing mootness, the underlying judgment is ordinarily allowed to stand. Assuming an otherwise final judgment on the merits for the § 1983 plaintiffs, that would appear sufficient under *Lackey* to support an award of attorney's fees under § 1988(b). In *Lackey*, for example, had the legislature repealed the offensive statute after losing a final judgment (rather than before) it would likely still have been liable for paying the plaintiffs' attorney's fees. Even if the voluntary cessation doctrine could not be used to save the case from mootness, the underlying final judgment would likely not have been vacated. The defendant's causing mootness post-judgment arguably would defeat vacatur and leave the final judgment in place.

4. Damage Actions. The majority in *Lackey* points to damage actions as one solution to the risk of mootness. While it may be possible to seek nominal and compensatory damages from municipalities to avoid mootness – local government, after all, can be held financially accountable for policies and customs, *see* Chapter 4, *supra* -- States and their arms are protected by constitutional sovereign immunity and the Court's conclusion that § 1983 does not include them as potential targets of claims to damages. See Chapter 2, *supra*. Those enforcing challenged laws, meanwhile, are almost certainly entitled to qualified immunity, *see* Chapter 3, *supra*, which protects them from compensatory and punitive damages. Are enforcement officials also entitled to qualified immunity from nominal damages? All Circuits to address the matter say they are, *see*, *e.g.*, *Walker v. Schult*, 45 F.4th 598 (2d Cir. 2022), notwithstanding that a convincing argument to the contrary exists. *See* James Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L.REV. 1601 (2011) (arguing that qualified immunity should not apply to claims for nominal damages).

Add the following to the end of Note 1 on page 532:

In *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101 (2017), the Court (in a unanimous opinion by Justice Kagan) analogized fee-shifting based on bad-faith conduct to the analysis applied in *Fox*. In so doing, Justice Kagan elaborated on the approach applied in *Fox*:

> In *Fox,* a prevailing defendant sought reimbursement under a fee-shifting statute for legal expenses incurred in defending against several frivolous claims. The trial court granted fees for all legal work relating to those claims—regardless of whether the same work would have been done (for example, the same depositions taken) to contest the *non*-frivolous claims in the suit. We made clear that was wrong. When a "defendant would have incurred [an] expense in any event[,] he has suffered no incremental harm from the frivolous claim," and so the court lacks a basis for shifting the expense. ... This but-for causation standard generally demands that a district court assess and allocate specific litigation expenses—yet still allows it to exercise discretion and judgment. The court's fundamental job is to determine whether a given legal fee—say, for taking a deposition or drafting a motion—would or would not have been incurred in the absence of the sanctioned conduct. The award is then the sum total of the fees that, except for the misbehavior, would not have accrued. But as we stressed in *Fox,* trial courts undertaking that task "need not, and indeed should not, become green-eyeshade accountants" (or whatever the contemporary equivalent is). "The essential goal" in shifting fees is "to do rough justice, not to achieve auditing perfection." Accordingly, a district court "may take into account [its] overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Ibid*. The court may decide, for example, that all (or a set percentage) of a particular category of expenses—say, for expert discovery—were incurred solely because of a litigant's bad-faith conduct. And such judgments, in light of the trial court's "superior understanding of the litigation," are entitled to substantial deference on appeal.

[2] Shifting Fees to Benefit Defendants

Add the following new Note 4 on page 533:

4. Dismissals Based on Lack of Jurisdiction. Must a defendant win a decision "on the merits" in order to prevail and be entitled to fees? Or might it be sufficient that the court has merely dismissed the plaintiff's complaint based on some jurisdictional defect? In *CRST Van Expedited v. Equal Employment Opportunities Commission*, 578 U.S. 419 (2016), the Court (per Justice Kennedy) ruled that even dismissals that are not technically "on the merits" may support defendants' rights to attorneys' fees under Title VII's fee-shifting provision found in 42 U.S.C. § 2000e–5(k):

> There is no indication that Congress intended that defendants should be eligible to recover attorney's fees only when courts dispose of claims on the merits. The congressional policy regarding the exercise of district court discretion in the ultimate decision whether to award fees does not distinguish between merits-based and non-merits-based judgments. ... The Court, therefore, has interpreted the statute to allow prevailing defendants to recover whenever the plaintiff's "claim was frivolous,

> unreasonable, or groundless." It would make little sense if Congress' policy of "sparing defendants from the costs of *frivolous* litigation," depended on the distinction between merits-based and non-merits-based frivolity.
>
> A plaintiff's claim may be frivolous, unreasonable, or groundless if the claim is barred by state sovereign immunity, or is moot. In cases like these, significant attorney time and expenditure may have gone into contesting the claim. Congress could not have intended to bar defendants from obtaining attorney's fees in these cases on the basis that, although the litigation was resolved in their favor, they were nonetheless not prevailing parties.
>
> Having abandoned its defense of the Court of Appeals' reasoning, the Commission now urges this Court to hold that a defendant must obtain a preclusive judgment in order to prevail. The Court declines to decide this issue, however.

Because "it has been the Court's approach to interpret the ["prevailing party" requirement contained in various fee-shifting statutes] in a consistent manner," *CRST Van Expedited*, 578 U.S. at 422, it would appear that the same result applies to 42 U.S.C. § 1988(b).

Add the following new Note 5 on page 533:

5. Does § 1988(b) Limit State Courts? In *James v. City of Boise*, 577 U.S. 306 (2016), the Idaho Supreme Court concluded that it could award attorney's fees to a city that had successfully defended a federal suit regardless of whether the plaintiff's federal claim was frivolous. The Supreme Court summarily reversed: "As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, 'the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.' The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law. The state court erred in concluding otherwise."

C. Limits Under the Prison Litigation Reform Act

Add the following as the principal reading on page 549:

MURPHY v. SMITH
Supreme Court of the United States
583 U.S. 220 (2018)

JUSTICE GORSUCH delivered the opinion of the Court.

This is a case about how much prevailing prisoners must pay their lawyers. When a prisoner wins a civil rights suit and the district court awards fees to the prisoner's attorney, a federal statute says that "a portion of the [prisoner's] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of

attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." 42 U.S.C. § 1997e(d)(2). Whatever else you might make of this, the first sentence pretty clearly tells us that the prisoner has to pay some part of the attorney's fee award before financial responsibility shifts to the defendant. But how much is enough? Does the first sentence allow the district court discretion to take *any* amount it wishes from the plaintiff's judgment to pay the attorney, from 25% down to a penny? Or does the first sentence instead mean that the court must pay the attorney's entire fee award from the plaintiff's judgment until it reaches the 25% cap and only then turn to the defendant?

The facts of our case illustrate the problem we face. After a jury trial, the district court entered judgment for Charles Murphy in the amount of $307,733.82 against two of his prison guards, Officer Robert Smith and Lieutenant Gregory Fulk. The court also awarded Mr. Murphy's attorney $108,446.54 in fees. So far, so good. But then came the question who should pay what portion of the fee award. The defendants argued that, under the statute's terms, the court had to take 25% (or about $77,000) from Mr. Murphy's judgment before taxing them for the balance of the fee award. The court, however, refused that request. Instead, it ordered that Mr. Murphy "shall pay 10% of [his] judgment" (or about $31,000) toward the fee award, with the defendants responsible for the rest. ... [D]id the district court have latitude to apply 10% (or some other discretionary amount) of the plaintiff's judgment to his attorney's fee award instead of 25%?

As always, we start with the specific statutory language in dispute. That language (again) says "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded." § 1997e(d)(2). And we think this much tells us a few things. First, the word "shall" usually creates a mandate, not a liberty, so the verb phrase "shall be applied" tells us that the district court has some nondiscretionary duty to perform. Second, immediately following the verb we find an infinitival phrase ("to satisfy the amount of attorney's fees awarded") that specifies the purpose or aim of the verb's non-discretionary duty. Third, we know that when you purposefully seek or aim "to satisfy" an obligation, especially a financial obligation, that usually means you intend to discharge the obligation in full. Together, then, these three clues suggest that the court (1) *must* apply judgment funds toward the fee award (2) with the *purpose* of (3) *fully discharging* the fee award. And to meet *that* duty, a district court must apply as much of the judgment as necessary to satisfy the fee award, without of course exceeding the 25% cap. If Congress had wished to afford the judge more discretion in this area, it could have easily substituted "may" for "shall." And if Congress had wished to prescribe a different purpose for the judge to pursue, it could have easily replaced the infinitival phrase "to satisfy ..." with "to reduce ..." or "against...." But Congress didn't choose those other words.

Mr. Murphy's reply does more to hurt than help his cause. Consider, he says, college math credits that the college prospectus says shall be "applied to satisfy" a chemistry degree. No one, the argument goes, would understand that phrase to suggest a single math course will fully discharge all chemistry degree requirements. We quite agree, but that is beside the point. In Mr. Murphy's example, as in our statute, the word "satisfy" does not suggest some hidden empirical judgment about *how often* a math class will satisfy a chemistry degree. Instead it serves to tell the college registrar *what purpose* he must pursue when handed the student's transcript: the registrar

must, without discretion, apply those credits toward the satisfaction or discharge of the student's credit obligations. No doubt a college student needing three credits to graduate who took a three-credit math course would be bewildered to learn the registrar thought he had discretion to count only two of those credits toward her degree. So too here. It doesn't matter how many fee awards will be fully satisfied from a judgment without breaking the 25% cap, or whether any particular fee award could be. The statute's point is to instruct the judge about the purpose he must pursue—to discharge the fee award using judgment funds to the extent possible, subject to the 25% cap.

Retreating now, Mr. Murphy contends that whatever the verb and the infinitival phrase mean, the subject of the sentence—"a *portion* of the judgment (not to exceed 25 percent)"—necessarily suggests wide judicial discretion. This language, he observes, anticipates a *range* of amounts (some "portion" up to 25%) that can be taken from his judgment. And the existence of the range, Mr. Murphy contends, necessarily means that the district court must enjoy discretion to pick *any* "portion" so long as it doesn't exceed the 25% cap.

But that does not logically follow. Under *either* side's reading of the statute the portion of fees taken from the plaintiff's judgment will vary over a range—whether because of the district court's discretionary choice (as Mr. Murphy contends), or because of the variance in the size of fee awards themselves, which sometimes will be less than 25% of the judgment (as Officer Smith and Lieutenant Fulk suggest). If the police have two suspects in a robbery committed with a red getaway car, the fact that one suspect drives a red sedan proves nothing if the other does too. The fact that the statute contemplates a range of possible "portion[s]" to be paid out of the judgment, thus, just doesn't help identify which of the two proposed interpretations we should adopt for both bear that feature.

Nor does the word "portion" necessarily denote unfettered discretion. If someone told you to follow a written recipe but double the portion of sugar, you would know precisely how much sugar to put in—twice whatever's on the page. And Congress has certainly used the word "portion" in just that way. ... So the question is how has Congress used the word "portion" in this statute? And as we have explained, the text persuades us that, subject to the 25% cap, the size of the relevant "portion" here is fixed by reference to the size of the attorney's fee award, not left to a district court's unguided choice.

Comparing the terms of the old and new statutes helps to shed a good deal of light on the parties' positions. Section 1988(b) confers discretion on district courts in unambiguous terms: "[T]he court, in its *discretion, may* allow the prevailing party ... a *reasonable* attorney's fee as part of the costs" against the defendant. (Emphasis added.) Meanwhile, § 1997e(d) expressly qualifies the usual operation of § 1988(b) in prisoner cases.

The surrounding statutory structure of § 1997e(d) reinforces this conclusion. Like paragraph (2), the other provisions of § 1997e(d) *also* limit the district court's pre-existing discretion under § 1988(b). These provisions limit the fees that would otherwise be available under § 1988 to cover only certain kinds of lawyerly tasks, see §§ 1997e(d)(1)(A) and (B)(ii); they require proportionality between fee awards and the relief ordered, see § 1997e(d)(1)(B)(i);

and they restrict the hourly rate of the prisoner's lawyer, see § 1997e(d)(3). All this suggests a statute that seeks to restrain, rather than replicate, the discretion found in § 1988(b).

Notably, too, the discretion Mr. Murphy would have us introduce into § 1997e doesn't even sit easily with our precedent under § 1988. Our cases interpreting § 1988 establish "[a] strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee." To be sure, before the lodestar became "the guiding light of our fee shifting jurisprudence," many lower courts used one of your classic 12–factor balancing tests. Ultimately, though, this Court rejected undue reliance on the 12–factor test because it "gave very little actual guidance to district courts [,] ... placed unlimited discretion in trial judges[,] and produced disparate results."

At the end of the day, what may have begun as a close race turns out to have a clear winner. Now with a view of the full field of textual, contextual, and precedential evidence, we think the interpretation the court of appeals adopted prevails. In cases governed by § 1997e(d), we hold that district courts must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN join, dissenting.

The text of § 1997e(d)(2)—"a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant"—and its statutory context make clear that the provision permits district courts to exercise discretion in choosing the portion of a prisoner-plaintiff's monetary judgment that must be applied toward an attorney's fee award, so long as that portion is not greater than 25 percent.

The crux of the majority's reasoning is its definition of the infinitive "to satisfy." The majority contends that "when you purposefully seek or aim 'to satisfy' an obligation, especially a financial obligation, that usually means you intend to discharge the obligation in full."

But the phrase "to satisfy" as it is used in § 1997e(d)(2) does not bear the weight the majority places on it. Its neighboring text and the realities of prisoner-civil-rights litigation rebut the conclusion that "to satisfy" compels a district court always to maximize the amount of the prisoner-plaintiff's judgment to be contributed to the fee award, and instead indicate that the only work "to satisfy" does in the statute is to direct a district court to contribute some amount of the judgment toward payment of the fee award.

Beginning with the neighboring text, it may well be that, standing alone, "to satisfy" is often used to mean "to completely fulfill an obligation." But the statutory provision here does not simply say "to satisfy"; it says "applied to satisfy." As a matter of everyday usage, the phrase "applied to satisfy" often means "applied toward the satisfaction of," rather than "applied in complete fulfillment of." Thus, whereas an action undertaken "to satisfy" an obligation might, as the majority suggests, naturally be understood as an effort to discharge the obligation in full, a contribution that is "applied to satisfy" an obligation need not be intended to discharge the obligation in full.

Take a few examples: A consumer makes a payment on her credit card, which her agreement with the card company provides shall be "applied to satisfy" her debt. A student enrolls in a particular type of math class, the credits from which her university registrar earlier announced shall be "applied to satisfy" the requirements of a physics degree. And a law firm associate contributes hours to a *pro bono* matter that her firm has provided may be "applied to satisfy" the firm's overall billable-hours requirement. In each case, pursuant to the relevant agreement, the payment, credits, and hours are applied toward the satisfaction of a larger obligation, but the inference is not that the consumer, student, or associate had to contribute or even necessarily did contribute the maximum possible credit card payment, classroom credits, or hours toward the fulfillment of those obligations. The consumer may have chosen to make the minimum credit card payment because she preferred to allocate her other funds elsewhere; the student may have chosen the four-credit version of the math course over the six-credit one because the former had a better instructor; and the associate may have been judicious about the hours she dedicated to the *pro bono* matter because she knew her firm more highly valued paid over *pro bono* work. So, too, here. Section 1997e(d)(2), like the credit card agreement, university registrar announcement, and law firm policy, sets out the relevant rule—"a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy" the fee award—and the district court, like the consumer, student, and law firm associate, decides how much of the judgment to apply.

As a practical matter, moreover, a district court will almost never be able to discharge fully a fee award from 25 percent of a prisoner-plaintiff's judgment. In the vast majority of prisoner-civil-rights cases, the attorney's fee award exceeds the monetary judgment awarded to the prevailing prisoner-plaintiff. In fiscal year 2012, for instance, the median damages award in a prisoner-civil-rights action litigated to victory (*i.e.,* not settled or decided against the prisoner) was a mere $4,185. Therefore, in 2012, the maximum amount (25 percent) of the median judgment that could be applied toward an attorney's fee award was $1,046.25. The PLRA caps the hourly rate that may be awarded to a prisoner-plaintiff's attorney at 150 percent of the rate for court-appointed counsel under 18 U.S.C. § 3006A, which in 2012 was $125. Thus, a prisoner's attorney was entitled to up to $187.50 per hour worked. Even if a district court were to apply an hourly rate of just $100, well below the cap, unless the attorney put in fewer than 10.5 hours in the ordinary case—a virtually unimaginable scenario—25 percent of the judgment will not come close to discharging fully the attorney's fee award.

Given the very small judgment awards in successfully litigated prisoner-civil-rights cases, it is hard to believe, as the majority contends, that Congress used "applied to satisfy" to command an effort by district courts to "discharge ... in full," when in most cases, full discharge will never be possible. Rather, taking into account both the realities of prisoner-civil-rights litigation and the most natural reading of "applied to satisfy," the more logical inference is that § 1997e(d)(2) simply requires that a portion of the prevailing prisoner-plaintiff's judgment be applied toward the satisfaction of the attorney's fee award. It does not, however, demand that the district court always order the prisoner-plaintiff to pay the maximum possible portion of the judgment (up to 25 percent) needed to discharge fully the fee award.